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243

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Civil Rights: Gauging Congressional Reactions

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CIVIL RIGHTS: GAUGING CONGRESSIONAL REACTIONS

The Honorable Charles Grassley
United States Senate

The Honorable Thomas Campbell
United States House of Representatives

Michael Carvin
McGuire, Woods, Battle & Boothe

Moderated by M.D.B. Carlisle
Vice President for Government Relations
The Heritage Foundation

The Lehrman Auditorium
The Heritage Foundation
October 2, 1989

Mrs. Carlisle: We are honored to have three very distinguished guests in our civil rights discussion this morning: Senator Charles Grassley, Representative Tom Campbell, and Mr. Michael Carvin. When we have heard from each of our three panelists, we will then throw open the topic to discussion and questions.

Senator Charles Grassley is our first speaker. Senator Grassley is on most of the key committees. But it is probably of greatest interest for our purposes to recognize his service as the senior Republican on the Administrative Practices Subcommittee of the Judiciary Committee.

He has proven, over the years he has been in the House and the Senate, an extremely shrewd analyst and interpreter of trends in the Congress and in the country, and that is rare indeed. And if anybody wants to doubt me on that, take a look at the Iowa Senators. A lot of one-termers, and Senator Grassley. And that has got to tell you that he has his fingers on some of the critical buttons at home and abroad. I think you will find what he has to say incisive and to the point. And, Senator, with that informal introduction, we would love to hear from you.

Senator Grassley: First, some advice to my Republican colleagues. For Republicans who think there ought to be legislation to overturn or modify the Supreme Court civil rights decisions, I say: Read the opinions, study them hard, and hopefully you will decide, as I have, that they are not sweeping opinions. These decisions are not in need of legislation to modify or put into statute unnecessary clarifications. To my colleagues who support the Court, I say, "Don't be defensive about these decisions." They are decisions that we ought to feel comfortable with, and can defend.

First, understand the context, especially in the wake of the Lucas nomination defeat. It's very important that those of us who fought for that nomination remember what it was all about.

Second, we need to appreciate the single-mindedness of the civil rights industry's agenda. What is that agenda? That agenda is strict adherence to racial quotas. Whether they intend it or not, the agenda sows seeds of racial discontent.

Finally and most important, if those who support quotas want us to consider compromise, they must change their attitudes of intolerance to dissent, which makes political accommodation impossible.

These quota bills – and that's what we should be calling them – need not present us with any problem. In fact, this debate can be an opportunity to rethink and reframe the debate on civil rights for the next 25 years.

A generation of discriminatory quotas hasn't helped minorities, but it has bred resentment, polarization, and hostility. The Washington advocacy groups have preached social engineering on behalf of some groups at the expense of others. We should respond by endorsing equal opportunity for all.

I want to make clear that discrimination against individuals, as well as group entitlement, are both invidious. This debate gives us an opportunity to say that both should be prohibited. And we must also make clear that the most important civil right is the right to live in a crime-free and drug-free neighborhood.

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Now we have an opportunity to take back the issue of civil rights, to reframe the debate in the tradition of America. We have every right to challenge as an outright lie the assertion that the Court is turning back the clock in deciding these civil rights cases. And we must refute very clearly the falsehood that the Court is reversing the progress that we have made in civil rights over the last 35 years.

We need to think of civil rights in terms of the rights of equal citizenship. This means the law must treat everyone equally, without government preference. This puts us in the company of Martin Luther King, who spoke of a color-blind society. It puts us in company with Hubert Humphrey, who said during the debate on Title VII that Title VII would tolerate no discrimination, not even reverse discrimination. It puts us in the company of Jefferson, who endorsed an aristocracy of merit.

The current debate gives us an opportunity to emphasize the consensus our nation has achieved on civil rights, to recognize the progress that has been made since 1964. Everyone now agrees that our nation must stand for equal opportunity. And it gives us an opportunity to state very clearly that we are not a racist nation, as some want us to believe, and that we can demand positive government action to forbid racial discrimination. This is 1989, not 1964.

It gives us an opportunity to make clear that the quota bills being proposed by some in Congress represent the failed policies of the past. The well-intentioned legislative efforts to tinker with the Court's carefully crafted decisions will always result in bad policy.

It seems to me that this is a test of George Bush's mettle in the wake of the defeat of the Lucas nomination. It gives the President an opportunity to hang tough. To cave in now would snatch defeat from the jaws of victory.

The Court is now starting to agree with the arguments many of us have been making. The liberal ratchet has finally been undone. And we ought to let it be undone. Thank you.

Mrs. Carlisle: Well, Senator, I think you've thrown your gauntlet down. Our second speaker is a shiny new Congressman from California. He represents the 12th District in California, which includes the Law School at Stanford University, where previously he taught economics, anti-trust and corporate law. He also has spent hands-on time in the bureaucracy, where he served as Director for the Bureau of Competition at the Federal Trade Commission. We are delighted to welcome Representative Tom Campbell.

Representative Campbell: I come today from a point of view which is not popular, I suspect, and so I would like to use my time telling you why you should change your minds.

I come today to speak about *Ward's Cove*, not *Martin v. Wilkes*, not *Richmond v. Croson*, and not *Anderson v. McClean*. I speak about one case only, *Ward's Cove*, where I believe a change is needed.

But let me start by telling you I think the holding of *Ward's Cove* was correct. It is the dicta that gives me trouble.

In *Ward's Cove*, the Court dealt with a salmon cannery and a group of plaintiffs who had the dirty part of the job, the actual cleaning of the fish and putting them in the cans. The plaintiffs argued that their representation, Native Americans, was particularly high; whereas the accounting jobs, the office jobs, were generally white, Caucasian.

They argued that this disparity was enough to raise an inference of discrimination that the employer would have to rebut. Now, plaintiffs did show more, but for the sake of the holding of the Supreme Court, that's what we should focus on.

And the Supreme Court quite correctly rejected the argument. They said: "You're going to have to show me a comparison between a qualified applicant pool and the selected group. Don't just compare the assembly line of salmon canners to the accountants. It may take a CPA degree to be an accountant."

Similarly, one might say you're not going to get to the prima facie stage by comparing the representation of blacks or Hispanics in a city to the faculty of the university in that city. Qualified, relevant comparison was the holding of the Supreme Court. And with that I have no disagreement.

But en route to that conclusion, the Court added dicta on burdens of proof when this initial prima facie showing was met. And that's where I believe we need to make a change.

Now, notice this is dicta because the Court threw out the prima facie comparison of those two groups, as it should. But supposing a relevant comparison had been made, the Court said that the plaintiff's burden of proof to establish a prima facie case was still not met. The Court said that comparing a qualified applicant pool to those selected was not enough to shift the burden to the employer. The employee would have to identify the precise practice that discriminated. And furthermore – and here my greatest objection resides – the plaintiff would have to show that this practice was not a business necessity.

In other words, the plaintiff would have to identify the precise aspect, having already shown the difference between qualified groups, and then negate the business necessity. Now, that was a major change.

And, lest you take my word for it entirely, let me quote the (BNA) *Labor Relations Reporter*'s analysis of the case.

(Justice O'Connor had authored a plurality in *Watson v. Fort Worth Bank* that was very similar during the previous term, but it was only a plurality decision.)

"Justice O'Connor's plurality discussion, which *Ward's Cove* adopted, represents a sharp change in tone, expressing concern that the previous approach was putting too much pressure on employers. She proposed changing what heretofore had been an affirmative defense, with the burden being on the proponent of the defense, into a rebuttable defense, with the burden being on the plaintiff to undercut the defense."

This was the change effected. And this was the change with which I disagree. I believe that an affirmative defense should be the burden of the employer. I believe that after a plaintiff has shown a disproportionate representation between a qualified applicant pool – I am talking about people who have the skills, who have the degrees, who have the qualifications for the job – in a complex employment setting, that the burden shifts to the employer to explain what went wrong. Because if you leave the burden on the employee, at that stage it violates one of the principal rules of evidence: namely, that the burden of production, the burden of evidence, be upon the party most capable of bearing it.

Who is most capable of bearing it? If I have shown that there is this disparity between a qualified group and a selected group, I still don't know the employment selection process. I don't know if I was weeded out at the stage when they checked with my previous employers,

or when I had the in-person interview, or maybe during a probationary period. I don't know at which step. It is unfair to put the burden on the employee.

But let's say I'm wrong. Let's say that the Court had it right, in their 5-4 opinion, and that it is appropriate to put the burden on the employee. What about rebutting the business necessity? What about this sharp change in tone? The Supreme Court admitted it was making a change.

To quote the text: "Some of our earlier decisions can be read as suggesting otherwise, but to the extent that those cases speak of an employer's burden of proof – [And they did!] – with respect to a legitimate business justification defense, they should have been understood to mean an employer's production, but not persuasion burden."

No one quarrels that the plaintiff has the burden of persuasion. No one quarrels that the plaintiff has the ultimate burden of proof. But you meet that burden by presenting a prima facie case.

If you make the prima facie stage, then the plaintiff is entitled to win, unless rebutted. That is the concept of prima facie. It stands unless rebutted.

And so in this change the Supreme Court has made a major shift. And I think it a wrong one, from the point of view of proper enforcement of Title VII.

Let me emphasize the importance of this distinction with an example. Suppose you were to show that you had a qualified group of CPAs – take the *Ward's Cove* case, but suppose that you applied it just to the accountants who worked in the office. And suppose that a group applied who had CPAs and five years' previous experience. And the representation of Native Americans in that group was 25 percent and none of them got hired. I believe it is time at that stage in the proceedings to ask the employer to explain what went wrong.

The employee does not know what went wrong. The employee only knows that having met the qualifications, he did not get the job. And worse, even if that employee can show exactly what went wrong – it was the face-to-face interview where he got bounced out – then the employee has to come forward and say, "And that face-to-face interview was not a business necessity. And here's why, from my extensive knowledge of accountancy in salmon canning."

That's wrong. It is the employer who has the relevant knowledge at that point to establish a business necessity, because the employer knows what it takes to be an accountant in a salmon cannery. That's what is meant by an "affirmative defense," which a business necessity was up until four months ago.

My last point is to acknowledge the importance of recognizing what *Ward's Cove* did right, and my strong support for that.

Yes, courts were doing some strange things. I wrote an article, when I was Professor of Law at Stanford, in Volume 38 of the *Stanford Law Review*, that examined all the abuses of statistics by courts. And there are some doozies. There are some comparisons with the surrounding community – a totally unqualified pool. There are some people confusing a T-statistic for an R-squared. There are some people who just shouldn't have been using statistics, and courts should have stopped that misuse.

Ward's Cove was profoundly right when it said, "Plaintiff, you show me that qualified group." And that was the holding.

But it would be shortsighted not to recognize the additional steps the Court took.

Now for the points that will probably ingratiate me to no one. I have, as you might guess, received a few comments from my Republican colleagues about my bill. A number of comments came from people who said, "It's wonderful that the first bill responsive to the Supreme Court opinions this term, introduced by anybody in the Congress, was by a Republican."

At a meeting of the Conservative Opportunity Society, it was suggested that I change the name of my bill, to take the title "Civil Rights Restoration Act of 1989" – to prevent the reverse happening, as did in 1988. I think it's an opportunity for those of us who are Republicans to participate in the civil rights debate so that we can hold the line on quotas.

I oppose quotas. I believe that no one should be denied opportunity on the basis of race or gender or national origin. And that goes for males as well as females, for whites as well as blacks, for Native Americans as well as immigrants. Nothing in my bill requires a quota. Nothing in my bill limits its protection to white males.

And now I am going to get a little direct, but I am afraid I must, because one of the most strongly-worded criticisms of my bill was written by William Allen, Chairman of the Civil Rights Commission. He says the following,"Tom Campbell, a Republican Congressman newly elected from California's Silicon Valley, proposes to lead this country deeper into the hell of a society divided by racial terms of reference and race-conscious social remedies.

"He adds critical interpretive language which becomes the explicit foundation for the entire Act. This is what occurs when he says that the groups 'are receiving protection under Title VII,' making explicit for the first time that white males are not protected."

That is a lie.

I have a copy of my bill. There is no reference at all to white males not being protected. I'll read for you the entirety of the bill: "A prima facie violation of this title shall be deemed to have been made out by proof that the representation of the group receiving protection under this title, of which plaintiff is a member, is significantly less in the position or among those receiving the benefit in question, than among the qualified applicants, or likely qualified applicants, for the position, or eligible persons, or likely eligible persons, for the benefit. The defendant may rebut such a showing by proving that each part of the selection process in question was a business necessity."

Jones v. Lee Motor Freight told us what we knew from the civil rights history in 1964: that whites are protected as well as blacks, that men are protected as well as women.

My reference to the group receiving protection under the Act is a necessary reference to the statistical premise of the proof. It does not say – it was not intended to, and I would find it abhorrent if it meant – that white males are not entitled to protection when they suffer discrimination on the basis of their gender or their race.

And, frankly, to put the debate in terms such as that cheapens it. We have a very important debate. And I recognize the legitimacy of the other point of view. But it's not on whether I am promoting quotas. It isn't on whether I am limiting protection to white males. That is inaccurate, and a disservice.

Lastly, I'd like to comment on the footnote in the Landmark Legal Foundation Center for Civil Rights analysis of my bill, which in polite terms disagreed with me.

"H.R.3157 would impose an even more onerous standard than existed before *Ward's Cove*." I don't think so – but I will annotate their comment as I go through it.

"...allowing plaintiffs to rely solely on statistics." Recall in *Castaneda v. Partita* (1977), the Supreme Court established that statistics are legitimate for a prima facie case, and all my bill says is prima facie case.

"...and forcing the employer to prove that every part of its selection process is a business necessity." No. Not every part. Only every part *in question*. Cite my bill: "Every part in question." Ever since *Albemarle v. Moody Paper Company* (1975), the obligation has been imposed on the employer to justify as a business necessity every part of the employment test at issue.

"...is a business necessity." Quotation directly from *Griggs v. Duke Power Company* (1971); the case that first established the standard for disparate impact used the phrase "business necessity."

"This standard would permit judicial review of virtually every employee selection decision." Only those as to which a prima facie case has been made, where the percentage of those qualified is different from those chosen.

"...And compel racial quotas." No. And this is the point to which I'll return in my conclusion.

"The costs of such a law in terms of American competitiveness, as well as the principle of equal opportunity, would be staggering." Well, I think no one has fought more for American competitiveness than I. I took active part in the recent debate on capital gains. I have submitted a bill on anti-trust reform to allow Americans to compete better. And perhaps on another occasion we can talk about American competitiveness.

But now for my conclusion. There is one, in my judgment, legitimate difference of opinion – and if the focus of the debate could be on that, we would be advancing the argument. Here is what I consider the legitimate difference, and I have it with Brad Reynolds, my good friend, for whom I have the highest regard. If you allow statistics to play a part – any part – in a Title VII case, employers will be tempted to get their numbers up so they look right. Are we willing to risk that outcome? I abhor that outcome, and I would support a reverse discrimination lawsuit in such a context, and that's explicitly in Title VII, that quotas are not to result. But it's true, they might. And I'll grant it. Some employers, to avoid having the burden shifted to them, will get their numbers up right. It is, however, unavoidable, so long as statistics have any part to play in a discrimination case. I think you see that.

The only way to cure that is to take statistics out of a discrimination case. And that, I think, is wrong. The way statistics got in to civil rights cases was with the early cases dealing with discrimination on juries in the South. *Whitus v. Georgia*, 1967. *Turner v. Fouche*, 1970. In those cases, the Supreme Court said, under standards for jury selection such as "all good men and true shall be eligible" – but no black ever was – statistics were enough to shift the burden to the defendant to explain why no black ever made it.

Imagine what a *Ward's Cove* standard would do to those cases. The standard says "good men and true." No blacks made it on the jury in *Turner v. Fouche*, or *Whitus v. Georgia*. But the statistics alone won't be enough to make the Jury Commissioner explain. You'd have to come forward if you were the plaintiff, and say that I was excluded by the good-men-and-true standard; and, furthermore, I am going to show, as an affirmative point, that it is not a necessity to require that jurors be good men and true.

That seems to me wrong. It seems to me it would have reversed an important step in our civil rights history. Thank you.

Mrs. Carlisle: Thank you very much, Mr. Campbell. I think it's unanimous that Senator Grassley's gauntlet has been retrieved.

Now, I don't know Mr. Carvin, but I am looking forward to hearing him very much, by virtue of the fact that he has his foot on the starting block, and he has covered about 30 pages with notes in the last three-and-a-half minutes.

Mr. Carvin was Deputy Assistant Attorney General for the Office of Legal Counsel, and there he was involved in issues relating to federalism, separation of powers, foreign policy, and the First Amendment.

Earlier, he was in the Justice Department's Civil Rights Division, as both Deputy Assistant Attorney General, and, before that, as Special Assistant. And there again he was actively involved in equal employment opportunity, and higher education desegregation litigation.

We welcome you and look forward to your remarks.

Mr. Carvin: Thank you. I must confess I had been taking extensive notes, and what struck me most from the outset was Tom's insistence that Brad and he were against quotas then and against them now, and will be against quotas in the future.

It's not unlike the story I am sure you have all heard about the Englishman speaking in Hyde Park who says, "I was born an Englishman, I am an Englishman, and I will die an Englishman," and the heckler stands up and says, "What, man, have you no ambition?"

Although Tom pretends not to have any ambitions – and although he may well have been against quotas in the past – wittingly or not he is most assuredly in favor of quotas now. There is no other possible conclusion, make no mistake about this, from the language of his bill. Notably, the language that requires quotas is the language Tom never discussed. It's the language of his bill that supplants the current standard of Title VII liability with the words "business necessity." And that, on its face, inherently, forces employers to hire by no means other than by racial, gender, and ethnic quotas. Now, that's a provocative statement. Let's find out if it will withstand analysis.

Because if it does withstand analysis, then it is my submission that no self-respecting Republican or believer in the free market can stand behind this bill. Because this bill is the culmination of the perversion of the civil rights movement that's occurred during the past 25 years.

It used to be that the civil rights movement said, "The purpose of our laws is to ensure that race is not used as a criterion in selection, and to assure fair treatment of minorities." It has now been perverted into a system where civil rights leaders are saying that – absent necessity, or absent another compelling reason – the only criterion you use is race. And you may not look at merit.

The proposition that I am going to advance here, and I'd like Tom to speak directly to it, is: Anyone who believes that race should not be a criterion for selection – and this of course applies as well to gender and ethnicity – has to vigorously support the Supreme Court decisions and vigorously oppose the Campbell Bill. And that the sole purpose, and the only effect, of this bill is to ensure that racial criteria are the exclusive means of hiring people in the United States, and that this result will be forced on private employers by this law.

Let's take a look at it. What is a discriminatory effect? It's the difference between the number of people you select, or the number of people in your work force, and the number of people in the general applicant pool.

Okay, under the law now you do create a prima facie case if you've shown that this difference exists.

But since the purpose of the law is to ensure that race did not enter into the decision making, since the purpose of the law is to find out whether or not your system is fair, we don't require you to say that the the selection system you used was a necessity. We ask three questions: Did you consider race? Did the selection systems you used significantly serve a legitimate business purpose? And third, is there an alternative out there that has less of an adverse effect on minorities? And it's only if you satisfy all three of those standards that you are adjudged in compliance with Title VII law.

Now, my question to Tom is: Why do we want to change that? What has an employer who has satisfied that standard done wrong?

And I am not talking now, to make it quite clear, about all this burden of proof and regression analysis and T-squared stuff. I'm just asking why is the standard of liability changed to a necessity standard instead of "significantly serves a business purpose"? I haven't heard the explanation. It is my proposition that there is only one explanation, and that is to make sure that no employer can ever hire on any basis other than race.

Why is that so? You've got your basic standard. You must hire X proportion of Aleuts, blacks, Hispanics, women. To be sure, under the Campbell Bill, you've got a defense. It's not an absolute quota requirement. If it's absolutely necessary to your business's survival, you can justify not engaging in quota hiring. You can justify refraining from reverse discrimination.

Again: Why do we impose this burden? Moreover, isn't this reminiscent of the standard kind of exceptions to the rules that are in the law? You have "Thou shalt not kill." Now, we'll make an exception if it's a necessity, if it's in self-defense. Same thing here: a business necessity.

We'll carve out a limited exception to the rule, but it's only a limited exception to the proportional representation mandate, and that is "if it's necessary." Okay?

This means that the absence of quota hiring is akin to killing: something we will grudgingly tolerate only in the most extraordinary circumstances.

Now, standing alone, this shows that the Campbell bill's purpose and effect is to ensure that all private employers hire by quota. There is not an employer in the world who is not immediately going to shift to a quota when the avowed purpose of the Campbell bill is to require such a regime unless it is "necessary" to do otherwise, when the avowed purpose of the Campbell bill is to overturn court decisons that were expressly attempting to lessen the hydraulic pressure on employers to use quota hiring. There is no one in the country who is not going to switch immediately to a quota regime, especially in light of the cost of litigation, in light of the fact that it costs $100,000 to validate a single selection criterion.

The real evil genius of the Kennedy-Metzenbaum – or the Metzenbaum-Campbell Bill, perhaps we should call it: they have identical language. And that identical language is the definition of business necessity, which quoting from your "Dear Colleague" letter means "essential to the performance of the defendant's legitimate functions."

Metzenbaum Bill: "The term 'required by business necessity' means essential to effective job performance." Under this language, it is quite clear that it is impossible for an employer to satisfy the business necessity standard or hire other than on a racial basis.

This is so for two reasons. One is: very few things that an employer looks at are essential to effective job performance. And number two, if they are essential – that is, you must have them before you can do the job – this provides no basis for making an employment decision, because employers don't look and choose people on the basis of minimum qualifications. They choose people on the basis of relative comparisons. Is this the characteristic that makes him a *better* lawyer? Not is it *essential* to being a good lawyer?

So let's assume, even after Tom's bill is passed, that there are employers out there who are not going to let the EEOC and all the costs of litigation and the costs of validation stop them from hiring on the basis of merit; they're going to overcome all these litigation and administrative burdens.

And they come to Brad Reynolds and they say, "Brad, how do we hire on the basis of merit?"

He says, "Well, you can only look at things that are essential to job performance." I don't think a law degree gets you there, because Clarence Darrow and Abe Lincoln were good lawyers and they didn't have law degrees. In addition, you can challenge licensing procedures, including bar examination requirements, under Title VII. So I don't think you can even ask if the guy has a law degree.

More important, there are a lot of people with law degrees, a whole lot of people with the basic minimum qualifications that are essential to job performance, applying for a tiny number of jobs. And what the employer has to do is make distinctions among these minimally qualified people.

If he can only look at what is essential to job performance, then he cannot make any such distinction. He cannot look at whether or not you are on law review, because clearly that is not essential to job performance.

He can't look at whether you went to an Ivy League school. He can't look at your grades, because it cannot be essential to being a good lawyer that you're an A student rather than a B student.

How about a test of job knowledge? Okay? Is it essential? No, because we could impart to you the job knowledge. (That's the current EEOC guideline.) How about prior experience? I can't tell you it's essential. But it significantly serves the job. That's no good.

And each one of these, each part of the selection process in question, has to be a business necessity.

It can't be done. You've got to hire by race.

But what if this employer still insists on merit hiring? I'd point out a couple of other things to him.

So far we've been talking about objective criteria. Now after *Watson*, the "business necessity" standard applies to subjective criteria. The employer has absolutely no chance of showing that the questions he asks in a subjective interview are necessary to the performance of the job.

In addition the employer will most certainly – contrary to what the sponsor just said – be required to validate every single part of the selection process in question. Even if these parts of the selection procedure don't have an adverse impact, he is still going to have to go through the "business necessity" rationale. Because the question is whether the selection procedure *as a whole* has a disparate impact.

Finally, I would point out to an employer who is trying to comply with the Campbell Bill – and I am assuming this is just a draft – if you hire or promote on a proportional basis, if 10 percent of your applicant pool is black or Hispanic and you hire 10 percent of your black or Hispanic pool, you still violate this law. Because what this law says is that disparate impact occurs if the group receiving protection is significantly less in the position for which you are hiring than in the qualified applicant pool.

Let's say right now I've got 5 percent blacks in the position, okay? I get 10 percent black applicants. I choose 10 percent black applicants. The number in the position, 5 percent, is still significantly less than the number of qualified applicants. So I am still in violation of this Title.

Ironically enough, if I hired zero percent blacks or 10 percent, it really doesn't matter, because I am still in violation of this Title.

That is a brief discussion of what I think is wrong with this bill. As you may have noticed, I am not entirely dispassionate.

I am not dispassionate about this because I am angry. I think this is the last chance to reverse the steady erosion of civil rights in America. Congress is never going to come back to this issue. They are not going to say, "This is a temporary fix, and in five years if it hasn't worked out too well, let's come back."

They will be accused of turning back the clock and raising divisive racial issues. This is our last chance.

For that reason, anybody who adopts a position analogous to what I just discussed has to answer at least three questions, if only to prove the existence of good motives in this, if not intelligent law making.

The first question I have for the Congressman is: if you really are devoted to eliminating racial quotas, and if you really do find them abhorrent, what kind of support, other than cheerleading outside the courtroom, are you going to give these non-minority employees whom you allegedly care for?

For example, are you going to put in your bill some law which prohibits preferential treatment of white males? Because you must know, Tom, that after *Weber* and *Johnson*, the protection under Title VII is minuscule at best for those groups. And after this bill it is my contention that they will have absolutely no protection.

It seems to me incumbent on somebody who wants to argue that he supports anti-quota provisions, to put that affirmatively in this bill.

The other question I think you have to answer – unless you are going to engage in the normal hypocrisy of Congress, of applying standards to others that they refuse to apply to themselves – is to tell us how each and every selection procedure for your congressional staff is essential to their performance as staffers.

You've got to define for us, keep in mind, what the essential attributes of a Congressman are, what effective performance in that job is, how that staffer contributes to it, and what objective empirical evidence and expert testimony you are going to rely on to support that result, because the employer's own self-serving assertions are not enough.

And, finally, and this will be my last point, if you can point me to one case in the history of Title VII law that has ever found any selection procedure a business necessity – not some other lesser standard or variation – but actually essential to carry on a business, then I will reconsider the merits of your bill. Thank you very much.

Mrs. Carlisle: Well, that indefinite and indecisive statement has already provoked some questions. So why don't we proceed?

Mr. Hugh Joseph Beard, Department of Justice, Office of Civil Rights: Congressman Campbell, you suggest that the Supreme Court's decision in *Ward's Cove*, the dicta, made a sharp change in Title VII jurisprudence. I wanted to ask you a question regarding the issue of the burden of pursuasion versus the burden of articulation or production, which Mr. Carvin avoided. You suggest that before *Ward's Cove* the Supreme Court treated this as an affirmative defense and that your bill will restore it as an affirmative defense. My question, therefore, is: Has the Supreme Court at any point, has any Justice ever referred to the employer's burden in Title VII on disparate impact as an affirmative defense?

Rep. Campbell: Yes. I am trying to recall. I think the best answer would be in *Albemarle*, and I would urge you to take a look at it, as I will.

The phrase I quoted from the Supreme Court's decision in *Ward's Cove* in which they recognized they were making a switch is instructive here, too. An affirmative defense has the burden of proof on the person proposing the defense. And in *Ward's Cove* they say, "Some of our earlier decisions can be read as suggesting otherwise, but to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense, they should have been understood to mean an employer's production, but not persuasion burden." To the best of my recollection, the footnote at the phrase "burden of proof" is to *Albemarle*.

So there is the Supreme Court in *Ward's Cove* admitting that they used to say it was the employer's burden of proof, and that that was changed this spring.

Mr. Carvin: Well, since I was accused of ducking the question, I will be happy to answer it. First, I would point out that the "burden of proof" question is subsumed within the legal standard. But I cannot understand what the objection is to putting the burden on the plaintiff, as it is in all civil litigation, to expose something you consider wrong.

This has been the standard in discriminatory intent cases since the enactment of Title VII. In a statistical class action discriminatory treatment case, or an individual case, the burden of persuasion remains at all times with the plaintiffs, and it is those cases, arguably, where the employer really does have access to better information, and that's important.

There may be some planet on which plaintiffs do not have full access to the rationale for employers' employment practices in this context, but it is certainly not this one.

The employer, it is important to remember, has the burden of production. He has to come up with the explanation for this disparity. And he will always say regarding, "Well, it was [blacks or Hispanics or whoever did worse on the test and had less prior experience] the test." Or, "It was prior experience."

And then the question becomes whether or not that criterion is something that employers generally look at, and whether it is an intelligent thing to look at.

It is not as if people are left wondering what the employer's explanation is. If the employer does not give an explanation, then it is unexplained, and the inference is that race explains it and the plaintiff wins the case.

All that does is focus the litigation. This is not at all unusual in civil litigation. What it does is to avoid situations that occurred at the Department of Justice, where we would go in, 25 years after the Civil Rights Act had been enacted, and we could not specify to any police department in the United States a test that was valid for selecting police officers.

What we would do instead is say, "Well, we are really not sure what makes a good police officer. And we're not really sure that you tested for this. And no, we really can't tell you what tests you can use." And we would win case after case on that basis.

So what the burden issue does is put plaintiffs to the task of saying, "We've got something the employer could have done." Or, at least, "We know what he is doing is wrong." It does not continue the situation where the plaintiff's industrial psychologist can nitpick the testing procedures used by the employer and win in those circumstances.

Mr. Beard: One follow-up. Doesn't your bill make confused use of the term "affirmative defense"? Because as it is currently written I think it can be interpreted merely to shift the burden of production or articulation, and not the burden of persuasion.

Rep. Campbell: Well, I will certainly adapt any well-intentioned and well-thought-out drafting changes. But I think the way I phrased it was accurate.

If you make out a prima facie case, and the defendant says nothing, plaintiff wins.

Mr. Beard: But if you make out a prima facie case, it is a presumption governed by Rule 301 of the rules of evidence, and that shifts only the burden of production, not the burden of persuasion.

Rep. Campbell: Joe, just take one second longer. Suppose you fail to meet your burden of production and you are silent. I am a plaintiff and I win. If I have met my burden of prima facie case, and you are the defendant and say nothing, plaintiff wins.

Mr. Beard: But if the plaintiff simply produces evidence, and does not persuade the court

Rep. Campbell: No. It has to meet prima facie.

Mr. Beard: Then it is rebutted. But you are suggesting that previous Supreme Court cases shifted that – the prima facie case shifted the burden of persuasion. Rule 301. And your bill says shift this burden of production.

Rep. Campbell: Truly, it's just on the affirmative defense. The burden of proof on an affirmative defense is with the defendant.

Mr. Ronald Trowbridge: This question is predicated on a comment by Senator Grassley who said, "We are not a racist nation." My question is simply this, and I'd like each of you to respond: Is there, or is there not, racism in this country? If so, what, if anything, would you do about it?

Mrs. Carlisle: Senator, do you want to take that one?

Senator Grassley: Whatever the legal processes are, ultimately change is made through education, through developing and encouraging the spiritual values of our society, and through government setting standards of fairness. And I think that's what these cases are all about, setting a standard of fairness, where everyone is treated equally – where one segment of society does not have advantages over other segments of society.

Mr. Carvin: Sure I think there is racism in American society. Let me point out that the current law, as it exists, after the Supreme Court decision, is quite intrusive. It guards against any kind of discrimination or subtle institutional racism or sexism. You have a court second-guessing an employer's management decisions. It is not enough that the employer believed he acted in good faith. He brings in outside experts and testimony to figure out whether or not this is, if you will, state of the art. He has to produce empirical evidence that these are the kind of criteria that are related to actual job performance, not measuring the person in the abstract. And also, as I noted, that there are not other alternatives out there that work just as well, but have less of a negative impact on minorities.

That seems to me to be an extraordinarily prophylactic ban against any kind of subtle discrimination.

But I do not want to see this turned into a mandate for discriminating against others. And when you ratchet the standard of employers up to that of necessity, that of a self-defense for murder, that is the inexorable result.

Mr. Trowbridge: Senator Grassley has told what he would have done. You have said what should not be done. What are you going to do about it?

Mr. Carvin: I think we have all the laws in place and I would vigorously enforce them. I don't think any further legislation is necessary, and I refuse to be defensive about saying that after 25 years of incredible pressure on employers, and an incredible education process by employers, I don't think we need some draconian measure which not only takes away all management prerogatives from employers, but visits precisely the same evil of racial discrimination that we're allegedly trying to prevent.

Rep. Campbell: I will try a quick answer. Yes, there is racism. I believe your question was excellent, and perhaps it could be amplified to ask are we doing enough about it? I don't think we are. I don't consider it a platitude to speak against discrimination. And as for what I would do about it, I believe the Senator is quite right: education has a role.

I used to be a university professor, and I am offended to hear that universities, in California at least, are alleged to be setting maximum quotas on Asian Americans. We must speak out against that as readily as we would on any other form of discrimination.

But in addition, here's what I would do, and I think it's no surprise: I would make sure that the victims of discrimination have a fair chance to prove their case in court. As long as you have a fair chance to prove your case in court, and you're not saddled with impossible burdens, we're on the road toward getting rid of that racism.

I will use thirty seconds longer to rebut at this point, because I may not otherwise have the occasion. To use "business necessity" is not ratcheting up.

In 1971, in *Griggs v. Duke Power*, the Supreme Court said, "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."

For eighteen years we have operated under that standard of business necessity, interpreted by the courts, with reference to job performance. So I am not ratcheting up. I am returning to the standard that has existed for eighteen years.

Unidentified Guest: Well, it seems to me that despite all the discussion of it, the concept of business necessity has not been clarified. Even in your quotation, Mr. Campbell, although it used the phrase "business necessity," the explanation said "related to performance."

So my question is this: what specifically is the standard? If Mr. Carvin's interpretation is right, that you are referring to what is necessary to keep the business afloat, then I think his criticism of your bill is justified. But I find it doubtful that you would accept that version of business necessity. Am I right?

Rep. Campbell: You are right. And I used the term of art precisely because it had been used in the Civil Rights litigation jurisprudence ever since 1971.

So my purpose, and if we ever get hearings on the bill, this is something which will be identified quite clearly, is to use business necessity as it was intended in the *Griggs v. Duke Power* case. That is what I intend.

But you might be convinced by Mr. Carvin on that point if you do not find my reference to the seventeen years' history persuasive. But I would hope still to convince you on my point of who has the burden.

Let us, for example, take Mr. Carvin's definition of "business necessity." He argues that the burden should be on the employee to prove the absence of the relation to the job for any practice that has this outcome that I describe. That is the heart of my bill. It deals with burdens. The Supreme Court shifted on burdens. So let's not lose sight of who has the burden, as well as what the standard is.

Mr. Clint Bolick, Landmark Center for Civil Rights: I would like to agree with you on one point, and disagree emphatically on another. The disagreement first, that this is somehow not an issue of competitiveness or productivity in addition to being an important issue of discrimination. The Equal Employment Advisory Council, in a survey of its members, found that 82 percent of its corporate members had abandoned or modified employment standards for fear of litigation that they could not win. And that has serious ramifications for our economy. The federal government's abandonment of the General Aptitude Test battery has caused millions of dollars in lost productivity.

The one thing I would agree with, though, is that Republicans ought to be the first out of the block on civil rights legislation. Now, I have visited companies in your district and found that they are not trying to find ways to discriminate, they are trying to find ways to find people to employ who have skills. On the one hand, they have to defend their employment practices and spend millions of dollars defending those practices when they are not discriminatory; and yet they are not able to find qualified minorities in adequate numbers.

Now, instead of buying into the liberals' definition of civil rights, why can we not redefine affirmative action to mean giving people the tools to satisfy those standards, and to pass the tests – rather than adopting a "business necessity" standard, which I think Mike Carvin correctly stated. The lower courts which have used that standard uniformly have found that it is not satisfied.

Why can't we have a much more positive approach, and begin to set the agenda, rather than respond to a failed agenda?

Rep. Campbell: Well, three cheers for you. I entirely agree. We need to set a positive agenda. And my bill is, I think, an important part of that.

On the specifics that you raised, and this was a point Mr. Carvin raised as well: I used to do discrimination litigation. I used to do defendants' litigation. And I do recall, at least in one instance, the age for retirement of pilots at age sixty was upheld as a business necessity. So I can at least put the lie to the argument that it has never been done. That one was within my own experience. And I suspect there are many others as well.

As to your survey of the businesses in my districts, I would not be adding to their burden in any way that I perceive, in that they have grown used to the rules that been in force since 1971. I don't dispute that *Ward's Cove* is a major change. Indeed, that is why I am suggesting my bill. But they have grown used to the rules of the last eighteen years.

Last point: competitiveness. Yes, you have a point. I believe in general we are a litigious society. And I would like to get rid of frivolous litigation as much as possible. My start in politics was as a co-founder of the California Legal Reform Project, to eliminate frivolous litigation, to adopt the English fee system, so that if I sue you and put you to the costs and I was wrong, why I pay your fees.

But I wouldn't make civil rights, as a category, less likely to be litigated, for the reasons that I gave in answering the previous gentleman. How else do you answer somebody who says, "Is there racism? And what are you doing about it?" than say, "You may bring your case to the court."

Mr. John Eastman, Office of the Chairman of the Civil Rights Commission: Since you've laid a gauntlet, I guess my boss [William B. Allen] would feel obliged to take it up. And I'd like to ask you two particular questions. It seems to me your bill accepts the wrong side of the last twenty years of debate over civil rights, and what defines discrimination. Does statistical disparity equal discrimination? Or is it rather simply an indication that illegal discrimination might have occurred?

The second question: I wasn't aware that Title VII protected groups. Rather, I thought it made discrimination against an individual on the basis of that individual's race, illegal. So what does your language of "protected groups" mean, if not proportional representation of groups as protected under Title VII?

Rep. Campbell: The second is really quite easy to answer. Let me read to you again the language. The reference to group is merely for what percentage gets you to the prima facie case. The individual is the subject of Title VII, and that's why I used the phrase "the representation of the group receiving protection under this title, *of which plaintiff is a member* is significantly less in the position or among those receiving the benefit in question than among the qualified applicants, or likely qualified applicants, for the position." (emphasis added)

So I am saying no more than I need if you ever are to allow any statistical evidence. Which is to say here are the qualified applicants who have met the preliminary requirements – CPA, five years' experience, whatever it happens to be – and among them there are 20 percent – you fill in the name: black, white, men, women, Hispanic, Anglo. Any one of those is a group receiving protection under Title VII. I had to use a generic term because I

couldn't say "all of those" six times, or other groups that might be protected under the age discrimination act.

I'm sorry that I cannot respond face to face to your boss. I am sure he is an honorable man, but you might convey to him the sincerity of my offense at his reference to any bill of mine making explicit for the first time that white males are not protected. That is simply wrong and unfair.

Mr. Carvin: But what about his question on statistical discrimination?

Rep. Campbell: No. My bill creates a presumption of discrimination in certain circumstances, where you have shown a qualified group – the word "qualified" is in my bill – and a statistical disparity between that representation in the qualified group and the group actually chosen. It creates a presumption, which may be rebutted – but in the absence of a rebuttal, it's a prima facie case.

Let me explain why that's not such a surprise. We use a preponderance-of-the-evidence standard throughout civil litigation. Title VII is civil litigation. Preponderance of the evidence, if you must use a statistic, is 50 percent plus one.

The statistical inference that courts have accepted – and I have a background in it sufficient to tell you because I've read so many of these cases – the statistical standard is one in twenty, or less. That is to say, the result could have been produced by chance one time in twenty or less.

So to shift the burden at that point is to say, "I have a qualified pool. It has fifty blacks in it. I have a selection group. It has only one. That could have occurred by chance once in a hundred times. Employer, please tell me what happened?" That seems to me fair. It shifts the burden at the point a prima facie case has been made.

Mr. Carvin: If I could just comment. Rep. Campbell's inference of discrimination is premised on this notion that we only look at the difference between qualified applicants and those selected as opposed to society at large.

A couple of points. The first is, who says they are qualified? Take your definition of "qualified applicant pool" – suppose you say your "qualified applicants" are people with five years' prior experience. That's going to be subject to precisely the same business necessity challenge as it would be if you used prior experience as a selection criterion.

So your qualified applicants always goes back to the minimally-qualified people with the law degrees, okay? But that's only for professional jobs, like CPAs. Tom, tell me, what is the basic qualification you need to work on an assembly line? To be considered for a job? You have to be vertical.

I mean that is honestly it. There is not this great differentiation. It is the unmitigated mass of people out there. And you don't use the words "qualified applicants." You use the words "likely eligible persons," which expand it, and add an additional ambiguity. So there's no such thing.

On the second point about whether groups receive protection: the point is you obviously have to define the group because if you hired fewer people with red hair, or fewer people under the age of forty, or fewer people who are left-handed, I don't think you would suspect ongoing discrimination or require validation in those circumstances.

So you have to narrow it. But when you do that, make sure you include Aleuts and Pacific Islanders, who are always granted affirmative action. And make sure you exclude Asians and Jewish groups, who are the primary victims of affirmative action because they have committed the cardinal sin in America of making it on their own, notwithstanding the history of prior discrimination.

Those are the very sensitive determinations you're going to have to make if you start talking about groups receiving protection.

Mrs. Carlisle: Senator, do you want to make any final comments? We're going to have to ring the curtain down on what has been a very lively, provocative discussion with a very good audience.

Senator Grassley: I would take advantage of this opportunity to summarize and to comment on what has been discussed here, and to emphasize a few points that have not been given top billing.

The first panel made reference to "the decisions." We have talked in this panel about only one decision. I assume that means there is general agreement about those other decisions: the *Martin v. Wilks*, *Patterson*, *Lorence*, and *Richmond* decisions. At least I hope so.

If there is that sort of consensus, then there has been something accomplished by focusing just upon *Ward's Cove*.

Second, Mr. Carvin made reference to the fact that Congress never applies these laws to itself. This is an excellent point, and one we can work to remedy.

I successfully offered an amendment to apply the recently-passed Americans With Disabilities Act to Congress. For the first time, after sixteen major pieces of civil rights and labor legislation over the last 55 years exempting Congress, perhaps we are ready to apply the law to ourselves.

The Senate adopted my amendment, and hopefully the House will follow suit and apply the ADA to Congress. If we are going to have a discussion of civil rights legislation that imposes new burdens on private sector firms and individuals, then it is obviously important and appropriate to consider whether Congress ought to be exempt from its provisions. I'm going to see that this issue is fully debated.

Third, it has been said that in some of these cases the Court seems to be encouraging remedies other than simply litigation. We discussed the problems of our litigious society.

But in the *Patterson* case the Court referred to the use of conciliation in Title VII. Hopefully this effort to promote other alternatives will become a trend in the Court, and I hope Congress with follow suit, so we don't have every dispute in the courts in the first instance.

Mrs. Carlisle: Marvelous. Thank you Senator, Congressman Campbell, and Mr. Carvin.