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Collection/Office of Origin: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files

OA/ID Number: 29146
Folder ID Number: 29146-008

Folder Title:
Civil Rights (2 of 2) 1991 [2]

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HE PRESIDENT OWES
DANFORTH A PRIVATE MEETING.
HE WILL NEED A PRE-BRIEF
WITH BOYDEN/JOHN SUNUNU/
FRED MCCLURE. A LISTENING
SESSION.

Document Originally
Attached to
Following Page

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

Discuss with Jim on trip

July 10, 1991

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

Many thanks for your phone call and for your willingness to visit with me about the civil rights legislation when you return from Europe. I think we are now at the point where the resolution of one policy question is the key to concluding the civil rights debate. Here is the question:

Should it be lawful for an employer to use job qualifications which are unrelated to ability to perform the job and which have the effect of screening women or minorities from employment?

Examples of such job qualifications might include the possession of a high school diploma as a condition of employment as a janitor, or a rule that an employer will not hire single parents. In both cases, the qualifications would be unrelated to ability to perform the job, and would have the practical effect of screening out minorities or women.

Exactly this question was decided by the Supreme Court in the case of Griggs v. Duke Power Co. In Griggs, the Court held that an employer could not require a high school diploma as a qualification for a job where the diploma had no relationship to ability to perform the job and where the practical effect was to screen out blacks. This remained the law from 1971 until the Supreme Court decided the Wards Cove case in 1989.

Throughout the lengthy discussions of the civil rights legislation, the Administration has taken the position that we should restore the Griggs decision. In fact, the Administration has said that the exact

wording of Griggs should be included in the statutory language. Both Republican and Democratic Senators who have been working on the legislation have accepted the Griggs language insisted on by the Administration.

EEOC Chairman, Evan Kemp, has stated that an employer's requirement of academic credentials might further the Administration's education program. However, such a policy, even if justified on the basis of education, would contradict Griggs unless the academic credentials are related to ability to perform the job. To endorse such a policy would be viewed as a negative statement on civil rights and a reversal of the Administration's support of the Griggs case.

Mr. President, if you agree that the Griggs case was decided correctly, and that qualifications unrelated to ability to perform the job should not be lawful where they are used to screen women or minorities from employment, I believe we are a short step from reaching a successful conclusion to the civil rights debate.

Sincerely,

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01a. Memo	From C. Boyden Gray to POTUS Re: Civil Rights - Senator Danforth (2 pp.)	7/19/91	P-5	

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 (2 of 2) 1991 [2]

Open on Expiration of PRA
(Document Follows)
By NLGB (NLGB) on 4/21/08

Date Closed:	1/3/2005	**OA/ID Number:**	29146-008
FOIA/SYS Case #:	1998-0004-F[2]	**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)]

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

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THE WHITE HOUSE

WASHINGTON 91 JUL 19 PM 4:35

July 19, 1991

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY

SUBJECT: Civil Rights - Senator Danforth

Although Senator Danforth's July 10 letter to you is incorrect in many respects, it does focus attention on the real issue: whether Federal law should permit measures of educational achievement to have any role in employment decisions.

Under Danforth's proposal, employers will not be able safely to use tests, diploma requirements, or other measures of educational achievement unless they conduct a scientific validation study that proves a direct link between the criteria adopted and performance of the exact job at issue. Such studies are so costly that only the largest corporations can afford them. And they only prove what everyone already knows. Experience with the Armed Forces test, practices in other countries, and many studies by industrial psychologists, all show that educational achievement is highly correlated with worker productivity. It makes no sense to require each employer to reinvent the wheel, especially when it is prohibitively expensive to do so.

Danforth believes that Federal law should forbid employers from requiring diplomas for janitorial jobs. His proposal will certainly do that, and more. But he does not explain why employers should be stopped from requiring that a janitor finish high school. One study found that high school diplomas predict very little besides low absenteeism and low job turnover, the very qualities that are probably most important for janitors.

Bill Coleman has repeatedly said that he wants to stop employers from requiring high school diplomas for any entry-level job because blacks have a much higher dropout rate than whites. Danforth's bill, like its Democrat predecessors, is designed to produce a complete disconnect between performance in school and opportunities in the entry-level job market. But the job market is the only mechanism that can reliably provide kids with the incentive to work hard in school. If we eliminate that link, all our efforts to revitalize American education will be fruitless.

The Coleman/Danforth approach undermines the central premise of Brown v. Board of Education, that basic education is "the very foundation of good citizenship." And that is on top of the damage their approach will do to the economy. Fortunately, there is one bright spot: the Armed Forces are exempted from Title VII, so at least the military will still be able to select high quality personnel.

Finally, a quick review of the major errors in Danforth's letter:

- As the Attorney General explained to him in a five-page letter a month ago, Danforth's interpretation of the 1971 Griggs decision is untenable.

- Danforth also misinterprets current law and the relevant provisions of your bill. He suggests, for example, that current law would allow employers to "screen out" women by refusing to hire single parents. Under well-settled law (and your bill), it would be virtually impossible to defend such a practice. It is interesting and revealing that Danforth does not cite a single case in which the courts have ever upheld a silly or unconscionable employment practice under the well-established legal test incorporated into your bill.

- Strangest of all, Danforth says that he and the Democrats have accepted the language insisted on by the Administration. This is flatly wrong.

The single most important issue raised by Danforth's letter is the relation between this civil rights legislation and America 2000. For that reason, I recommend that any meeting you have with Danforth include Evan Kemp and David Kearns (and perhaps Secretary Alexander).

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01b. Note	From Phillip D. Brady to POTUS Re: Attached memo (1 pp.)	7/11/91	~~P~~5	

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 (2 of 2) 1991 [2]

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

Date Closed:	1/3/2005	**OA/ID Number:**	29146-008
FOIA/SYS Case #:	1998-0004-F[2]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
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AR Disposition:		**MR Disposition:**	
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RESTRICTION CODES

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THE WHITE HOUSE
WASHINGTON

July 11, 1991

MR. PRESIDENT:

Fred McClure advises that you asked this be sent directly to you. Copies have been provided to the Chief of Staff and Boyden Gray, and they understand this is a personal, private communication.

Thank you.

Phillip D. Brady

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

July 10, 1991

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

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Mr. President, if you agree that the Griggs case was decided correctly, and that qualifications unrelated to ability to perform the job should not be lawful where they are used to screen women or minorities from employment, I believe we are a short step from reaching a successful conclusion to the civil rights debate.

Sincerely,

Senator Danforth and his Republican co-sponsors have accepted a reasonable compromise definition of "business necessity." There are many other important issues to be resolved. Once that happens, Democratic support will be needed to pass a bill. While there has been definite progress, we have a long way to go.

A tax-exempt public policy research institute

June 28, 1991

John H. Sununu
Chief of Staff
The White House

Dear Governor Sununu:

When I sent you my other letter earlier today, I had not yet read today's newspapers, so I had not seen the stories about the negotiations with Senator Danforth breaking down.

I spoke with Nelson Lund just a few minutes ago. He said that there may not be any need to put out a paper analyzing the revised bills that Senator Danforth introduced yesterday because no one else seems to be joining the Senator's cause. Nelson and I will speak again on Monday.

Sincerely yours,

William G. Laffer III
McKenna Fellow in Regulatory
and Business Affairs

Edwin J. Feulner, Jr., *President*
Herbert B. Berkowitz, *Vice President*
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Copy to Boyden

The Heritage Foundation

A tax-exempt public policy research institute

June 28, 1991

John H. Sununu
Chief of Staff
The White House

Dear Governor Sununu:

I just wanted to give you a quick update on things, so you don't think I abandoned you.

After examining Senator Danforth's three bills more closely, I concluded:

(1) that under any interpretation of their language, the bills still had substantial quota-promoting tendencies;

(2) that in several critical respects, however, the bills were highly ambiguous; and therefore

(3) that the extent and degree of the remaining quota problems depended heavily on what certain provisions meant.

Based both on the ambiguity (which I attributed to sloppy draftsmanship) and on the lingering quota problems, I was convinced that Senator Danforth would have to make substantial changes in the bills in order to make them acceptable to the President and the American people. Therefore, my supervisors and I felt that it made more sense, under the circumstances, for us to conserve our ammunition and wait to see what Danforth comes up with next.

In the mean time, I have kept in regular contact with Nelson Lund in the White House Counsel's Office. When we spoke Tuesday evening a couple of days ago, he told me that there had been a fairly favorable meeting with Danforth in which the Senator had been fairly receptive to at least one change suggested by the Administration and had indicated that he would be making other changes in the bills as well. I don't know any of the details of

Edwin J. Feulner, Jr., *President*
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Hon. Frank Shakespeare
Hon. William E. Simon
Jay Van Andel

what was discussed, and I don't know what changes the Senator has in mind or whether they would be changes suggested by you or by Senator Kennedy, but it would appear that our decision to hold our fire has been vindicated, at least for now. Nelson and, I believe, Boyden both agree that it would be better at this stage for me not to attack Danforth's initial versions for being the quota bills that they are, but instead to wait and see what he comes up with next, and whether he moves more in Ted Kennedy's direction or in yours. I will continue to stay in contact with Nelson, and I will be prepared to turn out a short paper on Senator Danforth's revised versions (depending of course on what they say) as soon as they become available.

In the mean time, I will be writing on another matter which also merits your personal attention -- Senator Glenn's attack on OIRA. I assume you are already familiar with this subject. This attack threatens one of the most important protections of individual liberty built into the Constitution by our founding fathers -- the separation of powers. At issue is nothing less than the President's right to control the Executive Branch of government and to direct the actions of his subordinates.

Under the first sentence of Article II, subordinate officers have no independent standing or authority; they are merely agents of the President, and they enjoy only such authority as the President chooses to delegate to them. Senator Glenn's bill would severely compromise (at least indirectly) the President's ability to control his subordinate officers by requiring them to submit the regulations they promulgate to review by OMB prior to promulgation. Moreover, by holding nominees hostage unless the President agrees to support his bill, Senator Glenn commits a form of constitutional extortion which represents a further threat to the principle of separation of powers. Therefore, I hope that when the time comes for the Administration to take a position on this matter, you will advise the President not to give in to this attempted extortion but instead to defend the legitimate constitutional prerogatives of his office and to oppose Senator Glenn's evil bill. (I guess you can tell I have strong views on this subject.)

Sincerely yours,

Bill

William G. Laffer III
McKenna Fellow in Regulatory
and Business Affairs

P.S. Illegitimi non carborundum, of course.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Letter	From Evan J. Kemp to John Sununu Re: "Business Necessity" Language Proposed by Danforth (5 pp.)	6/24/91	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 (2 of 2) 1991 [2]

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

JUN 24 1991

The Honorable John H. Sununu
Chief of the Staff to the President
First Floor, West Wing
The White House
Washington, D.C. 20500

Dear Governor:

As Chairman of the principal Federal agency charged with implementing civil rights laws as they apply to employment discrimination, I am urging that the Administration not accept the "business necessity" language proposed by Senator Danforth in his letters to you of June 19 & 20, 1991.

The focus of the Danforth "business necessity" language will, if adopted, undermine the President's America 2000: An Education Strategy by making it extremely difficult for employers to show that use of educational credentials and objective measures of academic achievement are legally defensible. The tragedy of the Danforth proposal is that it would actually cause disproportionate harm to minorities, while claiming the flag of civil rights.

In proposing his latest definition of "business necessity," Senator Danforth quoted the following language from the 1971 Supreme Court Griggs v. Duke Power Co. decision:

> 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. (401 U.S. 433 n.9, emphasis in Senator Danforth's letter).

My concern is that the Commission and the courts have so broadly construed the meaning of Griggs that all selection procedures, not just employment tests, must be shown to be a "business necessity" if they adversely affect members of a class covered by Title VII. The 1978 Uniform Guidelines on Employee Selection Procedures, for example, define the universe of affected practices as follows:

> Section 2B: Employment decisions. These guidelines apply to tests and other selection procedures which are used as the basis for any employment decision. Employment

> decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above (emphasis added).

The most serious shortcoming of Senator Danforth's proposal is its focus on job performance in the "business necessity" definition. While seemingly reasonable at first blush, Senator Danforth's focus on job performance will make it extremely difficult, if not impossible, for employers to show that use of educational credentials and objective measures of academic achievement are legally defensible.

The Danforth proposal may constrain an employer in unexpected ways. Imagine the virtual impossibility of defending, for example, an employer's use of a high school diploma or a liberal arts degree in English or history in terms of how that knowledge directly relates to job performance for most entry-level positions. It simply can't be done. Furthermore, are undergraduate education majors the only teaching candidates qualified to teach? The Danforth proposal's focus means a school district in many cases would not be able to prefer candidates with advanced degrees because the undergraduate education degree is the only "correct" curriculum directly related to job performance. The Administration's bill, by contrast, would permit that same school district to insist on candidates with advanced degrees and non-education majors with degrees, for example, in English or history.

An additional unintended consequence of the Danforth's bill's focus on job performance is that it will undermine the President's America 2000: An Education Strategy. One of the strategic national goals established by President Bush is that by the year 2000:

> "(E)very school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our modern economy."

Yet as Chester Finn recently wrote in a New York Times op-ed piece (5/18/91) entitled "Educational Reform vs. Civil Rights Agendas," realizing the President's educational strategy will mean challenging the status quo:

> How many personnel directors will be able to convince a Federal enforcer or judge that a young person's command of science and geography is germane to the work of a forklift operator or receptionist? Yet so long as

> employers are inhibited from examining a candidate's test scores, 'rational' students will see no payoff for buckling down to learn such subjects. High marks won't matter.

Challenging the status quo means reexamining Griggs in light of an economy that is significantly more complex and demanding than is suggested by the facts at issue in that power plant. The fact situation in Griggs revealed that Duke Power waived their high school diploma requirement for initial assignment to manual labor positions but required the diploma for those wishing to transfer to better paying indoor jobs. Duke Power used an alternative requirement that instead of having a high school diploma, in order to qualify for positions requiring more than a strong back, it was necessary to attain the average score for high school graduates nationwide on two professionally developed ability tests. As I am sure by now you are aware, both the high school diploma and test requirements adversely affected minorities and the rest, as they say, is history.

The Supreme Court has held that an employer has the burden to defend the "business necessity" of any employment standard that adversely affects members of a class covered by Title VII. Unreasonably narrow interpretations of "business necessity" by the EEOC, the Labor Department, and some lower courts created terrible legal risks for firms that required educational achievement of their applicants. As a consequence of Griggs, given the expense and uncertainty of Title VII litigation, many employers simply abandoned requiring high school diplomas and checking transcripts for any job. Furthermore, the Supreme Court in Griggs stated that:

> "(I)t 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."

We think that improving this nation's competitiveness warrants addressing the promotability issue of "capability for the next succeeding position" and the Administration's bill does so.

The unintended consequence of Griggs has been to eliminate employers' ability to reward learning. The resulting lack of signals to students from employers that academic achievement counts has meant that for the past two decades since the 1971 Griggs decision, the most basic incentive for many students to take school seriously has been missing. Now, more than a quarter of a century after the Civil Rights Act of 1964 was passed and in an increasingly competitive multi-national marketplace, we find that our economy is less dependent on strong backs and is more dependent on jobs requiring developed cognitive skills and abilities and the capability to benefit from training for the next succeeding

position.

According to the Hudson Institute's 1988 report Opportunity 2000, more than half of all new jobs created over the next 20 years will require some education beyond high school and almost a third will be filled by college graduates (compared with only 22% of all occupations today). Notwithstanding employers' ever increasing dependence on individual competence in order to remain competitive, students, parents and teachers will not be able to point to a reward for learning if employers are for all practical purposes precluded from even inquiring about degree status much less rewarding academic achievement. As the Secretary of Labor's Commission on Workforce Quality and Labor market Efficiency has recently urged:

> The business community should...show through their hiring and promotion decisions that academic achievements will be rewarded.

The need to encourage academic achievement by encouraging employers to reward students who achieve academically will be met by the Administration's definition of "business necessity" which is the same as the definition adopted by the Supreme Court. The Danforth bill's definition of "business necessity," focusing on job performance, will in effect make use of educational credentials and objective measures of academic achievement indefensible unless quotas are also employed.

For fifteen months, I've maintained that we would not have an acceptable civil rights bill until we aired the philosophical differences between the Administration (back to merit hiring) and the civil rights community (proportional representation in the workplace). Lawyers could not write a satisfactory bill until these very real philosophical differences were openly confronted.

As you know, Governor, I was deeply involved in the early negotiations on the Americans With Disabilities Act (ADA). The White House and disability community had few differences on sections concerning employment, transportation, relay communications for the deaf, or coverage of state and local governments. The area of contention was public accommodations. At that time, I told you the disability community wanted total access: a "flat world" tomorrow. Because it was a question of civil rights, the disability community did not believe there could be a cost defense. You replied that it wasn't fair to place a financial burden on small businesses that had no government contracts or received no federal money.

You stated that the disability community's demand was not reasonable and clearly against Republican Party philosophy. Eventually both sides agreed to the "readily achievable" standard for existing public facilities to ensure mainstream opportunities

for disabled people. The ADA negotiations were exemplary in that both sides thoroughly discussed areas of philosophical disagreement. Had we not done so, the ADA would never have become law.

Hopefully the information I have provided will encourage additional candor about these differing philosophies between the parties. Unless the latest Danforth definition of "business necessity" is rejected, when employers realize that they will be unable to defend use of educational credentials and objective measures of academic achievement under the Danforth bill, they will have little choice but to revert to hiring by the numbers. For these reasons I urge the Administration not agree to the Danforth compromise "business necessity" language.

Best regards,

Evan

Evan J. Kemp, Jr.
Chairman

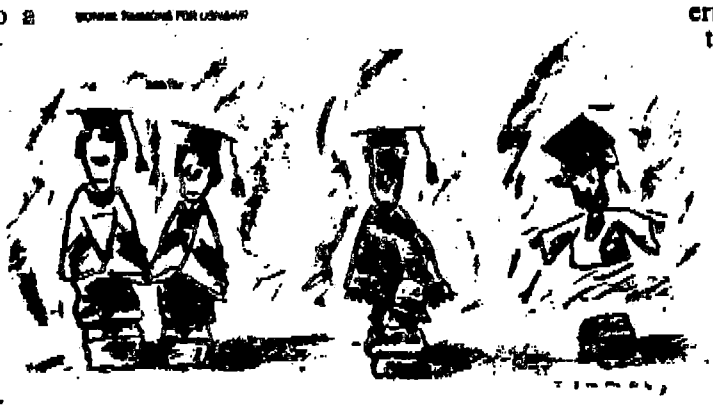
■ ON SOCIETY

BY JOHN LEO

California's racial arithmetic

A good many Washington commentators are convinced that the quota debate is "Willie Horton II," i.e., a basically irrelevant nonstarter that is nevertheless useful for distracting and inflaming impressionable voters. This seems to be yet another curious case of that familiar Washington eye ailment known as inside-the-beltway myopia. In America, the large country just outside the Capital Beltway, quotas are a live issue indeed. Even if the Republicans should somehow manage to exorcise the spirit of Lee Atwater and shed all cynicism and manipulation by noon tomorrow, quotas would still be a major issue in the 1992 elections.

On my desk is a minor example of the growing quota mentality, a report to the U.S. Forest Service from its Task Force on Work Force Diversity. Twenty years ago a report like this would simply have said, in effect, it isn't right for the service to be almost all white and male; let's open it up. But this report, infected by current notions of multiculturalism (there are many cultures or tribes that have to be appeased as groups), says that by 1995, the service "must have percentages in recognized groups equal to the percentages in the Civilian Labor Force in 1990." Quota time. Though momentarily stumped on what would be a proper quota for the disabled, the report says, "We think the appropriate number will be about 5.9 percent." Yeah, that's about right.



The Forest Service says that this report, a wellspring of odd but doctrinally correct multiculturalism, has been accepted "in spirit." This probably means that the leadership, being basically sane, will try to bury it if it can and just try to hire people from both sexes and all races. But here is the problem: To buy some peace, administrators often tell the multiculture believers to go off and make a report. When the report arrives, all thunder and lightning, it sometimes takes on a scary life of its own, raising so much fuss that administrators are tempted to buy peace once again by adopting it, even if it involves quotas, or as in the case of schools, ceding control of the curriculum to various pressure groups. In the worst-case scenario, this report enters and then polarizes partisan politics, with the Democrats trapped by angry constituents into defending assorted zaniness and quotas, thus putting the future of the party at risk.

Diplomas of color. This is roughly the dynamic at work in California, where the most serious quota drama is currently being played out. In brief (and I am not making this up), the Democratic majority in the state legislature is attempting to establish, by law, that California state universities and colleges will grant degrees to ethnic and racial groups in direct proportion to their share of the state's high-school graduates. This astonishing plan, pushed by Assembly Speaker Willie Brown and ex-Fonda husband Tom Hayden, is an explicit rejection of what used to be called civil rights and affirmative action (openness, giving everyone an equal chance, removing obstacles to individual freedom and advancement). We are way beyond that. Now we are in the arena of group entitlements, bringing the colleges under political control and dividing up university degrees and jobs as part of a spoils system run from Sacramento. Since the Democrats vote as a bloc on this, only the good fortune of a last-minute veto by a retiring Republican governor saved California from this quota plan last year, just as the likelihood of another veto by the current Republican governor, Pete Wilson, will save the state this year or next.

To its great credit, California has been deeply concerned for two decades with the low rate of college graduation among some minorities. The disheartening news is that graduation rates for Hispanics and blacks are still very low. With frustration over this rising, the ideal of getting as many blacks and Hispanics as possible ready for college changed to the ideal of proportional representation in freshman admissions, then to the ideal of graduating roughly equal numbers of each group and finally to Willie Brown's favorite kind of ideal, one with legislative teeth.

The quota provision is in Willie Brown's bill, No. 2150, which has been temporarily shelved because of the budget crisis. Perhaps wisely, the bill is presented in a fog of euphemisms. Proportional representation in admissions and graduation is "educational equity," described as a central priority that California universities "shall strive to approximate, by 2000." If that sounds like the soothing language of goals, not quotas, don't be lulled: The "shall strive" is backed by tough provisions of reports, impact statements and the reminder that "governing boards shall hold faculty and administrators accountable" for all this legislated equity (i.e., their jobs are on the line). Since the bill neglects to provide funding for remedial help that unprepared minority students really need, I assume that if the bill passes, the universities would quickly capitulate and grant as many worthless political degrees as the legislature wants. Even now, voices are being raised around the system that every student has a "right" to graduate and that a "privileged elite" (administrators and faculty) is arbitrarily withholding a desirable good (automatic diplomas) from "underrepresented minorities." This is the language of pork-barrel politics, not education, and that is what the Brown bill is all about. ■

From: EDWARD I. KOCH

I thought you would be interested in the enclosed.

All the best.

ROBINSON SILVERMAN PEARCE ARONSOHN & BERMAN

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WRITER'S DIRECT NUMBER:

June 25, 1991

The Honorable Joe Biden
United States Senate
Washington, DC 20510-6275

Dear Joe:

You were really nice to continue our correspondence on H.R.1 even though we are on different tracks. You still believe that the legislation does not encourage quotas and apparently will co-sponsor it in the Senate. I am a firm believer in securing the civil rights of all of our citizens, but not through the use of reverse discrimination. I believe H.R.1 is a bill which encourages racial, ethnic, religious and gender quotas and, therefore, should be defeated.

There are legislative changes that are necessary as a result of recent Supreme Court decisions, but H.R.1 does not solve most of those problems. What it does do is pressure employers to fill jobs on the basis of racial, ethnic, religious and gender proportionality in order to avoid massive backpay and attorneys' fees awards. The proponents never admit that they support quotas and always refer to affirmative action in a way that would place them on record as opposing quotas, even when they acknowledge support of "goals, timetables and sanctions." Those words are simply euphemisms for quotas.

What H.R.1 does, and regrettably the President's bill in the spirit of compromise does the same, is to presume an employer guilty of racial, ethnic, religious or gender discrimination when his workforce statistically does not mirror the applicant

workpool or the regional population in the particular job category when plaintiffs allege discrimination based not on intentional discrimination but on the "disparate outcome" of testing or of the hiring practice. The burden of proof is then shifted to the employer who must defend his hiring practices. H.R.1 also effectively eliminates the plaintiff's requirement to identify the practice(s) causing the disparity and has a brand new onerous definition of business necessity which exceeds the definition in Griggs v. Duke Power (1971) and subsequent Supreme Court cases. Faced with costly lawsuits, monetary damages and negative publicity, employers will simply throw in the towel and make certain their workforce reflects the "correct" racial, ethnic, religious and gender profile, rather than hiring the best person for the job.

I don't believe that President Bush, in introducing his bill through Robert Michel (R-Il.), should have compromised on this issue by including as he did the same presumption of guilt as H.R.1, but at least his bill retains the two other safeguards against quotas requiring the plaintiff(s) to identify the practice(s) causing the discrimination and the Supreme Court's 20-year-old concept of business necessity.

Some suggest there should be compromise on both sides. I suggest that fundamental positions of morality which we all have, sometimes on different sides of the same issue, whether it be with respect to abortion, the death penalty, gay rights, civil liberties and civil rights, should not be compromised. Are there many supporters of Roe v. Wade, who would agree to a compromise, which opponents sometimes offer, to eliminate the right of abortion on demand up to the second trimester except to save the life of the mother, and in cases of rape, incest or gross fetal defects? I doubt that you would vote for such a bill. And certainly supporters of N.O.W. and many others would not. Would you suggest that those who are opposed to the death penalty, as for example New York Governor Mario Cuomo, give up their deeply held position against it be agreeing to it but only in the case of someone convicted of killing a police officer in the line of duty? I doubt it.

There are those in the Congress and on the editorial pages who have used the fact that both the Anti-Defamation League and the American Jewish Congress supported H.R.1 as a shield to criticism. However, subsequent to the bill's passage, both groups have stated that H.R.1 does indeed have quota implications, placing their ultimate support of H.R.1 in question. One reason they take this position is that in an effort by its sponsors to put themselves on record as opposed to quotas, H.R.1 now contains language defining "quota" in such a way as to inferentially protect quotas. How? By defining a quota as requiring employers to take those who are not qualified

for the job, and making that action illegal. That means that the minimally qualified applicant of the "correct" race, ethnicity, religion or gender needed to avoid lawsuits based on the presumption of guilt and H.R.1's rewriting of the other elements of disparate impact lawsuits would be hired rather than the best applicant and that would be legal and a quota.

You should also know that after the House passed H.R.1, AJC executive director Phil Baum issued a statement saying that "in an effort to define quotas, the bill in its current form in fact legalizes and institutionalizes quotas and other forms of race- and sex-conscious employment practices which AJ Congress cannot endorse." ADL took a similar position.

I believe H.R.1 is supported by some because they feel nothing else has worked to end racial discrimination. In fact, much has been accomplished in breaking down discrimination against minorities and women, but much more can and should be done to reduce and eliminate remaining discrimination. We can point with pride to the fact that of the top ten cities in our country half have been or currently are governed by a black mayor. But I do not believe in engaging in reverse discrimination to cure past or present discrimination except when a specific individual can show that he or she was the subject of discrimination in which case that individual should be given preferential treatment to correct the prior discrimination.

"Race norming" which has been used by the federal government for nearly 15 years allows testing applicants for jobs solely within their own race or ethnicity and eliminates scoring the entire applicant group with the same criteria. This practice elevates minority applicants over white and Asian applicants taking the same test and scoring higher. There is a bitterness amongst many whites, who are 80% of the country's population, which results from a feeling that their sons and daughters will suffer reverse discrimination to atone for the earlier and current discrimination practiced against blacks and Hispanics. Many believe as I do that David Duke received 60% of the white vote in Louisiana for U.S. Senate not because those voting for him support the Ku Klux Klan, but rather because of their anger against the Democratic party and its support of preferential treatment and racial and ethnic quotas.

There are many who applaud Senator Kennedy for his leadership in the fight for H.R.1. These same people attack President Bush for his continued opposition to the legislation which he believes encourages quotas and is antithetical to our historical opposition to the use of such quotas. Shouldn't President Bush be applauded for standing up for what he perceives to be a matter of conscience?

The children of those who are wealthy, in political office or have access to "networking" will always get jobs and will not suffer the consequences of the reverse discrimination created by the passage of H.R.1. The children of our working poor and middle classes of every ethnic extraction including, but not limited to, Irish, Italian and Jewish will see their sons and daughters restricted in their opportunities. Ultimately, they will have to accept that they will not rise in an occupation or profession of their choosing based on their ability but rather will be judged by the demographics of race, ethnicity, religion and gender in employment in the private sector, in government and at our universities. That is not the America that most of us, including blacks, Hispanics and women who are the intended beneficiaries of preferential treatment under H.R.1, have dreamed of or been made cognizant of during our academic careers.

Enclosed is some additional material on the subject including a statement I made before the American Jewish Committee and various op-ed articles.

I have gone on at great length knowing that I will not convince you, but I do believe that I have reasonably, responsibly and accurately described what H.R.1 will do and have staked out my position in opposition as a matter of conscience which I will not compromise.

All the best.

Sincerely,

Edward I. Koch

EIK/mgl

enclosures

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 11, 1991

The Honorable Edward I. Koch
1290 Avenue of the Americas
New York, New York 10104

Dear Ed:

Thank you for contacting me again about the Civil Rights Act. H.R.1 is very similar to the civil rights legislation passed during the 101st Congress. You may remember that I was a cosponsor of that legislation, which would have restored important civil rights protections.

As I mentioned in my previous letter, I carefully reviewed the Civil Rights Act of 1990 and concluded that it would not cause employers to adopt quotas. In addition, the House-passed bill explicitly states that quotas are illegal.

Again, thank you for your letter. When H.R.1 is considered by the Senate, I will closely examine it and certainly keep your views in mind.

Sincerely,

Joseph R. Biden, Jr.
Chairman

A tax-exempt public policy research institute

June 28, 1991

John H. Sununu
Chief of Staff
The White House

Dear Governor Sununu:

I just wanted to give you a quick update on things, so you don't think I abandoned you.

After examining Senator Danforth's three bills more closely, I concluded:

(1) that under any interpretation of their language, the bills still had substantial quota-promoting tendencies;

(2) that in several critical respects, however, the bills were highly ambiguous; and therefore

(3) that the extent and degree of the remaining quota problems depended heavily on what certain provisions meant.

Based both on the ambiguity (which I attributed to sloppy draftsmanship) and on the lingering quota problems, I was convinced that Senator Danforth would have to make substantial changes in the bills in order to make them acceptable to the President and the American people. Therefore, my supervisors and I felt that it made more sense, under the circumstances, for us to conserve our ammunition and wait to see what Danforth comes up with next.

In the mean time, I have kept in regular contact with Nelson Lund in the White House Counsel's Office. When we spoke Tuesday evening a couple of days ago, he told me that there had been a fairly favorable meeting with Danforth in which the Senator had been fairly receptive to at least one change suggested by the Administration and had indicated that he would be making other changes in the bills as well. I don't know any of the details of

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what was discussed, and I don't know what changes the Senator has in mind or whether they would be changes suggested by you or by Senator Kennedy, but it would appear that our decision to hold our fire has been vindicated, at least for now. Nelson and, I believe, Boyden both agree that it would be better at this stage for me not to attack Danforth's initial versions for being the quota bills that they are, but instead to wait and see what he comes up with next, and whether he moves more in Ted Kennedy's direction or in yours. I will continue to stay in contact with Nelson, and I will be prepared to turn out a short paper on Senator Danforth's revised versions (depending of course on what they say) as soon as they become available.

In the mean time, I will be writing on another matter which also merits your personal attention -- Senator Glenn's attack on OIRA. I assume you are already familiar with this subject. This attack threatens one of the most important protections of individual liberty built into the Constitution by our founding fathers -- the separation of powers. At issue is nothing less than the President's right to control the Executive Branch of government and to direct the actions of his subordinates.

Under the first sentence of Article II, subordinate officers have no independent standing or authority; they are merely agents of the President, and they enjoy only such authority as the President chooses to delegate to them. Senator Glenn's bill would severely compromise (at least indirectly) the President's ability to control his subordinate officers by requiring them to submit the regulations they promulgate to review by OMB prior to promulgation. Moreover, by holding nominees hostage unless the President agrees to support his bill, Senator Glenn commits a form of constitutional extortion which represents a further threat to the principle of separation of powers. Therefore, I hope that when the time comes for the Administration to take a position on this matter, you will advise the President not to give in to this attempted extortion but instead to defend the legitimate constitutional prerogatives of his office and to oppose Senator Glenn's evil bill. (I guess you can tell I have strong views on this subject.)

Sincerely yours,

Bill

William G. Laffer III
McKenna Fellow in Regulatory
and Business Affairs

P.S. Illegitimi non carborundum, of course.

TO: BARBARA, WTOC

FR: SHARLEEN; MAXWELL MACMILLAN PHONE: 201/816-8696

Chief of Employment Commission Criticizes G.O.P. Bill on Job Bias

By STEVEN A. HOLMES
Special to The New York Times

6-25-91

WASHINGTON, June 24 — The chairman of the Equal Employment Opportunity Commission today urged the White House to reject compromise civil rights bills fashioned by moderate Republicans.

In a letter to John H. Sununu, the White House chief of staff, Evan J. Kemp, head of the commission, said the compromise would make it "extremely difficult for employers to use educational credentials and objective measures of academic achievement" like tests to determine who to hire or promote.

Mr. Kemp said precluding such criteria in employment decisions would undermine President Bush's efforts to improve the educational achievements of students and therefore make it more difficult for American businesses to compete.

"Notwithstanding employers' ever increasing dependence on individual competence in order to remain competitive, students, parents and teachers will not be able to point to a reward for learning if employers are for all practical purposes precluded from even inquiring about degree status, much less rewarding academic achievement," Mr. Kemp wrote in the letter, a copy of which was provided by an Administration official on the promise of anonymity.

First Senior Opposition

Mr. Kemp's letter marks the first time any senior official within the Bush Administration has voiced outright opposition to the compromise measures drafted by Senator John C. Danforth, Republican of Missouri.

It is not clear whether Mr. Kemp's letter presaged a formal Administration announcement opposing Mr. Danforth's measure or if it indicated a split within the Administration over whether to accept to Missouri Republican's compromise.

When asked about the Danforth proposals two weeks ago, Mr. Bush was non-committal, saying, "Our people are taking a hard look at them." More recently he said he had reservations about them.

The letter was the first time Mr. Kemp has indicated his views on any version of the civil rights legislation, which has become embroiled in a debate over whether it would compel employers to adopt hiring and promotion quotas in order to avoid job discrimination lawsuits.

As head of the Equal Employment Opportunity Commission, Mr. Kemp is charged with the enforcement of Federal employment discrimination laws, but to date he has sat on the sidelines during the heated debates over the measure.

Steve Hilton, a spokesman for Mr. Danforth, said the Senator had not seen Mr. Kemp's letter and therefore would not be able to comment on it.

A version of the civil rights bill supported by the House Democratic lead-

A White House official opposes moderate Republicans.

ership was approved by the House June 5 by a margin that was 17 votes short of what would be required to override a Presidential veto.

Democratic leaders in the Senate are reluctant to bring that measure to a vote, and are hoping that a compromise could be worked out that would secure White House support.

Backers of the civil rights bill are seeking to overturn a series of 1989 Supreme Court decisions that made it harder to sue and collect damages in job discrimination cases. They are also seeking to increase the financial penalties employers would pay if they are found to have discriminated intentionally against women.

Mr. Kemp's letter underscores the main philosophical difference between supporters of both the Democrats' bill and Mr. Danforth's compromise and their opponents within the Administration, including C. Boyden Gray, the White House counsel.

According to the letter, Mr. Kemp believes that Federal employment law as practiced during the last 20 years has fallen out of step with the current demands of the economy. In 1971, the Supreme Court that criteria for hiring and promotions like requiring a high school diploma or a college degree must be directly relevent to the job in question.

THE WHITE HOUSE
WASHINGTON

6/17

TO: John Sununu

FROM: FRED McCLURE
Assistant to the President
for Legislative Affairs

☒ FYI

☐ Comment

☐ Action

Attached is the Labor Policy Association analysis of Danforth with some comparisons.

FRED

Special Memorandum

MEMORANDUM

June 6, 1991
91-121S

TO: Key Federal Policy Makers

RE: **The Danforth Civil Rights Proposals**

As the House was taking up H.R. 1, the 1991 civil rights amendments, Senator Danforth along with eight other moderate Republicans introduced an alternative divided up into three separate bills.

The Danforth bills—S. 1207, S. 1208 and S. 1209—represent the latest in a series of Republican attempts to reach consensus on civil rights. The other measures are the Administration's proposal (S. 611) and ones offered by Senator Simpson (S. 478) and Senator Dole (S. 472). Thus far, no Democratic Senator has introduced a civil rights bill.

Enclosed are fact sheets providing our analysis of the three Danforth proposals.

LPA FACT SHEET

June 6, 1991
91-121

S. 1207, Senator Danforth's Civil Rights Alternative Reversing Numerous Supreme Court Decisions

On June 4, 1991, Senator Danforth introduced three proposed civil rights bills as substitutes for H.R. 1. His S. 1207 reverses several Supreme Court civil rights decisions and toughens Title VII. The controversial issues of disparate impact and damages are addressed separately by the other two bills.

***Patterson v. McLean Credit* (Employment Contracts)** Amends 42 USC Sec. 1981 to prohibit race discrimination beyond the formation or enforcement of an employment contract. Section 1981 thus would cover all terms and conditions of employment as well as on-the-job harassment. Both H.R. 1 and the Administration's bill reverse *Patterson.*

***Price Waterhouse v. Hopkins* (Mixed Motive Cases)** Like H.R. 1, S. 1207 establishes a violation if race, sex, *etc.*, was a "motivating" factor in making an employment decision. If the respondent proves it would have taken the same action in the absence of discrimination, the court can grant declaratory and injunctive relief, unlimited attorney fees (the main aim of this provision) and costs. Unlike H.R. 1, the court could not award damages or order hiring or reinstatement.

By definition, affirmative action uses race or sex as a "motivating factor" in employment decisions. Employers who use voluntary action or comply with Executive Order 11246 run the risk of having their actions declared illegal, enjoined, and paying attorney fees. S. 1207's language protecting affirmative action may protect only "court-ordered"—not voluntary—efforts.

***Martin v. Wilks* (Finality of Consent Decrees)** Establishes ground rules for challenges to consent decrees. No challenge would be allowed if, before entry of the decree, the person knew of the decree and had a reasonable opportunity to object, or was represented by someone else who adequately protected his rights.

***Lorance v. AT&T* (Challenges to Seniority Systems)** Allows plaintiffs to attack a seniority system not only when the system is adopted, but also when the individual becomes subject to the system or injured by its application. If the plaintiff alleges that the practice was adopted for an intentionally discriminatory purpose, then an unlawful employment practice occurs. Enactment of this language would mark a new era in American jurisprudence. It would make the plaintiff's allegation, rather than proof of the employer's intent, determinative of whether a violation has occurred.

Labor Policy Association, Inc. • 1015 Fifteenth Street, NW • Washington, DC 20005 • Telephone 202-789-8670 • Fax 202-789-0064

Expert Fees Like H.R.1, this section allows unlimited expert witness fees. The Administration bill limits such fees to $300 per day.

Alternative Dispute Resolution Lifted from H.R. 1, this provision encourages alternative dispute resolution techniques to resolve disputes. The House Committee reports indicate that these alternative methods would not stop an individual who receives an unfavorable arbitration award from having a second bite at the apple through a Title VII suit. In place of lawsuits, the Administration's bill encourages alternative procedures, including binding arbitration that is "knowingly and voluntarily agreed to by the parties."

Congressional Coverage While purportedly requiring Congress to live with the same rules it imposes on the private sector, in fact Congress will continue to act as judge in its own cases under S. 1207. The Administration bill, in contrast, would allow private suits to be filed in court against Congress.

Effective Date The bill is effective on the date of enactment, but contains no language clarifying that it is not retroactive. Indeed, past Senate interpretations indicate that the changes would apply retroactively to any cases pending on the date of enactment.

FACT SHEET

June 6, 1991
91-122

S. 1208, Senator Danforth's Disparate Impact/Business Necessity Civil Rights Alternative

S. 1208 is the second of Sen. Danforth's three substitutes to H.R. 1. The bill addresses the standards used to litigate disparate impact (numbers-based statistical) discrimination cases against companies. At issue in the civil rights debate is whether statistics alone would be sufficient to get a disparate impact case into court, and how the employer's defense of "business necessity" against that statistical case would be defined.

Disparate Impact Cases The Administration's bill allows a plaintiff to bring a statistical case by (1) alleging "bad" numbers, (2) requiring the plaintiff to point to the specific practice or practices that caused the bad numbers and (3) allowing the defendant to justify the challenged practice.

"Grouping of Practices" Requiring the plaintiff to specify and prove which practices caused disparate impact *individually* was the majority appellate rule before *Wards Cove*. The Danforth bill would reverse this requirement. Danforth would *not* require a plaintiff to prove that each practice caused an impact. All a plaintiff has to do is "identify with particularity each practice that is responsible in whole or significant part for the disparate impact." Thus, all the plaintiff must do is list the employer's various practices (*e.g.*, test, interview, education requirement, experience) and this minimal requirement for getting into court is met.

The phrase—"in whole or significant part"—should not be construed to require a showing of causation. This language came out of last year's negotiations between Senator Hatch and the bill's proponents, and was included in the second Conference bill that was vetoed. The second Conference Report stated that a practice was assumed to satisfy this requirement unless the practice made only a "*trivial* or *insubstantial* contribution to the disparate impact." Under this definition, any practice with more than a trivial impact on minorities or women would have to go to trial and be justified by business necessity. The practical effect of S. 1208 would be as burdensome on employers as the present language of H.R. 1.

Even more, the plaintiff can avoid this "listing" requirement by stating "after discovery" that the "elements of the employer's decisionmaking process are not capable of separation for analysis." This is a clear invitation to plaintiffs to file a lawsuit whenever a numerical imbalance is present in the workforce, and launch a burdensome process to see if a lawsuit should have been filed in the first place. Again, employers will be encouraged to have a balanced workforce to avoid this expense.

Thus, the Danforth proposal has the same result as H.R. 1—it allows the plaintiff to attack a *group* of practices without having to show that any of the practices caused a disparate impact. A plaintiff could now get into court by simply alleging bad numbers and asserting that the listed

practices, lumped together, were responsible for the bad numbers. Merely *listing* practices is a far cry from having to prove which specific practice *caused* a disparate impact.

Business Necessity Definition At issue in the debate over business necessity is whether employers will be able to continue defending themselves against "bad" numbers by showing the disparity is caused by legitimate business reasons that are not a pretext for discrimination.

Business Necessity—Nonselection Practices The Danforth bill has an excellent definition of business necessity for employment decisions *not* involving employment selection practices—"manifest relationship to a legitimate business objective of the employer." The problem is, can you think of many employment decisions that do not involve the selection of one person over another? Decisions regarding hiring, firing, promotion, demotion, layoff, reassignment, and relocation are all selection practices. Thus, enactment of this excellent language would be of no practical or legal consequence.

Business Necessity—Selection Practices With respect to selection practices, the Danforth proposal does not "restore" pre-*Wards Cove* law and, contains the same problem as H.R. 1. It ties business necessity to "the requirements for effective job performance." This definition is different and stricter than *Griggs* and, more fundamentally, bars companies from explaining disparities with evidence of legitimate business objectives that are not being used as an excuse to discriminate. Companies are run, not on the basis of whether employees can perform jobs effectively, but on whether there is a job that makes economic sense to be performed. Enactment of this language would seriously undermine the ability that employers have under existing law, and would have under the Administration's bill, to rebut accusations of bad numbers with legitimate business reasons.

Alternative Practices If an employer somehow meets the Danforth burden of proving business necessity, the plaintiff still can win by proving that a different practice or group of practices would serve the respondent as well and make more than a "negligible" difference in the impact. Like H.R. 1, the Danforth bill reverses the Supreme Court's *Albemarle Paper* decision, which treated such a showing as "evidence," rather than final proof, of discrimination. The Danforth bill also leaves out the Administration's requirement that the alternative be "comparable in cost" to the employer.

Race Norming Danforth prohibits an employer, a private employment agency, or a state employment agency from using race, sex, *etc.*, as a basis for adjusting, altering, or using different cutoff scores. The bill, however, states that this prohibition does not apply to a respondent seeking to comply with a court order aimed at remedying past discrimination. Thus, race norming could be used in a consent decree, court-approved settlement or in a court-ordered remedy after trial.

Effective Date The bill contains no provision specifying an effective date, thus leaving open the question of retroactive application.

Conclusion As explained above, S. 1208 may have different language than H.R. 1, but it is virtually indistinguishable in practical effect. Like the myriad "compromises" that preceded it, S. 1208 merely rewords H.R. 1 while leaving intact its underlying intent.

FACT SHEET

June 6, 1991
91-123

S. 1209, Senator Danforth's Civil Rights Alternative On Damages and Penalties

In addition to back pay, the Danforth bill proposes a total of $300,000 per plaintiff for nonpecuniary damages and penalties for companies with 100 or more employees, and $100,000 per plaintiff for those with less. No limit is placed on damages for pecuniary losses which means the sum total of damages and penalties could be substantially higher than $300,000. These provisions would apply to discrimination cases under Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA). The Administration, in contrast, proposes a single equitable remedy—no more than $150,000 in addition to back pay and limited to Tile VII harassment cases.

Compensatory Damages As under H.R. 1, all victims of any intentional ADA or Title VII discrimination would be provided a jury trial to receive compensatory damages. The standard of proof would be clear and convincing evidence. The jury would decide both factual liability issues and the amount of damages. Like H.R. 1, persons eligible for these damages would include class members in purely statistical (pattern or practice) cases alleging intentional discrimination. Compensatory damages could be given not only for pecuniary loses, but also for nonpecuniary losses such as "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."

Limitations on Compensatory Damages Awards Compensatory damages would be in addition to back pay. Up to $150,000 in nonpecuniary losses *per plaintiff* could be awarded against employers with more than 100 employees, and smaller employers could be made to pay up to $50,000 *per plaintiff*. The bill contains no limitation for compensatory damages for pecuniary losses. In deciding the amount of damages, the bill bars the court from informing the jury of these limitations.

Equitable Penalty S. 1209 also provides a penalty that can be assessed *in addition* to compensatory damages. Senator Danforth stated that "like punitive damages," this penalty is intended to exact a price for wrong conduct and to discourage such conduct by others. Like H.R. 1, the penalty is awarded if the employer has acted "with malice or reckless indifference to the federally protected rights of an aggrieved individual." Note that this could apply to rights beyond Title VII, such as the ADEA, IRCA, OSHA, or FLSA.

The same caps apply as with compensatory damages—$150,000 per plaintiff for companies with 100 employees or more, $50,000 per plaintiff for those with less. The award must be sufficient to *deter* the employer from similar future acts. A number of equitable factors would be considered including: the nature of the offense; employer EEO training; affirmative action efforts; available internal grievance procedures; employer investigation; and the size of the employer.

Labor Policy Association, Inc. • 1015 Fifteenth Street, NW • Washington, DC 20005 • Telephone 202-789-8670 • Fax 202-789-0064

Penalty Uses The plaintiff would not receive any of the penalty award. The court could spend it on measures to correct the company's discriminatory practices, such as public awareness and education programs. Or the court can put all or part of the award into a federally-administered trust fund used carry out the purposes of Title VII or the Family Violence Prevention and Services Act (but not apparently the ADA).

Effective Date There is no effective date in S. 1209, thus leaving for litigation the question of whether it applies retroactively.

DEFINITION OF BUSINESS NECESSITY

OPTION A

The term "required by business necessity" means--
(1) in the case of employment practices that are used to measure ability to do the job, the challenged practice must bear a manifest relationship to the employment in question.
(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "employment in question" includes, but is not limited to-- (1) the performance of actual work activities required by the employer for a job or class jobs; and
(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

OPTION B

The term "required by business necessity" means--
the challenged practice must bear a manifest relationship to the employment in question.
(1) in the case of employment practices used to measure ability to do the job, the term "employment in question" means job performance.
(2) in the case of employment practices not described in paragraph (1), the term "employment in question" means a legitimate business objective of the employer.

The term "job performance" includes, but is not limited to--
(1) the performance of actual work activities required by the employer for a job or class of jobs; and
(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

TELECOPIER TRANSMITTAL SHEET

DATE: June 25, 1991 **TIME:** 4:25 p.m.

NUMBER OF PAGES + COVER SHEET 3

TO : Governor John H. Sununu

OFFICE : Chief of Staff to the President

ROOM :

REMARKS : See circle for how far we have gone toward preferences (and/or confusion) in our society.

FROM : Evan J. Kemp, Jr., Chairman

OFFICE : OFFICE OF THE CHAIRMAN

PHONE NUMBER : 663-4001

FAX NUMBER : 663-4110

CONFIRMATION REQUESTED? YES xxx NO ___

IMMEDIATE DELIVERY REQUESTED? YES xxx NO ___

IF THERE IS A PROBLEM WITH THIS TRANSMISSION, PLEASE CALL

Debra **AT** 663-4001.

THE NEW REPUBLIC

JULY 1, 1991

Quotas in the State Department.

GENDER NORMING

By James Workman

By now you probably never want to read the word quota again. You've heard of race norming, the Labor Department practice of adjusting minorities' test scores to enhance their chances of getting jobs over whites. But you may not have heard of the newest play on this debate: gender norming. Once again, it takes place under the very auspices of those who would claim to spurn it: in the Reagan and Bush administrations' State Department. Women are getting a significant advantage over men in the testing, hiring, and assignment of Foreign Service Officers.

For decades the State Department engaged in what would now be rightly considered outrageous and unconscionable discrimination against women. Until the mid-1970s female foreign service officers had to resign when they got married. Because the job was considered masculine, few women bothered to apply for it anyway: each year less than 7 percent of the successful applicants were women. Because of the marriage policy, among other reasons, many women dropped out during the course of their careers, which left only 4.7 percent women in the corps and less than 2 percent at the senior officer grades. According to former female FSOs, most of the women who were employed by the Foreign Service were secretaries or wives of male officers, and the few women FSOs who remained were treated like secretaries and assigned to administrative, clerical, desk, and support duties "appropriate to women's nurturing instincts," as one woman was told. In FSO parlance, males were more often rated higher and given "stretch" (above their grade level of experience) assignments while women were given "downstretch."

To counter both overt and subtle forms of discrimination, roughly two dozen FSO women banded together in 1970 to form the Women's Action Organization. WAO worked through departmental task forces and ad hoc committees to lobby for changes. By 1974 State had finally removed the ban on marriage and began to train more women for senior-level positions, to discourage women who were contemplating resignation, and to reinstate many who had been forced to resign because of marriage. This increased the number of women FSO generalists from 149 to 234. But WAO believed the pace of change was too slow to ever bring about its goal of 50 percent representation of women in the Foreign Service. So in 1976 nine members filed a sex discrimination suit that challenged virtually all of the hiring, assignment, evaluation, and promotion practices of the FSO.

The suit took nine years to come to trial. In the meantime the State Department, concerned with bad publicity and the chance that it would lose control of its hiring and personnel, launched a systematic drive to recruit women through women's colleges, independent women's groups like the League of Women Voters, and advertising in women's magazines such as *Cosmopolitan*, *Woman's World*, and *Ms.* The female registration rate rose to 30 percent within three years of the lawsuit. But inevitably the pool of women applicants so recruited was dramatically different from the men and women who applied on their own. According to Educational Testing Service records, before the lawsuit most of the successful female applicants held graduate degrees in international studies, political science, philosophy, linguistics, or government. More of the women now applying have undergraduate degrees in fields like English, art history, and literature.

As a result, a lower percentage of female applicants were passing the grueling Foreign Service exam than before the recruiting effort began. The State Department also began exhibiting more concern about its minority applicants, who were passing at a rate of only 7 percent, as opposed to the non-minority pass rate of 15 percent. So State began to tinker with the exam itself. Since the 1940s there had been five parts to the application process: an English Expression test of reading comprehension, grammar, usage, and communication skills; a three-hour General Background test of broad knowledge of world history, geography, culture, politics, and physics; and a Functional Field test indi-

cating which job track, or "cone," best suited the individual's strengths: administrative, consular, economic, or political. These were followed by a foreign language aptitude test. The cut-off score was 70. Applicants who passed went on to an oral assessment stage. The process winnowed more than 15,000 applicants to an elite group of 250 appointees.

Because exam records showed the foreign language test hurt the chances of minority applicants, by the late 1960s it was eliminated. But that change, in turn, hurt female applicants in general, who typically passed the foreign language test at a higher rate than men. To compensate, in 1977 the department began to weight the English test (in which women performed better than men) disproportionately over the Background, 60 percent to 40. But that subsequently hurt minority males, who were weaker than other populations in English skills. So in 1979 the department created a "near pass" category for minority applicants. This meant that the passing score of 70 no longer applied to minorities, who, according to testing personnel, have been passed with scores in the mid-50s.

The disproportionate weighting of the English test still wasn't passing the right number of women, so the department began to alter test questions. ETS began to recycle questions on which women did better than men, according to a 1981 progress report compiled by ETS and State. In a partial settlement with WAO in 1983, the pressure to gender norm came to a head. State agreed to implement the same "near pass" mechanism for selection of women as it had with minorities. Women who scored 1 to 4 points below the passing score were waved through to the next stage, thereby ensuring that equal proportions of male and female applicants would pass.

In 1985, meanwhile, the lawsuit finally came to trial. The plaintiffs initially argued that female FSOs were individually discriminated against. For example, one of the women who testified failed the written examination on eight occasions between 1962 and 1977. She eventually passed the written exam, only to fail the oral stages in 1978, 1980, and 1981. This could mean she was discriminated against, but it could also mean that though this woman was admirably determined, she was, like roughly 14,750 other applicants each year, just not as good as the top 250 who made the cut.

After months of trial hearings, District Court Judge John Lewis Smith II, on September 13, 1985, found no evidence of personal discrimination, and ruled for the State Department on every major count. The plaintiffs immediately appealed, brought the case before a U.S. Court of Appeals panel, and shifted their focus from individual discrimination to the correction of statistical imbalances. On March 24, 1987, Judge Patricia Wald, widely considered the federal court system's leading liberal, overturned Smith's ruling. Despite all the procedural efforts State had made over the last decade, Wald based her decision almost entirely on the final outcomes, finding that discrepancies still existed between the scores of men and women. Although State had passed 498 women who fell into the near-pass category after the 1985, 1986, and 1987 exams, women were still not scoring as high as men. This is not unusual in standardized testing: from LSATs to MCATs to college boards, women statistically score lower than men. Nevertheless, Wald ruled that the State Department had to come up with a process that would advance an equal proportion of women through each stage of the program, from the written exam up through assignments, performance evaluations, and, eventually, promotions.

The problem for the State Department and the lower court was how to do this without resorting to legally questionable quotas. In January 1989 a two-part solution was reached by Judge Aubrey Robinson, who ordered that for the 1985-87 exams, the Department must disregard the General Background and Functional Field sections and pass applicants only according to English Expression scores.

In addition, the scoring on future exams would be dramatically adjusted. Whereas in the past the department administratively decided that women with raw exam scores a few points lower than men would be passed through to the next stage, now the department has simply substituted percentile scores—separately computed for men and women—for raw scores. In the words of the document explaining this (which had to be obtained from an unofficial source after the court and both parties to the lawsuit balked at providing it), the State Department decided to "devise scoring procedures which will ensure no disparate impact on women *before* the initial scoring of the examination." (Emphasis mine.) The department does this by

> creating separate rank order lists based on raw examination scores for men and women. An equal percentage of males and females would be identified from each rank order list as test passers. Candidates who have thus passed the written examination will receive a percentile score derived from their position on their own rank order list. This will mean that the highest scoring man and the highest scoring woman will each receive the same percentile score, as will any pair of men and women who hold the same relative position on their own rank order list.

The numbers have been made equal, in other words, but what they measure has not. This is classic "norming," and the difference between it and a simple quota is a question for semanticists or theologians, not ordinary mortals.

Nobody knows what effect, if any, all this will have on the quality of the Foreign Service. But the new dispensation means that nowadays a person (male or female) can be appointed to the most prestigious international branch of the U.S. government career service regardless of his or her ability to answer written questions about foreign policy, as long as he or she knows where to place a semicolon. Old prejudices and injustices have indeed been overcome, but women FSOs may now have to face a new prejudice, an assumption that they are less qualified than their male colleagues. ●

United States Senate

Photo Copy Preservation

June 28, 1991

The White House
1600 Pennsylvania Ave., N.W.
Washington D.C.

Dear Mr. President:

We are writing to express our deep concern about reports in today's media implying that our colleague, Senator Jack Danforth, did not act in good faith with regard to a recent proposal on civil rights legislation offered by Administration officials.

As members of the working group of Senators trying to craft a compromise civil rights measure, we want to clarify the apparent misunderstanding regarding the Administration proposal on the "business necessity" standard. We considered the proposal and as a group agreed to take it to the Democrats for review (and hopefully for their approval), and then reanalyze the situation in light of their comments. At no time during this process did we have an agreement to accept the White House language.

There can be no question that Jack Danforth is a man of the highest personal integrity. It distresses us to see what appears to be a miscommunication erroneously cast in terms of Senator Danforth's personal integrity. We would hope that this uncalled for challenge to our colleague's integrity will not affect the prospects for compromise legislation.

We want to give you our personal assurances that each of the nine Republicans involved in these discussions has been operating in good faith, and that our common goal is and always has been to find a means to the end we know you desire: the enactment of a fair and equitable civil rights bill.

We stand ready to discuss this matter with you at any time.

Sincerely,

John Chafee

Warren Rudman

Pete Domenici

James Jeffords

Arlen Specter

Mark O. Hatfield

Dave Durenberger

William Cohen

(1) in the case of employment practices used to measure ~~job qualifications or~~ ability to do the job, the term "employment in question" means job performance.

(2) in the case of employment practices not described in paragraph (1), the term "employment in question" means a legitimate business objective of the employer.

The term "job performance" includes--

(1) the performance of actual work activities required by the employer for a job or class of jobs; and

(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

PROPOSAL SENT TO DOJ 6/24
DANFORTH PROPOSAL

The term "required by business necessity" means--

(1) in the case of employment practices primarily measuring qualifications for or ability to do the job, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

DOLE STAFF RECOMMENDATION

The term "required by business necessity" means--

(1) in the case of practices that are used by the employer because they are relevant to job performance, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

DOLE STAFF RECOMMENDATION MODIFIED

The term "required by business necessity" means--

(1) in the case of practices that are used <u>as conditions of employment in or transfer to jobs</u>, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

DEFINITION OF BUSINESS NECESSITY

LANGUAGE OF S. 1208

The term "required by business necessity" means--

(1) in the case of employment practices involving selection, that the practice or group of practices bears a manifest relationship to the requirements for effective job performance; and

(2) in the case of other employment decisions not involving employment selection practices as described in paragraph (1), the practice or group of practices bears a manifest relationship to a legitimate business objective of the employer.

The term "requirements for effective job performance" includes--

(1) the ability to perform competently the actual work activities lawfully required by the employer for an employment position; and

(2) any other lawful requirement, that is important to the performance of the job, including, but not limited to, factors such as punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a work history demonstrating unreasonable job turnover, and not engaging in conduct or activity that improperly interferes with the performance of work by others.

to measure ability to do the job, perform

OPTION A

The term "required by business necessity" means--

(1) in the case of employment practices that are used as ~~conditions of employment in or transfer to jobs~~, the challenged practice must bear a manifest relationship to the employment in question.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

take from B → A

but not limited to

The term "employment in question" includes--

(1) the performance of actual work activities required by the employer for a job or class of jobs; and

(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

OPTION B

The term "required by business necessity" means--

the challenged practice must bear a manifest relationship to the employment in question.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From Frederick McClure to John Sununu Re: Danforth Press Conference (1 pp.)	6/27/91	~~P-5~~	

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 (2 of 2) 1991 [2]

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(Document Follows)
By JP (NLGB) on 10/28/05

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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:**	

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

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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.

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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

THE WHITE HOUSE AC HAS SEEN
WASHINGTON

Send copy to Boyden

June 27, 1991

THE CHIEF of STAFF has seen

MEMORANDUM TO GOVERNOR SUNUNU

FROM: Shawn Smeallie

THROUGH: Fred McClure

SUBJECT: Danforth Press Conference

At 4:30pm today, Senator Danforth announced that he will introduce legislation that will make 22 changes to his original bills that the Administration requested. It also includes a modification to your language on business necessity. He said that he felt compelled to introduce legislation since the Administration said that there "was no further room for negotiation."

Danforth is the only cosponsor thus far. He said that Senators Rudman and Domenici are not expected to cosponsor because they want to continue to negotiate with the Administration. Danforth stressed, however, that he and the original eight cosponsors are still unified in purpose.

(Danforth was asked whether you really wanted a civil rights bill, to which he replied he believed you did. He also denied charges that he reneged on agreeing to your language.)

Danforth sought me out after the press conference to tell me that if you accepted his changes to your "business necessity" language, he promises to keep the language intact until it reaches the President's desk.

CHANGES MADE AT THE REQUEST OF THE ADMINISTRATION
June 27, 1991

1. S. 1207, the Civil Rights Restoration Act of 1991.

a. The Administration expressed concern that attorney's fees granted by this bill for mixed motive cases (Price Waterhouse cases) would not be limited to the attorney's work performed on the mixed motive case. The concern was that the attorney would always plead a mixed motive claim along with numerous other claims and attempt to recover fees for work done on the other claims as well as the Price Waterhouse claim.
RESPONSE: Cosponsors inserted language that ensures that attorneys receive fees "directly attributable only to the pursuit of a claim under this section."

b. The Administration expressed concern about the bifurcation of the rule governing challenges to consent decrees or court-ordered remedies.
RESPONSE: Instead of applying different rules, cosponsors agreed to apply the same rules to all consent decrees or court-ordered remedies.

c. The Administration was concerned about retroactive application of the Martin v. Wilks section.
RESPONSE: Cosponsors made the section in question prospective.

d. The Administration wanted technical corrections in the section of the legislation concerning Lorance v. AT&T Technologies.
RESPONSE: Cosponsors made the technical corrections.

e. The Administration believed that the provision concerning affirmative action was too broad.
RESPONSE: Cosponsors narrowed the provision.

2. S. 1208, the Equal Employment Opportunity Act of 1991

a. The Administration believed that the purposes section was unclear and too broad.
RESPONSE: Cosponsors clarified it.

b. The Administration strongly emphasized the need to use the term "cause" to describe the plaintiff's burden in a disparate impact case.
RESPONSE: Cosponsors adopted the term "cause."

c. The Administration was disturbed by the phrase "after discovery" in describing the plaintiff's burden in a disparate impact suit.
RESPONSE: Cosponsors removed the term "after discovery."

d. The Administration was concerned about a clause they viewed as ambiguous with regard to when a defendant may use the defense of "business necessity."
RESPONSE: Cosponsors clarified that the defense was not available in intentional discrimination suits.

e. The Administration requested the deletion of a clause concerning statistical imbalances in the racial makeup of an employer's workforce.
RESPONSE: Cosponsors deleted the clause.

f. The Administration requested the deletion of a "comparable worth" construction clause.
RESPONSE: Cosponsors deleted the clause.

g. The Administration requested deletion of the subsection concerning court-ordered race-norming.
RESPONSE: Cosponsors deleted subsection in question.

h. The Administration requested use of the phrase "manifest relationship to the employment in question" in the definition of "business necessity."
RESPONSE: Cosponsors incorporated that phrase in the bill's definition.

i. The Administration was concerned about the potential breadth of the term "selection" in the definition of "business necessity."
RESPONSE: Cosponsors deleted this term and replaced it with a narrower description of employment practices.

j. The Administration was concerned that employers would lack discretion in making its own hiring decisions.
RESPONSE: Cosponsors attempted to clarify that employers have discretion in choosing their employees.

k. The Administration believed that certain sections of the bill would be misconstrued as circular.
RESPONSE: Cosponsors deleted terms of concern.

l. The Administration preferred conceptual descriptions (rather than lists of examples) in the definition of "business necessity."
RESPONSE: Cosponsors deleted lists and used language designed to describe the concepts.

m. The Administration requested deletion of construction clauses that it viewed as superfluous and subject to misconstruction.
RESPONSE: Cosponsors deleted the construction clauses in question.

n. The Administration requested that liability not be automatically assessed against an employer who did not

know about an alternative employment practice which has a less disparate impact upon a protected group than the employer's practice.

RESPONSE: Cosponsors adopted the Administration's position on alternative practices.

3. S. 1209, the Civil Rights and Remedies Act of 1991.

a. The Administration requested a limit on damages for "reasonable accommodation" cases under the Americans with Disabilities Act.

RESPONSE: Cosponsors developed a "good faith" exception for such cases.

b. The Administration requested a cap on future pecuniary damages.

RESPONSE: Cosponsors adopted such a cap.

c. The Administration requested a lowering of caps on compensatory and punitive damages.

RESPONSE: Cosponsors accommodated request by lowering caps, and creating three tiers of damages for varying sizes of businesses.

DEFINITIONS OF BUSINESS NECESSITY

LANGUAGE OF S. 1208

The term "required by business necessity" means--

(1) in the case of employment practices involving selection, that the practice or group of practices bears a manifest relationship to the requirements for effective job performance; and

(2) in the case of other employment decisions not involving employment selection practices as described in paragraph (1), the practice or group of practices bears a manifest relationship to a legitimate business objective of the employer.

The term "requirements for effective job performance" includes--

(1) the ability to perform competently the actual work activities lawfully required by the employer for an employment position; and

(2) any other lawful requirement, that is important to the performance of the job, including, but not limited to, factors such as punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a work history demonstrating unreasonable job turnover, and not engaging in conduct or activity that improperly interferes with the performance of work by others.

OPTION 1

The term "required by business necessity" means--

(1) in the case of employment practices primarily measuring qualifications for or ability to do the job, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "employment in question" includes--

(1) the performance of actual work activities required by the employer for a job or job family; and

(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

OPTION 2

The term "required by business necessity" means--

(1) in the case of practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest

relationship to a legitimate business objective of the employer.

OPTION 3

The term "required by business necessity" means--

(1) in the case of practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a demonstrable relationship to successful performance of the jobs for which it was used.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

OPTION 4

The term "required by business necessity" means--

(1) in the case of employment practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a manifest relationship to the employment in question.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "employment in question" includes--

(1) the performance of actual work activities required by the employer for a job or class of jobs; and

(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

OPTION 5

The term "required by business necessity" means--

the challenged practice must bear a manifest relationship to the employment in question.

(1) in the case of employment practices used to measure job qualifications or ability to do the job, the term "employment in question" means job performance.

(2) in the case of employment practices not described in paragraph (1), the term "employment in question" means a legitimate business objective of the employer.

The term "job performance" includes--

(1) the performance of actual work activities required by the employer for a job or class of jobs; and

(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

SUNUNU PROPOSAL

The term "required by business necessity" means--

(1) in the case of employment practices that are used to measure the ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "employment in question" includes, but is not limited to--

(1) the performance of actual work activities required by the employer for a job or class of jobs; and

(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

SUNUNU PROPOSAL WITH SUGGESTED DANFORTH CHANGES

The term "required by business necessity" means--

(1) in the case of employment practices that are used as job qualifications or used to measure the ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "employment in question" means ~~includes, but is not limited to~~ --

(1) the performance of actual work activities required by the employer for a job or class of jobs; or ~~and~~

(2) any requirement related to ~~work~~ behavior that is important to ~~the performance of~~ the job, but may not comprise actual work activities.

109 S. Ct. 2115 (1989) has weakened the scope and effectiveness of Federal civil rights protections.

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

(1) to overrule the ~~treatment~~ proof burden and the meaning of business necessity as a defense in Wards Cove Packing Co. v. Atonio and to codify the ~~meaning~~ proof burden and the of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and

(2) to provide statutory authority and guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).

SEC. 3. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

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

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if— why "only if" narrow construed

"(i) a complaining party demonstrates that a particular employment practice or group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin; and

109 S. Ct. 2115 (1989) has weakened the scope and effectiveness of Federal civil rights protections.

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DANFORTH:

Fair to say 95% will be taken care of

"Measure ability to perform the job"

3 Hypotheticals

1) H.S. Diploma
2) Local residence
3) Single women

Kennedy claims that none of those fall within (1).

∴ → (2)

∴ business could show any old reason to justify them

=

Suggest replace "means" ~~to~~ "is".

√o. includes but not limited to.

=

Alt suggest

Instead of all bus. nec.

To exclude ....

Cong. Hyde 226-1240

DEFINITION OF BUSINESS NECESSITY

OPTION A

The term "required by business necessity" means--
(1) in the case of employment practices that are used to measure ability to perform the job, the challenged practice must bear a manifest relationship to the employment in question.
(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "employment in question" includes, but is not limited to-- (1) the performance of actual work activities required by the employer for a job or class jobs; and
(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

June 24, 1991

M E M O R A N D U M

TO: SENATOR DOLE

FROM: DENNIS SHEA

SUBJECT: CIVIL RIGHTS -- UPDATE

Attached for your review are 1) the Hyde-Goodling letter to Senator Danforth, and 2) a letter from Evan Kemp to John Sununu.

Hyde-Goodling Letter

The Hyde-Goodling letter criticizes the Danforth bill on the following issues: 1) business necessity, 2) particularity, 3) jury trials, 4) damages, 5) Price Waterhouse, and 6) Martin v. Wilks. All of these concerns remain despite the apparent changes to the original Danforth bill. The Hyde-Goodling letter also criticizes the exception to the ban on race-norming contained in the original Danforth bill. Although Danforth has apparently deleted this exception, staff for Hyde and Goodling wanted to express in writing their objection to the race-norming exception.

Hyde and Goodling expect to send their letter to Senator Danforth "first thing" tomorrow morning.

Evan Kemp Letter

Evan Kemp's letter to John Sununu bluntly states that Danforth's non-Griggs definition of "business necessity" would lead to quotas and would undermine the President's Education Strategy. The Kemp letter is very strongly worded, and in fact, suggests that the Griggs decision should be reversed, not restored.

Meetings

It is my understanding that there will be a White House meeting tomorrow at 11:00 a.m. with Senator Danforth, John Sununu, and Attorney General Thornburgh.

It is also my understanding that Danforth will be meeting with his Republican co-sponsors and with the Democrats (Kennedy, Bumpers, and Boren) at 4:30 tomorrow afternoon.

If Danforth runs into a brick-wall during his meeting with Thornburgh and Sununu, he may use the 4:30 meeting to wrap everything up, saying that he tried to negotiate with the Administration but that the Administration was recalcitrant.

Another Business Necessity Compromise

I would like to suggest another compromise definition of "business necessity," which deletes the word "designed" from your June 19th proposal to Danforth and inserts the word "used." The revised compromise would read as follows:

1) In the case of employment practices primarily used to measure the ability to do the job, the challenged practice must be related to job performance.

2) In the case of employment decisions not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

It appears that Danforth has conceded that the inclusion of the word "used" in the business necessity definition is acceptable. His "DOLE STAFF RECOMMENDATION MODIFIED," which he wanted the White House to review today, reads as follows: 1) in the case of employment practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a manifest relationship to the requirements for effective job performance."

It appears that Danforth cannot complain about the word "used." He's adopted it himself.

I have forwarded the revised compromise definition to the White House. Perhaps Sununu could raise it with Danforth at the 11:00 meeting.

DEFINITION OF BUSINESS NECESSITY

LANGUAGE OF S. 1208

The term "required by business necessity" means--

(1) in the case of employment practices involving selection, that the practice or group of practices bears a manifest relationship to the requirements for effective job performance; and

(2) in the case of other employment decisions not involving employment selection practices as described in paragraph (1), the practice or group of practices bears a manifest relationship to a legitimate business objective of the employer.

The term "requirements for effective job performance" includes--

(1) the ability to perform competently the actual work activities lawfully required by the employer for an employment position; and

(2) any other lawful requirement, that is important to the performance of the job, including, but not limited to, factors such as punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a work history demonstrating unreasonable job turnover, and not engaging in conduct or activity that improperly interferes with the performance of work by others.

OPTION A

The term "required by business necessity" means--

(1) in the case of employment practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a manifest relationship to the employment in question.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "employment in question" includes--

(1) the performance of actual work activities required by the employer for a job or class of jobs; and

(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

OPTION B

The term "required by business necessity" means--

the challenged practice must bear a manifest relationship to the employment in question.

12:45

SENATOR GRAMM called.

"Rudman and Domenici are moving back toward us on the Civil Rights bill"

He is also seeking feedback on the Danforth meeting.

k

Governor Sununu

FROM
THE WHITE HOUSE
WASHINGTON, D.C.

The Honorable Vernon A. Walters
Ambassador to the Federal Republic
of Germany
American Embassy
Box 215
APO New York, New York 09080

THE PRESIDENT

June 24, 1991

Dear Dick,

Jim gave me your personal letter of 6-19.

1. I understand perfectly

2. Thanks for your kind - generous words on my Birthday. With your own sense

of history, I am very
flattered + pleased.

All Best to you.

Your Friend,

GB

EMBASSY OF THE
UNITED STATES OF AMERICA

Berlin
June 19, 1991

Dear Mr. President,

I would like to thank you for the marvelous opportunity you have given me to serve as Ambassador in Germany during these extraordinary times. My tenure has extended from the unification of Germany to the victory in the Gulf. My experience here has been unforgettable.

As I told you a few months ago, I believe it appropriate to leave the Embassy some time in late summer or early autumn, depending on when my successor can be chosen and confirmed. You may be sure I will do everything to ease his task of settling in.

Once again may I say how grateful I am to you for showing confidence in me and allowing me the chance to serve in Germany during its moment of historic change.

Your presidency has given a tremendous boost to our Nation not only in Germany but throughout the world. Please accept my wishes for the continuation of your outstanding success.

With warmest greetings to Mrs. Bush and to you,

Faithfully

Vernon A. Walters

Danforth Handwriting

This proposal was prepared after we received the "line by line" revision by the administration.

DANFORTH PROPOSAL

The term "required by business necessity" means--

(1) in the case of employment practices primarily measuring qualifications for or ability to do the job, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

This was suggested by Dole. It is not acceptable because of the subjective meaning of "because they are relevant."

DOLE STAFF RECOMMENDATION

The term "required by business necessity" means--

(1) in the case of practices that are used by the employer because they are relevant to job performance, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

This is an effort to fix the Dole suggestion. The underlined language is from Griggs p 426

DOLE STAFF RECOMMENDATION MODIFIED

The term "required by business necessity" means--

(1) in the case of practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

This is a variation on the modification immediately above. The underlined language is from Griggs p 431

MODIFICATION II

The term "required by business necessity" means--

(1) in the case of practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a demonstrable relationship to successful performance of the jobs for which it was used.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

Office of the Attorney General
Washington, D. C. 20530

June 21, 1991

The Honorable John C. Danforth
United States Senate
Washington, D.C. 20510

Dear Senator Danforth:

Governor Sununu has asked me to respond to your letters of June 19 and 20. In your first letter, you set out several phrases used in the course of discussions of "business necessity" in the opinion in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and stated that one of these phrases -- "manifest relationship to the employment in question" -- has been declared unacceptable by the principal proponents of H.R. 1. You suggested in both letters that we should instead accept as the holding of Griggs the phrase "shown to be related to job performance." Finally, you suggest in your second letter that this phrase be codified as the definition of "business necessity." As I will explain in some detail, the one phrase declared "off limits" is the only phrase that has been rationally defended as the definition of business necessity under Griggs.

I appreciate your efforts to identify language in Griggs which the proponents of H.R. 1 will accept. I can imagine your frustration that the proponents, notwithstanding their insistence that they are "merely restoring Griggs", are in fact prepared to accept anything but the legal standard established by Griggs.

One difficulty, however, with your suggestion is that it rejects two decades of Supreme Court precedent. Indeed, the very language now deemed unacceptable is the only language that the Court has always treated as the operative standard: "manifest relationship to the employment in question." Contrary to your suggested reading of the case, an unbroken line of Supreme Court opinions overwhelmingly confirms this proposition. Nor is this an issue on which there has ever been disagreement among the Justices.

- Scarcely a year after Griggs was decided, Justice Thurgood Marshall remarked in passing that Griggs "even placed the burden on the employer 'of showing that any given requirement must have a manifest relationship to the employment in question.'" Jefferson v. Hackney,

406 U.S. 535, 577 (1972) (Marshall, J., dissenting) (quoting Griggs).

- In 1973, in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805-806, the Court quoted the "related to job performance" language, but only because it had been specifically quoted and relied on by the court below (463 F.2d 337, 352 (1972)). The Supreme Court itself rejected its application to the case before the Court. See 411 U.S. at 806-807.

- In 1975, Justice Stewart, speaking for the Court and joined by Justices Douglas, Brennan, White, Marshall, and Rehnquist, said that the Court in Griggs had "unanimously held" that an employer must "meet[] 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (quoting Griggs).

- In 1976, the Court again quoted this same language when stating the Griggs standard. The opinion was written by Justice Rehnquist, and joined by Chief Justice Burger (the author of Griggs) and by Justices Stewart, White, and Powell. General Electric Co. v. Gilbert, 429 U.S. 125, 137 n. 14.

- In 1977, Justice Stewart again quoted this same language from Griggs. He was speaking for the Court, and his opinion was joined by Justices Powell, Stevens, Brennan, and Marshall. Dothard v. Rawlinson, 433 U.S. 321, 329.

- In 1979, Justice Stevens wrote an opinion for the Court quoting the same language: "manifest relationship to the employment in question." He was joined by Chief Justice Burger (the author of Griggs) and by Justices Stewart, Blackmun, and Rehnquist. New York Transit Authority v. Beazer, 440 U.S. 568, 587 n. 31 (quoting Griggs and citing Albemarle).

- In 1982, Justice Brennan's opinion for the Court, which was joined by Justices White, Marshall, Blackmun, and Stevens, quoted both formulations. The context makes it clear, however, that the phrase "manifest relationship to the employment in question" is the formulation adopted by "Griggs and its progeny" in establishing the analytical framework for disparate impact cases. Connecticut v. Teal, 457 U.S. 440, 446.

This reading of Teal was later confirmed in an opinion by Justice Blackmun, in which Justices Brennan and

Marshall joined. Justice Blackmun quoted the phrase "manifest relationship to the employment in question," attributing it both to Teal and to Griggs. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1004 (1988) (Blackmun, J., joined by Brennan and Marshall, JJ., concurring in part and concurring in the judgment). Elsewhere in the same opinion, these Justices quoted the same language yet again. See id. at 1001.

Justice Powell's dissent in Teal also quoted the phrase "manifest relationship to the employment in question." See 457 U.S. at 461 (quoting Dothard's quotation of Griggs).

- Also in 1982, Justice Rehnquist mentioned in an opinion for the Court that Griggs had held that the employer must show "a manifest relationship to the employment in question." His opinion was joined by Chief Justice Burger (the author of Griggs) and by Justices White, Blackmun, Powell, and O'Connor. General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 383 n. 8.

- In 1988, Justice O'Connor quoted the same language in an opinion joined by Chief Justice Rehnquist and by Justices White and Scalia. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997. As noted above, Justice Blackmun's concurring opinion, in which Justices Brennan and Marshall joined, used the same quotation no less than three times. Id. at 1001, 1004, 1005; see also id. at 1006.

- Finally, in the discussion of business necessity in Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989), the Court cited the page on which the phrase "manifest relationship to the employment in question" appears in Watson, Beazer, and Griggs. Even the dissenting opinion (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ.) quotes this same language at least three times. Id. at 666, 668 n. 14.

In sum, the phrase "manifest relationship to the employment in question" correctly states the legal standard to which the Supreme Court has unwaveringly held since Griggs was first decided. Apart from the citations in Teal and McDonnell Douglas, which for the reasons discussed above do not undermine my conclusion, the phrase you propose to treat as the holding in Griggs has never even been cited by the Court.

In response to the argument in your June 20 letter, I must say that it is not surprising that the opinion in Griggs would contain numerous phrases using the words "job performance" or the

like. The facts of that particular case, and the arguments generated by those facts, naturally led the Court to focus on the question of whether the employment practices at issue predicted job performance.

It is equally unsurprising, however, that the Court has never thought or said that every disparate impact case should be shoehorned into a narrow analytical framework dictated by the particular facts at issue in Griggs. That is why the Court has always relied on the more general language of Griggs -- "manifest relationship to the employment in question" -- when stating the legal standard established by Griggs.

To take but one example, this language reflects the fact that the Griggs Court expressly left open 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." Griggs, 401 U.S. at 432 (emphasis added). The Court later held unambiguously, in a manner that would have been difficult or impossible under the definition of business necessity that you propose, that the business necessity standard is satisfied if an employer's "legitimate employment goals...are significantly served by -- even if they do not require -- [a challenged practice]." Beazer, 440 U.S. at 587, n.31 (Stevens, J., joined by Burger, C.J., and by Stewart, Blackmun, and Rehnquist, JJ.) (emphasis added). This understanding of business necessity has been completely noncontroversial on the Court. Indeed, even the dissenting opinion in Wards Cove firmly stated: "The opinion in Griggs made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose." Wards Cove, 490 U.S. at 665 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (emphasis added).

Neither does it seem sensible to create a legal rule under which any employment practice not related to job performance could give rise to a finding of liability under Title VII. We know that there are legitimate employment criteria that would not meet this standard. "No smoking" rules provide one kind of example. A rule against hiring those with criminal convictions to work on a police force offers another example. An employer's decision to reject all applicants who lie on their employment applications is yet another example.

For over a year, Americans have been told again and again that the goal of this legislative initiative is to "restore Griggs." But we have never been told why the language from Griggs that the Supreme Court has been using for 20 years to define "business necessity" fails to codify Griggs. Nor have we been told why this language, or the language from Justice

Stevens' 1979 Beazer opinion, is "unacceptable" as an appropriate legal standard.

In your op-ed in the New York Times yesterday you said "[i]f ever the devil was in the details he has been present..." in this issue. I could not agree more. This is not a political issue, or one in which new language can be lightly substituted for well understood precedent. As the President's chief legal advisor, I have insisted on a reasoned and substantive review of every proposal offered to deal with these matters. Before this Administration and the Congress accept the departure from precedent and from the stated objective of this legislation which your proposal incorporates, I think it is only prudent that we have a clear understanding as to why the definition of "business necessity" consistently used by the Supreme Court for many years, and without any objection from any member of the Court, is suddenly unacceptable as a matter of policy.

Additionally, I must note that any agreement on an acceptable definition of "business necessity" would be inseparable from agreement on the related issues raised by efforts to codify disparate impact analysis and on the other matters addressed in these bills. As you know from the conversations that your staff had with Administration attorneys, S. 1208 -- like H.R. 1 -- suffers in our view from serious shortcomings in several respects.

I trust that we can continue to discuss these issues with a view to achieving a constructive outcome.

Sincerely,

Dick Thornburgh
Attorney General

Office of the Attorney General
Washington, D. C. 20530

June 21, 1991

The Honorable John C. Danforth
United States Senate
Washington, D.C. 20510

Dear Senator Danforth:

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Dick Thornburgh
Attorney General

Office of the Attorney General
Washington, D. C. 20530

June 21, 1991

The Honorable John C. Danforth
United States Senate
Washington, D.C. 20510

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ISSUE #2: DEFINITION OF BUSINESS NECESSITY

OPTION 1
The term "required by business necessity" means--
the challenged practice must bear a manifest relationship to the employment in question.

OPTION 2
The term "required by business necessity" means--
(1) in the case of employment practices primarily used for measuring qualifications for or ability to do the job, the challenged practice must bear a manifest realationship to the ~~requirements for effective job performance.~~ the employment in question.
(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

The term "requirements for effective job performance" includes--
(1) the ability to perform the actual work activities required by the employer for a job or job family; and
(2) any requirement related to work behavior that is important to the performance of the job, but may not comprise actual work activities.

CURRENT LANGUAGE
The term "required by business necessity" means--
(1) in the case of employment practices involving selection, that the practice or group of practices bears a manifest relationship to the requirements for effective job performance; and
(2) in the case of other employment decisions not involving employment selection practices as described in paragraph (1), the practice or group of practices bears a manifest relationship to a legitimate business objective of the employer.

The term "requirements for effective job performance" includes--
(1) the ability to perform competently the actual work activities lawfully required by the employer for an employment position; and
(2) any other lawful requirement, that is important to the performance of the job, including, but not limited to, factors such as punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a work history demonstrating unreasonable job turnover, and not engaging in conduct or activity that improperly interferes with the performance of work by others.

THE WHITE HOUSE

EXECUTIVE OFFICE OF THE PRESIDENT

FACSIMILE TRANSMITTAL SHEET

DATE: June 19, 1991

TO: Senator Rudman

FROM: John H. Sununu

PHONE: 456-6797

COMMENTS: Per our conversation --

NUMBER OF PAGES, EXCLUDING COVER SHEET 1

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June 21, 1991

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DANFORTH PROPOSAL

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DOLE STAFF RECOMMENDATION

The term "required by business necessity" means--

(1) in the case of practices that are used by the employer because they are relevant to job performance, the challenged practice must bear a manifest relationship to the requirements for effective job performance.

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DOLE STAFF RECOMMENDATION MODIFIED by Dan

The term "required by business necessity" means--

(1) in the case of practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a manifest relationship to the requirements for effective job performance;

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MODIFICATION II by Dan

The term "required by business necessity" means--

(1) in the case of practices that are used as conditions of employment in or transfer to jobs, the challenged practice must bear a demonstrable relationship to successful performance of the jobs for which it was used.

(2) in the case of employment practices not described in (1) above, the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

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 edu-

cation 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 jobseeker 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 cri-

teria 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.

UNITED STATES SENATE
WASHINGTON, D. C.

JOHN C. DANFORTH
MISSOURI

June 20, 1991

Honorable John Sununu
Chief of Staff to the President
The White House
Washington, D. C. 20500

Dear John:

Yesterday, you said that everyone agrees that the objective of civil rights legislation should be to return to the Supreme Court's decision in Griggs v. Duke Power Co., and that the definition of "business necessity" should be lifted verbatim from that decision. I think that your suggestion is very important, and that it offers the possibility of a real breakthrough in resolving this problem.

The issue dealt with in Griggs is explained by Chief Justice Burger in the first sentence of the Court's opinion:

> 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, (401 U.S. at 425-426, emphasis supplied)

The Court then proceeds to analyze the employment standards before it. With respect to two tests administered to employees, the Court finds that:

> Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. (401 U.S. at 428)

The Court then analyzes Title VII as follows:

> 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. (401 U.S. at 431-432, emphasis supplied)

Further interpreting Title VII, the Court quotes the following EEOC guidelines as "expressing the will of Congress:"

> 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. (401 U.S. 433 n. 9, emphasis supplied)

Finally, at the end of the opinion, the Court summarizes its holding.

> 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. (401 U.S. at 436, emphasis supplied)

John, as you can see, a fair reading of Griggs is not a matter of lifting one isolated sentence out of context. From the beginning of the opinion to the end, Griggs is about job performance. Therefore, it is clear to me that the Court best defines business necessity at 401 U.S. 431. Using Griggs language verbatim, the legislation could provide that:

The term "required by business necessity" means--shown to be related to job performance.

Let me know what you think.

Sincerely,

cc: Senator Robert Dole