

SPECIAL FEATURE

STATEMENT ON BEHALF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. BEFORE THE HOUSE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

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I. INTRODUCTION

Mr. Chairman and Members of the Committee:

Thank you for the invitation to testify on the important questions that have been raised by recent statements and proposals made by members of the Equal Employment Opportunity Commission (EEOC). My name is Patrick O. Patterson. I am an Acting Professor of Law at the University of California at Los Angeles, where I teach courses in a number of subjects, including employment discrimination law. Prior to my appointment to the UCLA faculty, I was employed as Assistant Counsel to the NAACP Legal Defense and Educational Fund, Inc. (Legal Defense Fund or LDF), where I specialized in employment discrimination cases.

I appear before you today on behalf on the Legal Defense Fund, which has substantial experience with the issues on which you have requested our testimony. The Legal Defense Fund has long been in the forefront of this nation's effort to translate its constitutional ideals into realities for Black Americans. The Supreme Court has recognized LDF's "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation."¹ For over forty years, LDF has worked through the courts to establish and enforce the rights of Black citizens seeking an equal opportunity to achieve decent housing, quality education, good jobs, and full participation in the mainstream of American life. LDF staff lawyers and cooperating attorneys have been counsel in many landmark cases in the Supreme Court of the United States which have established basic constitutional and statutory rights for Black Americans;² and they have litigated hundreds of employment discrimination cases throughout the country, including many of the most significant cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964.³

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1. NAACP v. Button, 371 U.S. 415, 422 (1963).

2. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Brown v. Board of Education, 347 U.S. 483 (1954); Shelley v. Kraemer, 334 U.S. 1 (1948).

3. See, e.g., Anderson v. City of Bessemer City, 470 U.S. 564 (1985); Webb v. Dyer County Board of Education, 85 L. Ed. 2d 233 (1985); Cooper v. Federal Reserve Bank, 467 U.S. 561 (1984); Firefighters Local Union 1784 v. Stotts, 467 U.S. 561 (1984); United States v. Aikens, 460 U.S. 711

My testimony today supplements the testimony given before this Committee by Barry Goldstein on behalf of the Legal Defense Fund on December 14, 1984. On that occasion Mr. Goldstein, in both his oral testimony and his written statement, surveyed a series of recent pronouncements in which EEOC Chairman Clarence Thomas had challenged the application of fundamental legal principles that were established long ago and have been confirmed repeatedly by Congress and the Supreme Court; had disputed the use of statistics as evidence of discrimination; had criticized the Uniform Guidelines on Employee Selection Procedures;⁴ and had retracted his support for the use of goals and timetables and other numerical remedies.⁵ Rather than repeating this earlier testimony, I will concentrate on two subsequent pronouncements that have brought some of these issues into sharper focus: (1) the issuance by the Office of Management and Budget (OMB) on August 8, 1985, of a publication entitled *The Regulatory Program of the United States Government*, which includes a proposal by Chairman Thomas to revise the Uniform Guidelines by reducing or eliminating the use of statistical evidence, the maintenance of necessary employment records, and the standards for demonstrating the validity of employee selection procedures;⁶ and (2) the adoption by the EEOC on February 5, 1985, of its *Policy Statement on Remedies and Relief for Individual Victims of Discrimination*.⁷

II. PROPOSALS TO REVISE THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

A. *The Existing Uniform Guidelines Are Consistent with Fundamental Legal Principles Enacted by Congress and Confirmed by the Supreme Court.*

The Uniform Guidelines on Employee Selection Procedures were adopted by the EEOC and four other civil rights enforcement agencies in 1978.⁸ They generally provide that, if an employment test or other selection procedure has an adverse impact on any race, sex, or ethnic group, an employer should either eliminate the impact or demonstrate the validity of the procedure. An employer who chooses to demonstrate validity is normally required to undertake a reasonable investigation of alternative procedures and uses with less adverse impact, and also to provide validity studies that conform to the technical stan-

(1983); *American Tobacco v. Patterson*, 456 U.S. 63 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Brown v. General Services Administration*, 425 U.S. 820 (1976); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *International Union of Electrical Workers v. Robbins & Meyer, Inc.*, 429 U.S. 229 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

4. 29 C.F.R. § 1607 (1985).

5. See *Oversight Hearing on the EEOC's Enforcement Policies: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 36-82 (1984) (statement of Barry Goldstein, ass't counsel, NAACP Legal Def. and Educ. Fund).

6. See OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAMS OF THE UNITED STATES GOVERNMENT (Aug. 8, 1985) (statement of Clarence Thomas).

7. See EEOC POLICY STATEMENT ON REMEDIES AND RELIEF FOR INDIVIDUAL VICTIMS OF DISCRIMINATION (Feb. 5, 1985).

8. 29 C.F.R. § 1607 (1985).

dards set forth in the guidelines. These guidelines are fully consistent with the language of Title VII of the Civil Rights Act of 1964, the intent of Congress, and the controlling decisions of the Supreme Court.

In enacting section 703 of Title VII, Congress prohibited intentional discrimination in employment,⁹ and it also made it unlawful for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁰

However, Congress provided an exception in section 703(h) for certain employment testing practices:

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. . . .¹¹

Thus, the language of Title VII prohibits not only intentionally discriminatory practices but also practices—such as some employment tests—that have the effect of “depriv[ing] or tend[ing] to deprive” persons of employment opportunities on the basis of race, sex, or national origin.¹² The use of such a test, even though it is not intentionally discriminatory, violates Title VII unless it is “professionally developed.”

In 1966, acting on the recommendation of a panel of professional psychologists, the EEOC adopted the first set of administrative guidelines interpreting the testing provisions of Title VII.¹³ The 1966 guidelines, reflecting the language of the statute, read section 703(h) as providing an exception only for job-related tests; any test that tended to exclude minorities would be considered unlawful unless the employer could demonstrate that the test “fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or . . . fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. . . .”¹⁴ In determining whether the tests were “professionally developed” within the meaning of section 703(h), the 1966 EEOC guidelines referred to the *Standards for Educational and Psychological Tests and Manuals*, which had been adopted jointly in 1966 by the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education.¹⁵ In 1968 and 1969, respectively, the Department of Labor's Office of Federal Contract Compliance¹⁶ and the Civil Service Commission¹⁷ issued their own testing guidelines.

9. 42 U.S.C. § 2000e-2(a)(1)(1982).

10. 42 U.S.C. § 2000e-2(a)(2)(1982).

11. 42 U.S.C. § 2000e-2(h)(1982).

12. 42 U.S.C. § 2000e-2(a)(2)(1982).

13. EEOC Guidelines on Employment Testing Procedures, Aug. 24, 1966, *reprinted in* 2 *Empl. Prac. Guide* (CCH) ¶ 16,904 (1967).

14. *Id.*

15. The American Psychological Association Standards (hereinafter APA Standards) have since been revised and reissued in 1974 and again in 1985.

16. *See* 33 Fed. Reg. 14,392 (1968).

17. *See* FPM Supp. 335.1 (1969).

In 1970, the EEOC issued the first detailed set of testing guidelines.¹⁸ The 1970 EEOC guidelines expressly defined "discrimination" in terms of unjustified adverse impact on protected classes, and they relied on the professional standards established by the American Psychological Association and other organizations in setting forth some specific technical requirements for test validation. Additional guidelines were adopted by the Office of Federal Contract Compliance (OFCC) in 1971¹⁹ and by the Civil Service Commission (CSC) in 1972.²⁰

In *Griggs v. Duke Power Co.*,²¹ the Supreme Court unanimously held that the 1966 EEOC guidelines were "entitled to great deference" by the courts: "[s]ince 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."²² The Court noted that the EEOC interpretation of Title VII had been elaborated upon in the 1970 guidelines,²³ and it resoundingly endorsed that interpretation:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity only 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.²⁴

The employer in *Griggs* had required applicants for its better jobs to have a high school diploma and to register satisfactory scores on two standardized aptitude tests (the Wonderlic Personnel Test and the Bennett Mechanical Aptitude Test). Although the employer had not adopted these requirements for the purpose of discriminating, both requirements had the effect of "render[ing] ineligible a markedly disproportionate number of Negroes . . .,"²⁵ and neither requirement was "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."²⁶ Indeed, the record showed that the requirements had been adopted "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."²⁷ This, the Supreme Court held, was insufficient justification under Title VII for a practice with a substantial adverse impact on minority applicants and employees. As the Court stated:

18. EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (1970).

19. OFCC Guidelines on Employee Testing and Other Selection Procedures, 36 Fed. Reg. 19,307 (1971).

20. CSC Guidelines on Examining, Testing, Standards, and Employment Practices, 37 Fed. Reg. 12,984 (1972).

21. 401 U.S. 424 (1971).

22. *Id.* at 434.

23. *Id.* at 434 n.9.

24. *Id.* at 431.

25. *Id.* at 429.

26. *Id.* at 431.

27. *Id.* at 431.

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 common-sense proposition that they are not to become the masters of reality.²⁸

Echoing the fundamental principles underlying the 1966 and 1970 EEOC guidelines, the Court in *Griggs* repeatedly emphasized that Title VII, in seeking "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,"²⁹ was not limited to a prohibition of intentional discrimination:

[G]ood 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. . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question (emphasis in original).³⁰

Not long after the Supreme Court decided *Griggs*, Congress enacted the Equal Employment Opportunity Act of 1972,³¹ which amended Title VII and extended its coverage to federal, state, and local government employment. As evidenced by the reports of this Committee and its counterpart in the Senate, Congress expressly recognized and approved the interpretation of Title VII set forth in the 1966 and 1970 EEOC guidelines and in the Court's opinion in *Griggs*. This Committee's report stated in part:

Employment discrimination, as we know it today, is a far more complex and pervasive phenomenon [than previously believed]. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. . . . A recent striking example was provided by the U.S. Supreme Court in its decision in *Griggs v. Duke Power Co.* . . . , where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria.³²

The Senate Committee's report included similar language³³ and additionally observed that

Civil Service selection and promotion techniques and requirements are replete with artificial requirements that place a premium on "paper" credentials. Similar requirements in the private sectors of business have often

28. *Id.* at 433.

29. *Id.* at 429-30.

30. *Id.* at 432.

31. Pub. L. No. 92-261, 86 Stat. 103 (1972).

32. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 8 (1971) (footnote and citations omitted).

33. See S. Rep. No. 92-415, 92 Cong., 1st Sess. 5 (1971).

proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (see, e.g., *Griggs v. Duke Power Co.*). . . . The inevitable consequence of this kind of a technique in federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvantaged suffer a heavy burden in trying to meet such artificial qualifications.

It is in these and other areas where discrimination is institutional, rather than merely a matter of bad faith, that corrective measures appear to be urgently required. For example, the Committee expects the Civil Service Commission to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met.³⁴

It is difficult to conceive of a more explicit congressional endorsement of the fundamental legal principles underlying *Griggs* and the 1966 and 1970 EEOC guidelines. The Supreme Court reaffirmed these principles and specifically approved several provisions of the 1970 EEOC guidelines in *Albemarle Paper Co. v. Moody*.³⁵ As the Court stated in *Albemarle*:

The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.”³⁶

These principles have subsequently been reaffirmed and applied in many decisions of the Supreme Court and in countless decisions of other courts.³⁷

As noted above, by 1972 the EEOC, the Civil Service Commission, and the Department of Labor each had its own separate set of employment testing guidelines. Thus, even before the enactment of the 1972 amendments to Title VII, the existence of potentially conflicting guidelines was a matter of concern to enforcement agencies, employers, unions, civil rights groups, and others. In response to this and similar concerns, in 1972 Congress established the Equal Employment Opportunity Coordinating Council and charged it with the responsibility for developing and implementing uniform enforcement policies.³⁸ The agencies thereafter intensified their efforts to develop a single set of uniform guidelines on employee selection procedures, but for a substantial period of time they were unable to accomplish this goal. In 1976, after several years of unsuccessful efforts, three of these agencies—the Department of Justice, the Department of Labor, and the Civil Service Commission—reached agreement and issued the Federal Executive Agency Guidelines on Employee Selection Procedures (FEA guidelines).³⁹ The EEOC, disagreeing with some provisions of the FEA guidelines, then reissued its 1970 guidelines.⁴⁰

It is important to note that, despite substantial discord among the agencies during this period, there was complete agreement as to the correctness and applicability of the basic principles enunciated by all the agencies in their

34. *Id.* at 14-15.

35. 422 U.S. 405 (1975).

36. 422 U.S. at 431 (quoting EEOC Guidelines, 29 C.F.R. § 1607.4(c)(1970)).

37. See, e.g., *Connecticut v. Teal*, 457 U.S. 440 (1982); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

38. See 42 U.S.C. § 2000e-14.

39. 41 Fed. Reg. 51,734 (1976).

40. 41 Fed. Reg. 51,984 (1976).

previous guidelines, approved by the Supreme Court in *Griggs* and *Albemarle*, and reaffirmed by Congress in the Equal Employment Opportunity Act of 1972. The agencies agreed that Title VII prohibits selection procedures that have an adverse impact unless those procedures are shown to be job-related; they agreed that statistical evidence should be maintained by employers and should be used to determine adverse impact; and they agreed that job-relatedness should be shown by professionally acceptable methods. The disagreements among the agencies did not concern these fundamental principles, but centered instead on the details of their implementation—*i.e.*, the types of statistical analyses that should be used in assessing adverse impact, and the technical details of the validity studies necessary to demonstrate job-relatedness.⁴¹

More than a year later, after further debate and negotiations, all the agencies finally reached agreement and jointly published a proposed draft of the Uniform Guidelines on Employee Selection Procedures on December 30, 1977.⁴² The agencies also published a notice of proposed rulemaking, solicited written comments, and held a public hearing and meeting at which testimony was given by representatives of private industry, state and local governments, labor organizations, civil rights groups, and professional psychologists.⁴³ After considering the written comments submitted by more than two hundred organizations and individuals, the testimony elicited at the public hearing and meeting, and the views expressed in informal consultations,⁴⁴ the EEOC, the Civil Service Commission (now the Office of Personnel Management), and the Departments of Justice, Labor, and the Treasury revised the proposed draft and adopted the Uniform Guidelines, which have remained in effect since September 25, 1978.⁴⁵ The Uniform Guidelines, like their predecessors, reflect the fundamental principles of Title VII law that have repeatedly been reaffirmed by Congress and the Supreme Court.

B. *Current Proposals to Revise the Uniform Guidelines Are Being Developed and Considered Without Adequate Public Notice and a Fair Opportunity To Be Heard.*

1. The 1983 Request for Comments on Recordkeeping Provisions

Section fifteen of the Uniform Guidelines describes the records that em-

41. See Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121, 124-40 (1980); Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. U.L. REV. 605, 607-10 (1979).

42. 42 Fed. Reg. 65,542 (1977). Before publishing this proposed draft, the enforcement agencies circulated an earlier draft and obtained comments from representatives of state and local governments, psychologists, private employers, and civil rights groups. See Uniform Guidelines, Supplementary Information: Analysis of Comments, 43 Fed. Reg. 38,292 (1978).

43. See Notice of Proposed Rulemaking, 42 Fed. Reg. 65,542 (1977); Notice of Issues of Particular Interest for Public Hearing and Meeting, 43 Fed. Reg. 11,812 (1978); Uniform Guidelines, Supplementary Information: Analysis of Comments, 43 Fed. Reg. 38,292-93 (1978).

44. See Uniform Guidelines, Supplementary Information: Analysis of Comments, 43 Fed. Reg. 38,292-93 (1978).

45. See 43 Fed. Reg. 38,312 (1978) (EEOC); 43 Fed. Reg. 38,310 (1978) (Civil Service Commission [Office of Personnel Management]); 43 Fed. Reg. 38,311 (Department of Justice); 43 Fed. Reg. 38,314 (1978) (Department of Labor); 43 Fed. Reg. 38,309 (1978) (Department of the Treasury). The Uniform Guidelines are codified in 5 C.F.R. § 300.103(c) (1986) (Civil Service Commission [Office of Personnel Management]); 29 C.F.R. § 1607 (1985) (EEOC); 28 C.F.R. § 50.14 (1985) (Department of Justice); 41 C.F.R. § 60-3 (1985) (Department of Labor).

ployers should maintain concerning adverse impact and, where appropriate, the validity of selection procedures.⁴⁶ On August 1, 1983, the EEOC published a request for comments on the recordkeeping provisions relating to adverse impact.⁴⁷ The request included seven specific questions regarding those provisions. Question one, for example, stated:

Should the Uniform Guidelines define more specifically the information that a user of a selection process must maintain to show whether its selection procedures have an adverse impact on the basis of race, sex, or ethnic origin? If so, what information (such as applications, applicant flow data, pass/fail data) should the Guidelines require?⁴⁸

The Legal Defense Fund and other organizations and individuals filed extensive written comments in response to this request, including detailed answers to the questions posed by the EEOC.⁴⁹ The EEOC has not, to our knowledge, completed its considerations of these comments. We are not aware of any pending proposals by the EEOC to revise the recordkeeping provisions of the guidelines. No public notice of rulemaking has been issued, no further written comments have been requested, and no public hearings or meetings have been scheduled on this matter.

2. The 1984 Vote to Review the Guidelines

In July 1984, the EEOC voted to direct its staff to undertake a comprehensive internal review of the Uniform Guidelines.⁵⁰ To our knowledge, that vote by the full Commission did not prejudice the outcome of the review, nor did it purport to question the fundamental principles expressed in Title VII, in *Griggs* and *Albemarle*, or in the Uniform Guidelines themselves. No public notice of rulemaking has been issued, no written comments have been requested, and no public hearings or meetings have been scheduled in connection with this review.

3. The Proposals of Chairman Thomas

Although the Commission apparently has not yet completed its review of the Uniform Guidelines, EEOC Chairman Thomas has already concluded that the guidelines reflect a "fundamentally flawed approach to enforcement of the antidiscrimination statutes," and has announced his intention to present major substantive revisions of the guidelines for a Commission vote in February 1986.⁵¹

The revisions proposed by Chairman Thomas⁵² would not just eviscerate the Uniform Guidelines; they would strike at the heart of Title VII itself. Ignoring the language of the statute, the legislative evidence of congressional

46. See 29 C.F.R. § 1607.15 (1985).

47. See 48 Fed. Reg. 34,766 (1983).

48. *Id.*

49. See NAACP Legal Defense and Educational Fund, Inc., Comments Pursuant to the Request for Comments Published by the Equal Employment Opportunity Commission, 48 Fed. Reg. 34,766 (August 1, 1983), Regarding the Documentation Section of the Uniform Guidelines on Employee Selection Procedures.

50. See OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAMS OF THE UNITED STATES GOVERNMENT 524 (Aug. 8, 1985) (statement of Chairman Thomas).

51. *Id.* at 523, 527 (Aug. 8, 1985) (statement of Chairman Thomas).

52. These proposals were submitted to the OMB by Chairman Thomas "as the head of the Agency without prior review or approval by the Commission." *Id.* at 523 n.1.

intent, the decisions of the Supreme Court, and the fundamental legal principles underlying not only the Uniform Guidelines but all previous testing guidelines ever adopted by any agency,⁵³ Chairman Thomas argues that the Uniform Guidelines:

define "discrimination" in employment on the basis of a mechanical statistical rule that bears no relationship to the plain meaning of that term. UGESP requires (1) that whenever there are variations beyond a narrow margin in the rates at which an employer hires or promotes people of different races, sexes, or national origins, the employer must "validate" its selection procedure(s) according to certain highly technical standards; and (2) that employers maintain records of the races, sexes, and national origins of their employees and applicants for employment.

These regulations are founded on the premise that but for unlawful discrimination, there would not be variations in the rates of hire or promotion of people of different races, sexes, and national origins. UGESP also seems to assume some inherent inferiority of Blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral.⁵⁴

Chairman Thomas has stated that he intends to propose broad revisions of the Uniform Guidelines to correct these perceived defects.⁵⁵ No public hearings or meetings have been scheduled in connection with these proposals.

4. The Need for an Open Review Process

The process by which the existing Uniform Guidelines were proposed, considered, revised, and adopted was a model of "government in the sunshine." Even before publication of their draft proposal in December 1977, the enforcement agencies had circulated an earlier draft and had obtained comments from representatives of state and local governments, psychologists, private employers, and civil rights groups. In addition to publishing the December 1977 draft, the agencies published a notice of proposed rulemaking, they requested and received written comments from more than two hundred organizations and individuals, and they held a public hearing and meeting at which they took testimony from representatives of private industry, state and local governments, labor organizations, civil rights groups, and professional psychologists. After considering these views as well as those expressed in additional informal consultations, the enforcement agencies revised the proposed draft and provided a detailed discussion of the comments they had received and the revisions they had made. The final version of the Uniform Guidelines was adopted only after a full and fair opportunity for consultation with and

53. Testing guidelines incorporating these fundamental principles have been issued at least twelve times, by five different federal agencies, through two Democratic and two Republican administrations. The 1966 EEOC guidelines and the 1968 OFCC guidelines were issued during the Johnson Administration. *See supra* notes 13, 16. The 1970 EEOC guidelines and the 1971 OFCC guidelines were issued during the Nixon Administration. *See supra* notes 18-19. The 1976 FEA guidelines were issued by the Department of Justice, the Department of Labor, and the Civil Service Commission during the Ford Administration. *See supra* note 39. The 1970 EEOC guidelines were also reissued in 1976 during the Ford Administration. *See supra* note 40. And the 1978 Uniform Guidelines were issued by the EEOC, the Civil Service Commission, and the Departments of Justice, Labor, and the Treasury during the Carter Administration. *See supra* notes 42-45.

54. OFFICE OF MANAGEMENT AND BUDGET, *supra* note 50, at 526.

55. *Id.* at 524.

participation by all interested persons and organizations.⁵⁶ As courts and commentators have recognized, these careful and open procedures added to both the quality and the authority of the Uniform Guidelines.⁵⁷

The current proposals to revise the Uniform Guidelines, by contrast, are being developed and considered through a process of "government in the shadows." At a meeting with Chairman Thomas in November 1984, after the EEOC had voted to review the guidelines, representatives of the Legal Defense Fund and the Lawyers' Committee for Civil Rights Under Law expressed their concern about the nature of the revisions under consideration, and they offered to share with the Commission both their considerable expertise in this complex field and the extensive memoranda, drafts, comments, and other materials they had prepared and compiled from the agencies and other sources over a period of several years during their participation in the development of the Uniform Guidelines.

Not only has this offer of assistance never been accepted by the EEOC, but the proposed revisions under consideration have never even been disclosed in sufficient detail to permit these groups or other organizations or individuals to provide the Commission with potentially helpful comments and suggestions. Having failed to obtain information on the proposed revisions through informal requests, on May 17, 1985, the Legal Defense Fund filed with the EEOC a formal request under the Freedom of Information Act for information relating to the development of revisions to the Uniform Guidelines and other aspects of the EEOC's regulatory and policy agenda for 1985.⁵⁸ The EEOC responded by providing copies of four cover letters from Chairman Thomas to Office of Management and Budget officials but declined to provide a total of 111 pages of submissions that accompanied the cover letters. The cover letters revealed absolutely nothing about the contents of the EEOC's submissions to the OMB, which were withheld on the ground that they were "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."⁵⁹

Thus, the only hints so far as to the contents of the proposed revisions have come in the form of Chairman Thomas's vague and general statements that he wants the guidelines to recognize "that statistical disparities are not tantamount to discrimination," and "that minorities and women are fully capable of competing on the basis of race- and sex-neutral standards."⁶⁰ We are left to speculate as to the precise revisions Chairman Thomas has in mind—an especially difficult task in view of the fact that the existing Uniform Guidelines already incorporate both of the principles he has articulated.⁶¹ We urge this

56. See *supra* notes 42-45 and accompanying text.

57. See Note, *The Uniform Guidelines: Compromises and Controversies*, 28 CATH. L. REV. at 630-31 ("since the Uniform Guidelines largely conform to rulemaking procedures outlined in the Administrative Procedure Act and represent a synthesis of agency judgments based on years of expert work, they likely will receive even greater judicial deference than previous guidelines"). See also *Allen v. City of Mobile*, 464 F. Supp. 433, 439 (S.D. Ala. 1978).

58. See Letter from Barry L. Goldstein to Stuart Frisch (May 17, 1985) (Freedom of Information Act Request).

59. See Letter from Stuart Frisch to Barry L. Goldstein (July 2, 1985) (Freedom of Information Act Response).

60. OFFICE OF MANAGEMENT AND BUDGET, *supra* note 50, at 524.

61. See *infra* notes 67-69 and accompanying text.

Committee to monitor closely the process by which these revisions are developed and considered by the EEOC, in order to ensure that all concerned persons and groups will have adequate notice of the contents of the proposals and a fair opportunity to express their views on this matter of crucial importance to the effectiveness of Title VII and other antidiscrimination laws.

C. *Chairman Thomas's Proposals Are Contrary to Fundamental Principles of Title VII Law.*

Chairman Thomas's proposals to revise the Uniform Guidelines, while too vague and general to permit detailed review and analysis, nonetheless are sufficiently specific to reveal glaring inconsistencies between his personal views and both the facts and the law under Title VII. Chairman Thomas says that he wants to revise the guidelines to recognize "that statistical disparities are not tantamount to discrimination," and "that minorities and women are fully capable of competing on the basis of race- and sex-neutral standards."⁶² He asserts that the existing guidelines, in addition to using "a mechanical statistical rule to define 'discrimination'. . .,"⁶³ "assume some inherent inferiority of [B]lacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral."⁶⁴ He suggests that the remedy for these perceived problems may lie in the elimination of requirements "that employers maintain records of the races, sexes, and national origins of their employees and applicants for employment;"⁶⁵ however, this would make it extremely difficult or even impossible to detect the existence of adverse impact in accordance with the standards established by Congress and the Supreme Court.⁶⁶

In addition, the Uniform Guidelines impose no "mechanical statistical rule," and they make no assumptions whatsoever about inferiority. On the contrary, the guidelines emphasize the need for flexibility and common sense in determining adverse impact,⁶⁷ and they expressly provide that the *same*

62. OFFICE OF MANAGEMENT AND BUDGET, *supra* note 50, at 524.

63. *Id.*

64. *Id.* at 526.

65. *Id.*

66. Chairman Thomas has also questioned "[u]nder what circumstances, if any, and according to what standards, does Title VII require that an employer demonstrate the validity of its employee selection procedures?" *Id.* at 526. However, we have not been able to determine whether he has thus far made any specific proposals to revise the guidelines' technical standards for validation of selection procedures. There appears to be no sound basis for any such revisions. In a recent letter to Chairman Thomas, the Chair and Executive Officer of the American Psychological Association's Committee on Psychological Tests and Assessment stated that the new APA Standards and the existing Uniform Guidelines "are not in conflict," and that they therefore saw "no compelling reason for revising the EEOC Guidelines on technical grounds." Letter from Douglas Jackson and Michael S. Pallak to Clarence Thomas (April 19, 1985) (discussing APA Standards for Educational and Psychological Tests).

67. *E.g.*, section 4D of the Uniform Guidelines, in language quoted with apparent approval by the Supreme Court in *Connecticut v. Teal*, 457 U.S. 440, 443 n.4 (1982), sets forth a discretionary policy under which a selection rate for any race, sex, or ethnic group which is less than four-fifths of the rate for the group with the highest rate will generally be regarded by the enforcement agencies as evidence of adverse impact. This section goes on to explain that smaller differences in selection rates may nevertheless constitute adverse impact, and that greater differences may not constitute adverse impact, depending on the circumstances. 29 C.F.R. § 1607.4D (1985). The explanatory "Questions and Answers" issued by the agencies similarly state that the four-fifths policy is an administrative "rule of thumb [which] is not intended as a legal definition, but is a practical means of keeping the

job-related standards should be applied to all persons regardless of race, sex, or national origin.⁶⁸ What the guidelines also provide—and what appears to be contrary to the views of Chairman Thomas but consistent with the statutory language, legislative history, and judicial interpretation of Title VII—is that selection procedures which have an adverse impact on minorities or women should not be used unless their relation to the job can be demonstrated in accordance with professionally acceptable validation standards.⁶⁹

Although couched in the superficially attractive language of “equality” and “neutrality,” Chairman Thomas’s proposals fail to take into account some of the unpleasant social facts of life in America. On the average, Blacks and minorities do not perform as well as whites and Anglos on standardized tests and other selection criteria that emphasize verbal skills and mastery of the dominant culture, and women do not perform as well as men on tests that emphasize certain mechanical and physical skills. Apart from Chairman Thomas, all informed participants on all sides of the ongoing debate about employment tests and testing guidelines appear to share this understanding of the basic facts.⁷⁰ This phenomenon of differential performance among racial and ethnic groups has long been recognized both in the leading psychology texts and in even the earliest legal articles on the subject,⁷¹ and it was recently confirmed in a report issued by the National Academy of Sciences, which concluded as follows:

The salient social fact today about the use of ability tests is that Blacks, Hispanics, and native Americans do not, as groups, score as well as do white applicants as a group. When candidates are ranked according to test score and when test results are a determinant in the employment decision, a comparatively large fraction of Blacks and Hispanics are screened out. . . .

So long as the groups offered protection under the Civil Rights Act of 1964 (particularly Blacks and certain ethnic minorities) continue to have a relatively high proportion of less educated and more disadvantaged members than the general population, those social facts are likely to be reflected in test

attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion, and other selection decisions.” Answer No. 11, Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 11,998 (1979). Noting that “[t]he determination of adverse impact is not purely arithmetic” and that “other factors may be relevant,” *id.* No. 12 at 11,998, the agencies further state that the four-fifths policy “merely establishes a numerical basis for drawing an initial inference and for requiring additional information,” *id.* No. 19 at 11,999, and that it “is not intended to be controlling in all circumstances.” *Id.* No. 20 at 11,999.

68. Section eleven of the Uniform Guidelines provides in part:

The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. . . .

29 C.F.R. § 1607.11 (1985).

69. See *supra* notes 13-20 and accompanying text.

70. See, e.g., Haney, *Employment Tests and Employment Discrimination: A Dissenting Psychological Opinion*, 5 INDUS. REL. L.J. 1, 26-27 n.131 (1982); Hunter & Schmidt, *Ability Tests: Economic Benefits Versus the Issue of Fairness*, 21 INDUS. REL. 293, 294 (1982); Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 41-42.

71. See L. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* 383 (4th ed. 1984); A. ANASTASI, *PSYCHOLOGICAL TESTING* 343-45 (5th ed. 1982); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1638-41 (1969); Note, *Employment and Education*, 68 COLUM. L. REV. 691, 692-95 (1968).

scores. That is, even highly valid tests will have an adverse impact. . . .⁷²

Contrary to the apparent view of Chairman Thomas, these facts do not rest upon an assumption that Blacks and Hispanics are "inferior" to whites and Anglos. Instead, they reflect the continuing legacy of racial discrimination and cultural and educational deprivation in our society, and they demonstrate the need for close investigation of any selection procedure that has an adverse impact, in order to determine whether the tests and requirements are in fact job-related.⁷³ Ironically, it is not the adverse impact standard of the Uniform Guidelines but Chairman Thomas's proposal to abolish that standard which is based upon and feeds into false assumptions. His apparent assumption that all "neutral" tests and requirements are job-related is hardly warranted by the great weight of either psychological or legal authority, and if adopted it would lead to the false and destructive conclusion that, because minorities may not meet these frequently irrelevant criteria, they must indeed be "inferior."

Chairman Thomas's approach would not only be contrary to the language, legislative history, and judicial interpretation of Title VII, but it would undo much of the good that has been done under the Civil Rights Act in the last twenty years. As demonstrated by Dr. Jonathan Leonard's recent comprehensive empirical study,⁷⁴ both affirmative action and Title VII "have been successful in prompting the integration of Blacks into the American workplace."⁷⁵ Indeed, this study examined a huge mass of data and concluded that "[c]lass action litigation under Title VII of the Civil Rights Act of 1964 has played a significant role in increasing Black employment, and has had a relatively greater impact than affirmative action."⁷⁶

The Uniform Guidelines and previous testing guidelines are responsible for a substantial part of the positive results that have been achieved under Title VII. Moreover, the existence and application of these guidelines have benefited not only minorities and women but also employers and society as a whole. The guidelines, which the courts have found to be entitled to "great deference,"⁷⁷ have provided enforcement agency personnel and judges with valuable assistance in interpreting Title VII in accordance with professional standards in a complex technical field. Even more importantly, the guidelines

72. COMMITTEE ON ABILITY TESTING, NATIONAL ACADEMY OF SCIENCES/NATIONAL RESEARCH COUNCIL, ABILITY TESTING: USES, CONSEQUENCES, AND CONTROVERSIES 143, 146 (1982) (hereinafter ABILITY TESTING).

73. As the National Academy of Sciences report concluded, the Uniform Guidelines "properly require a close investigation of any selection procedure that has adverse impact. A healthy suspicion of such selection procedures is warranted by the discriminatory behavior that has tended to characterize American society. . . ." *Id.* at 146.

74. This is the first unified and comprehensive empirical study of the impact of federal affirmative action regulation/ anti-discrimination law on employment, turnover, and productivity. J. LEONARD, THE IMPACT OF AFFIRMATIVE ACTION iii (1983). The study examines the effects of affirmative action requirements imposed on federal contractors under Executive Order No. 11,246 as well as the effects of litigation under Title VII. The affirmative action portion of the study is based on a national sample of more than sixteen million employees in nearly seventy thousand establishments, and the Title VII portion of the study is based on data from more than seventeen hundred class action lawsuits. *Id.*

75. *Id.* at 388.

76. *Id.* at 386.

77. *See, e.g.,* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

have provided employers with an effective incentive for, and useful guidance in, evaluating their employment tests and other selection procedures in order to determine whether those procedures have an adverse impact and, if so, whether the procedures are job-related and whether there are reasonable alternatives that would have less adverse impact. Like the prospect of liability for back pay under Title VII, the prospect of liability for violating the principles expressed in the guidelines "provide the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."⁷⁸

Because of the guidelines, employers have been motivated to examine many tests and requirements that otherwise would have remained unquestioned, and they have often found those tests and requirements to be poor measures of predicted job performance. As the National Academy of Sciences report concluded, "[e]nforcement of the Guidelines has revealed that many employment testing programs did not meet professional standards and were making no verifiable contribution to productivity."⁷⁹ Many unprofessional and unproductive selection procedures have thus been discarded in favor of new tests and procedures that are more likely to be accurate predictors of job performance—and therefore more likely both to select the best qualified employees regardless of race or sex and to serve the employer's and the society's interests in maximizing productivity.

III. THE EEOC POLICY STATEMENT ON INDIVIDUAL REMEDIES

In contrast to Chairman Thomas's proposals to revise the Uniform Guidelines, the full Commission's February 1985 *Policy Statement on Remedies and Relief for Individual Victims of Discrimination*⁸⁰ contains some positive elements. The Legal Defense Fund has previously expressed its views on the legitimacy of and the need for race- and sex-conscious affirmative remedies in appropriate cases,⁸¹ and its misgivings about attempts to portray "victim-specific" individual relief as an adequate substitute for classwide systemic relief.⁸² Furthermore, the Legal Defense Fund shares the concerns expressed by others about the EEOC's unworkable September 1984 "Statement of Enforcement Policy" (announcing a policy of filing suit in every case in which "reasonable cause" is found and conciliation fails), and about the possible relationship between that statement and the Commission's more recent statement on individual remedies.⁸³ We continue to believe that the Commission should devise and implement vigorous and realistic enforcement policies that

78. *Albemarle Paper Co. v. Moody*, 422 U.S. at 417-18, (quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

79. ABILITY TESTING, *supra* note 72, at 146.

80. EEOC, *supra* note 7.

81. *See Affirmative Action and Equal Protection: Hearings on S.J. Res. 41 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 223-43 (1981) (statement of William T. Coleman, Jr., Chairman, NAACP Legal Def. and Educ. Fund).

82. *See Oversight Hearings*, *supra* note 5, at 20-27.

83. *See Oversight Hearings on EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 81-208 (1985) (statement of William L. Robinson, Director, Lawyers' Comm. for Civil Rights Under Law).

will be effective in correcting not only individual instances of discrimination but also systemic discriminatory practices.

Nevertheless, to the extent that the statement on individual remedies can be accepted at face value and viewed solely on its own terms, we think that it represents a useful first step in defining and explaining the kinds of relief that the Commission regards as appropriate in individual, non-systemic cases of discrimination. While we believe there is room for improvement,⁸⁴ we support a number of the specific remedies enumerated in the statement,⁸⁵ and we also support the Commission's effort to articulate its policies in this area.

IV. CONCLUSION

While the full Commission's February 1985 policy statement on individual remedies contains a number of positive elements, Chairman Thomas's proposal to revise the Uniform Guidelines are extremely disturbing. Not only are those proposals contrary to the language and legislative history of Title VII and the controlling decisions of the Supreme Court, but they would dismantle one of the most effective tools available to the Government for opening up employment opportunities to minorities and women. In making such proposals, Chairman Thomas is either badly mistaken about the meaning and purpose of Title VII, or he is deliberately advocating disregard for the law. In either case, he is not performing his proper function as the chief official of the agency that has been given the lead role in the Government's efforts to eradicate unlawful discrimination in employment. Instead, he is causing confusion about the Commission's policies and goals, and he is undermining the reach and effectiveness of the very statutes he is supposed to enforce. We therefore urge this Committee to monitor with great care the EEOC's review of the Uniform Guidelines, in order to ensure both that the review process is fair and open, and that any resulting revisions are in accord with the law.

84. *E.g.*, the statement should be revised to make it clear that the Commission does not take the inflexible and unreasonable position that every enumerated remedy must be obtained in every case in which a finding of "reasonable cause" is made, without regard to the circumstances of the individual case; to emphasize that "bumping" of incumbent employees is only available in exceptional circumstances; and to provide that respondents may be required to keep records sufficient to demonstrate compliance and to make those records available for inspection on reasonable notice.

85. The provisions of the statement concerning the posting of notices, the calculation of back pay, the insulation of employees from supervisors who have engaged in intentional discrimination against them, the removal of adverse materials from personnel files, and the use of agreements and orders to cease discriminatory practices all may be useful in the circumstances of a particular case.