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Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?

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INTRODUCTION

Is a system committing decisionmaking in hiring, promotion, or pay to the discretion or other subjective judgments of supervisors unlawful under federal equal employment opportunity law when it is not valid or necessary and has a discriminatory impact against minorities or women, or is it lawful in the absence of purposeful discrimination? In the last eight years, the federal courts of appeals have rendered at least twenty-three decisions addressing that question, and have reached conflicting results.[1] The issue has generated considerable comment.[2] Late last Term the Supreme Court granted

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1. *See* Atonio v. Wards Cove Parking Co., 810 F.2d 1477, 1480-81 n.1 (9th Cir. 1987) (en banc) (list of cases).

2. *See* Barthelot, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982); Maltz, *Title VII and Upper Level Employment — A Response to Professor Barthelot*, 77 NW. U.L. REV. 776 (1983); Denis, *Subjective Decision Making: Does it Have a Place in the Employment Process?*, 11 EMPL. REL. L.J. 270 (1985); Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869; Blumrosen, *The Legacy of* Griggs: *Social Progress and Subjective Judgments*, 63 CHI.[-]KENT L. REV. 1 (1987).

certiorari to resolve the conflict in *Watson v. Fort Worth Bank & Trust.*[3]

Section 703 of title VII of the Civil Rights Act of 1964[4] as amended, renders unlawful not only failure or refusal to hire, promote, or "otherwise to discriminate" against a person "because of" race, but also "to limit, segregate or classify" employees or applicants "in any way which would deprive or tend to deprive" an individual of employment opportunities or adversely affect his or her status "because of such individual's race. . . ."[5] In 1971, the Supreme Court in *Griggs v. Duke Power Company*[6] held that section 703(a)(2) of title VII prohibits not only practices which are purposefully discriminatory, but also practices which discriminate in effect, unless the practice has been shown to be a valid predictor of success on the job, or has otherwise been shown to be required by business necessity.[7] In a unanimous decision authored by Chief Justice Burger, the Court in *Griggs* (only the second substantive decision of the Court interpreting title VII)[8] held unlawful, in absence of any intent to discriminate, a high school education requirement and a written examination which disproportionately excluded blacks from employment opportunities.[9] In three later decisions the Supreme Court applied the *Griggs* principle to hold unlawful tests which disproportionately excluded blacks, and a height and weight requirement which disproportionately excluded women from such opportunities.[10] The lower courts have applied the *Griggs* principle on many occasions to many different kinds of employment practices,[11] but are divided on

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3. 107 S. Ct. 3227 (1987). The decision of the Court of Appeals is reported at 798 F.2d 791 (5th Cir. 1986). Oral argument was heard on January 20, 1988.

4. 42 U.S.C. § 2000e-2 (1982 & Supp. III 1985).

5. *Id.* Title VII, section 703 (a)(2) provides:

It shall be an unlawful employment practice for an employer—

. . . .

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

Section 703(c)(2) imposes the same kind of obligation upon labor organizations; section 703(a)(1) contains the general proscription of discrimination because of race, color, religion, sex or national origin.

6. 401 U.S. 424 (1971).

7. *Id.* at 431.

8. A few months earlier the Court had rendered a short *per curiam* decision in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), holding that title VII prohibits a practice which discriminates against mothers of pre-school age children.

9. *Griggs*, 401 U.S. at 431-32.

10. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); Connecticut v. Teal, 457 U.S. 440 (1982).

11. Professor Blumrosen has found *Griggs* cited by federal courts of appeals in from 31 to 68 cases a year for each year from 1972 through 1985, a total of 618 times. *See* Blumrosen, *supra* note 2, at 11 n.53. He found 49 Supreme Court cases citing it in the same period. *Id.*

whether that principle is applicable to discretionary or "subjective" employment practices.[12]

The issue is now before the Court in *Watson*, where the "subjective" employment practices include not only unstructured interviews, but also hiring and promotion decisions made without ascertainable standards at the discretion of the supervisor, and compensation based upon the subjective appraisals of supervisors.

This Article will review the nature of subjective or discretionary decisionmaking, the treatment of the issue in the legislative history and the regulations and guidelines of the agencies having enforcement responsibilities, the arguments before the Court in *Watson*, and the possible consequences of the Court's decision on employer practices. It will also discuss an application of *Griggs* to subjective practices, based on *Griggs* and agency guidelines, that will protect the legitimate interests of employers, as well as those threatened with harm through the application of such practices.

THE FACTS AND DECISIONS BELOW IN *Watson*

Plaintiff, Clara Watson, a black employee of Fort Worth Bank & Trust (Bank) since 1973, applied unsuccessfully on four occasions in 1980 and 1981 for promotion to a supervisory position. In 1981,

12. The courts of appeals for Sixth, Ninth, Eleventh, and D.C. Circuits hold *Griggs* applicable, while the courts of appeals for the Fourth and Fifth Circuits hold it inapplicable to subjective practices. All of the circuits appear to have addressed the issue in the last eight years, several inconsistently. *See Atonio*, 810 F.2d at 1480-81 n.1 (list of cases).

The courts in the early years of title VII, following the precedents of the Supreme Court in the areas of grand jury selection and voting (*see, e.g.*, Louisiana v. United States, 380 U.S. 145 (1965)), treated a showing of statistical disparities coupled with subjective decisionmaking by a preponderately white (or male) supervisory corps as a violation of title VII. *See, e.g.*, Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

In the early 1980s, perhaps in response to the clarification of the distinction between disparate treatment and disparate impact highlighted by the Court's decision in International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.151 (1977), or encouraged by the suggestion of the Court in Furnco Const. Corp. v. Waters, 438 U.S. 567, 577-78 (1978), that if the employer complies with the requirements of title VII nothing precludes his use of subjective employment practices, the appellate courts began to consider such practices anew. In the early cases, the consideration on appeal was directed to the question of what kind of claim the plaintiff had made. *See, e.g.*, Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 272 n.10 (4th Cir. 1980).

The seminal decision in the line of cases leading to the conflict was Pouncy v. Prudential Ins. Co., 668 F.2d 795, 800 (5th Cir. 1982), in which the court used language suggesting that *Griggs* was applicable only to a clearly identified, "nondiscretionary" procedure.

when she filed suit, the Bank had nearly eighty employees; all of the supervisors were white, and the Bank had never had a black director or officer.[13]

Ms. Watson alleged that the Bank had discriminated against her and other blacks on the grounds of race in hiring, evaluation, and promotion. She challenged the system of granting unreviewed discretion to supervisors for hiring, promotion and pay, the application of the system to her and to other blacks, and sought relief both on disparate impact and disparate treatment theories.[14] After an evidentiary hearing, the district court certified her as a representative of a class of black applicants for employment with the Bank and black employees of the Bank. At the trial on the merits, she showed that the Bank relied upon the subjective views of its white supervisors to screen applicants and to evaluate employees both for purposes of pay and for purposes of promotion. There were apparently no written criteria for evaluating applicants for hire or candidates for promotion, so that the supervisors exercised discretion as to what standards they used as well as how to apply them.[15]

The supervisory ratings of incumbent employees were based on accuracy of work, alertness, ambition, appearance, attendance, courtesy, dependability, drive, experience, job knowledge, physical fitness, quantity of work, relations with supervisors and co-workers, and stability. The score on the appraisals determined the pay of the employees and was combined with such other factors as the supervisors deemed appropriate in selection of candidates for promotion.[16]

Although blacks constituted twenty-one percent of the applicants for employment with the Bank, they constituted less than five percent of the persons to whom offers of employment were made. That difference was highly significant statistically. Watson showed that black employees were rated lower than white employees on the subjective evaluations described above, that the differences were statistically significant, and that the differences resulted in black employees receiving $46 less per month than comparably situated white employees.[17] A bank vice president testified that he observed that black employees performed as well as white employees; when asked why the black employees received lower ratings than white employees he stated that he could not explain.[18]

With respect to her individual claim, Ms. Watson showed that she

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13. *Watson*, 798 F.2d at 808 (Goldberg, J., dissenting).
14. *Id.* at 794, 797.
15. *Id.* at 803-04 (Goldberg, J., dissenting).
16. *Id.* at 812 n.26, 813.
17. The statistical information summarized in the text is found in the dissenting opinion of Judge Goldberg, who noted that the defendant did not dispute or rebut these statistics. *Id.* at 810-14 (Goldberg, J., dissenting).
18. *See* Brief for the Petitioner at 7-8 (quoting the record).

had a greater length of service with the Bank than two of the white persons promoted over her, and also more supervisory experience than another successful candidate. Her score on the appraisal forms was, however, lower than the scores of the white candidates selected.[19]

After trial, the district court decertified the class, holding that there was no common issue of fact or law between the black applicants and the black employees, and that there were too few black employees to warrant maintenance of the proceeding as a class action. On the merits of Watson's individual claims, the district court held that the Bank had, in each instance of a promotion for which she had applied, articulated a legitimate, nondiscriminatory reason for the selection of the person promoted, and that Watson had failed to show that the reason was pretextual. The district court did not discuss the statistical evidence in the case.[20]

On appeal, a divided panel of the Fifth Circuit affirmed the district court's holding of no liability. The majority rejected Watson's disparate impact claims, holding that under the precedents of that court, claims based on "discretionary" practices "must be analyzed under the disparate treatment model, rather than the disparate impact model."[21] The court concluded that the district court's decertification of the class action was not an abuse of discretion and affirmed the finding of no purposeful discrimination on the grounds that it was not clearly erroneous.[22]

Watson sought review by the Supreme Court on five questions, the first of which was whether an employer's practice of "committing employment decision to the unchecked discretion of a white supervisory corps" is "subject to the test of *Griggs v. Duke Power Co.* . . ." After inviting and receiving the Solicitor General's brief on the views of the United States, the Court granted certiorari limited to this single question.[23]

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19. *Watson*, 798 F.2d at 793-94 & n.2.
20. *Id.* at 794-95.
21. *Id.* at 797.
22. *Id.* at 798.
23. *Watson*, 107 S. Ct. 1885, 3227. The United States on the petition urged review to resolve the conflict among the circuits, but supported the position of the respondent Bank. Brief for the United States as Amicus Curiae at 6-7, 20 (on petition for certiorari) [hereinafter Gov't Brief on Petition]. The Solicitor General had twice earlier asked the Supreme Court to review the conflict among the circuits in Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985), and in Shidaker v. Carlin, 782 F.2d 746 (7th Cir. 1986), *cert. granted and decision vacated sub nom.* Tisch v. Shidaker, 107 S. Ct. 1621 (1987) (in light of Johnson v. Transportation Agency, 107

The issue is properly raised and appropriate for decision in *Watson*. The courts below refused to consider plaintiff's challenge to the system of granting broad discretion to supervisors to hire and promote without standards, and to have pay rates depend upon their subjective appraisal of each employee. Moreover, that system is the common issue linking the interests of black applicants for employment with black employees, so that a reversal on the *Griggs* issue should lead to reconsideration and probably to reinstatement of the class action.

The Nature of Subjective Practices and the Importance of the Watson *Issue*

The Nature of Subjective Practices

By definition, something that is "objective" can be verified by reference to the object, while something "subjective" or "discretionary" reflects the state of mind or the feelings or temperament of the subject or person thinking.[24] Similarly, a decision committed to someone's discretion is not subject to verification, and invites "inconsistency and caprice."[25]

The same attributes that identify subjective decisions — namely the absence of verifiable facts to explain or support them — also cloak their bases and purposes in ambiguity. Even if they are made with the best intent, therefore, they are likely to be viewed as arbitrary, or motivated by favoritism or worse by those who were harmed by the decision. And to the extent that any person has "discretion" to decide something, his or her decision is not subject to review.[26]

One of the problems the courts and commentators have had with the issue in *Watson* is the slippery nature of the distinction between subjective and objective. For example, a supervisor's appraisal of a subordinate may be based on both objective and subjective factors, but his appraisal when written and forwarded to a superior or an-

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S. Ct. 1442 (1987)).

24. "Objective" is defined as "of or having to do with a known or perceived object, as distinguished from something existing only in the mind of the subject, or person thinking," while "subjective" is defined as "of, affected by, or produced by the mind or a particular state of mind; of or resulting from the feelings or temperament of the subject, or person thinking." WEBSTER'S NEW WORLD DICTIONARY 980, 1418 (2d Coll. Ed. 1982).

25. *Albemarle Paper Co.*, 422 U.S. at 421.

26. The courts have held unconstitutional procedures which vest unreviewable discretion in public officials, not only because such discretion may be a cloak for discrimination, but also because the vesting of the power to make arbitrary decisions concerning the fundamental rights of individuals is incompatible with a government based upon law. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Davis v. Schnell, 81 F. Supp. 872, 878 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949); Louisiana v. United States, 380 U.S. 145 (1965).

other employer becomes a verifiable piece of evidence for that next person. Similarly, while attendance is an ascertainable fact and is normally recorded and measured objectively, if it is assessed by the supervisor from his recollection and observation, it must be considered subjective.

The difficulty of the attempted distinction is demonstrated by the briefs in *Watson.* While the Bank and the *amici curiae* supporting it seek to exclude subjective practices from the coverage of *Griggs* (and in effect, section 703(a)(2)), the Bank does not appear to suggest a definition, while the briefs for the Government and a major employer association recite attributes of subjectivity, including the "common attribute" of reliance on "judgment, intuition, and discretion," but do not attempt a definition.[27] Another line of distinction between subjective and objective suggested by the Government in *Watson* was between procedures which can be validated and those which cannot.[28]

Importance of the *Watson* Issue

All parties in *Watson* recognize that subjective, ad hoc, informal, unscored and other "home made" decisionmaking is prevalent practice of many employers. The number of appellate decisions in the last few years on the issue offers support for that position. The importance of the issue turns on the differences in burden of proof on the employer between purposeful and impact discrimination, and practical differences in the assessment of facts and ability of individuals to represent a class.

The Bank, the Government and at least some of the *amici* representing employers suggest that a result favorable to Watson would invade essential management prerogatives. They argue that it is impossible or difficult and expensive to validate "subjective" decision making, that application of *Griggs* would require validation, and that the employer could have no defense under *Griggs* once the plaintiff makes a statistical showing sufficient to constitute a prima facie

27. Brief for the United States as Amicus Curiae Supporting Repondent at 12-13 [hereinafter Gov't Brief]. The Equal Employment Advisory Council (EEAC) adopts a similar position, describing an "ad hoc decision process" based on the "judgment, the motivation, the state of mind, and the intent of the person applying it." Brief Amicus Curiae of the Equal Employment Advisory Council in Support of the Respondent at 7-8 [hereinafter EEAC Brief]. That brief states that the EEAC's "membership comprises a broad segment of the employment community in the United States, both individual employers and trade associations which themselves have hundreds of employers." *Id.* at 1.

28. *See* Gov't Brief, *supra* note 27, at 21-23 & nn.25-27.

case. Accordingly, they argue, application of *Griggs* to subjective or discretionary procedures will require employers either to abandon such procedures or to require their use in conjunction with quotas, and neither result will serve the purpose of title VII.[29]

Plaintiff Watson and *amici* supporting her position, on the other hand, suggest that if subjective procedures are insulated from a *Griggs* analysis, employers will use such procedures to provide a defense which will largely immunize their decisions from suit under title VII or other provisions of federal law.[30] The brief of the American Psychological Association in particular argues that subjective practices can be validated, and that title VII should be read as requiring that "employers use psychometrically sound and job-relevant selection devices."[31]

Under title VII, a plaintiff not only may attack the application of a practice to him as discriminatory but may challenge a practice as being unlawful in itself because it is discriminatory, or was adopted in part for discriminatory purposes,[32] or unlawful under *Griggs* as having a discriminatory impact[33] without validation or other business

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29. *See id.* at 17-25; Brief for the Respondent Forth Worth Bank & Trust at 36-41 [hereinafter Bank Brief]; Brief for Amicus Curiae, The Merchants and Manufacturers Ass'n in support of Respondent at 25-26 [hereinafter Merchants & Manufacturers Brief]. The latter brief was filed by Paul Grossman, co-author of B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983), a widely read and cited treatise on equal employment opportunity law.

Another amicus brief argues that there is no clear line between objective and subjective practices, and that the real issue in *Watson* is whether "promotion decisions in which a few people compete" will continue to be based on a manager's business judgment subject only to proof of an intent to discriminate. Brief for the American Society for Personnel Administration, the International Personnel Management Association and the Employment Management Association as Amici Curiae Supporting Respondent at 6-10 [hereinafter ASPA Brief]. The ASPA Brief does not discuss the broad challenge by the plaintiff to the Bank's practice of committing decisions concerning hiring, promotion, and pay to the discretion of its supervisors. Although the Court's grant of certiorari was limited to Question 1, which concerned only the application of the *Griggs* principle to the subjective discretion of its supervisors, the brief does not suggest dismissal of the writ as improvidently granted, but rather affirmance. *Id.* at 30.

30. *See* Brief for the NAACP Legal Defense and Educational Fund, Inc., the Mexican American Legal Defense and Educational Fund, Inc., the Employment Law Center, and the Center for Law in the Public Interest as Amici Curiae at 26-27 [hereinafter NAACP Brief].

31. Brief for the American Psychological Association as Amicus Curiae in Support of Petitioner, *reprinted in* Daily Labor Report (BNA), No. 213, at D-1, D-10 (Nov. 5, 1987) [hereinafter APA Brief].

32. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

33. The Supreme Court has recognized that "either" the discriminatory impact theory or the discriminatory treatment theory may be applied to the same set of facts. *International Bhd. of Teamsters*, 431 U.S. at 335 n.15.

The importance of the distinction between an intent and impact standard is not found primarily in establishing a prima facie case. A showing of statistically significant disparities between the races (or sexes) is sufficient to raise an inference of an unlawful practice under both the discriminatory impact and discriminatory treatment theories and there-

necessity.

Under the discriminatory impact analysis, once the challenged employment practice has been shown to have an adverse (that is, discriminatory) impact, the law is clear that the burden shifts to the employer to show that the procedure is valid or is otherwise required by business necessity and that the employer has the burdens of both production and persuasion.[34]

The Bank and the Government and other advocates of the employer position assume that if the same statistical showing is made to raise an inference of purposeful discrimination, the employer has the lesser burden of showing that its decision was motivated by a legitimate, nondiscriminatory reason to refute the inference. Moreover, they assume, the burden on the employer in a discriminatory treatment case is one of production, and the burden of persuasion remains with the plaintiff.[35]

The assumptions of the employer advocates are probably unduly optimistic,[36] and the burden of proof in a purposeful pattern or practice case is still unclear. While the Court repeatedly has stated what kind of proof was not sufficient to rebut an inference of discrimination raised by a statistically significant level of racial disparities, the Court has not articulated what kind or level of proof is sufficient to do so and it has not even ruled clearly whether the burden in such circumstances is one merely of production or is also one of persuasion.[37]

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fore constitutes a prima facie case under both models. While there is much merit in the argument that a lesser showing is needed to demonstrate adverse impact, and that well may be the law (*see Connecticut v. Teal*, 457 U.S. at 443 n.4; Blumrosen, *supra* note 2, at 3-4, 21), that issue need not detain us here, because the only other measure of adverse impact usually considered is the four-fifths rule of thumb contained in the Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. pt. 1607 (1987); and that rule itself is a surrogate for statistical significance in most instances, including the *Watson* case.

34. *See Griggs*, 401 U.S. at 431; *Teal*, 457 U.S. at 446.

35. *See* Gov't. Brief, *supra* note 27, at 17; Bank Brief, *supra* note 29, at 38-42.

36. The plaintiff's burden in individual cases is minimal, and the Court's rulings on shifting burdens are limited to such cases. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796-98, 805 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Where a plaintiff has mounted a "pattern of practice" or class-wide attack and has shown through the use of statistics that the chances are more than 95 out of 100 that the racial disparities are due to race, however, the court imposes a significantly greater burden on the employer to rebut the inference. After such a showing, the employer cannot escape liability under title VII by declarations of nondiscrimination, or by stating a policy of selecting only the best qualified. *See International Bhd. of Teamsters*, 431 U.S. at 342-43 n.24.

37. *See* Bazemore v. Friday, 106 S. Ct. 3000 (1986), where the Court held that defendant employer's evidence appeared to be insufficient to rebut the statistical and

Nevertheless, if the position advocated by the Bank and the *amici* supporting its position is adopted by the Court, that ruling would create a substantial incentive to employers to utilize subjective procedures. For if *Griggs* and in effect section 703(a)(2) were inapplicable to subjective procedures, a system of evaluating employees subjectively would be free from challenge under title VII except in those rare circumstances where the employee could show that the system was adopted for purposes of facilitating discrimination. In any suit challenging the application of the system, moreover, the employer would have a respectable and possibly winning argument that the burden of persuasion rests on the plaintiff. Moreover, the employer frequently would have a strong argument in favor of confining the case to the discrete claims of individuals to whom the system was applied, thereby avoiding class actions (as indeed the Bank did successfully in *Watson*).

Even apart from formal burdens of proof, a finding of purposeful discrimination is one which involves a moral judgment, and such a finding may impose a stigma on the defendant employer. It is, therefore, one for which many judges will impose a higher burden of persuasion in finding the facts than a challenge involving the good faith use of a faulty procedure. If *Griggs* is held inapplicable to "subjective" procedures, therefore, title VII would offer a substantial incentive for employers and labor organizations to use subjective or discretionary procedures wherever possible, and to replace or combine objective procedures with them so as to build defenses to title VII liability.

The position of the employer advocates is that any practice which has an element of subjectivity in it is exempt from the application of *Griggs*, and in effect section 703(a)(2), because it is not feasible to validate such practices. The Court could of course take that view. In many circumstances, however, subjective procedures can be validated, or replaced by valid procedures or by objective procedures which have no adverse impact. The author believes that the primary purpose of Congress was to open opportunities to blacks and others in jobs to which they traditionally had been denied access; that Congress sought to reach institutionalized as well as purposeful discrimination.[38] To adopt the employer position would therefore not only create an exception to section 703(a)(2) where Congress declined to do so, but would stand on its head the congressional intent to grant a preferred status to professionally developed tests.

The American Psychological Association at least, and perhaps the

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other evidence of the plaintiffs in a pattern or practice case. Without articulating clearly what standards applied, the Court remanded the case for assessment of the evidence under the Supreme Court's analysis and the "clearly erroneous" standard.

38. *See infra* notes 55-99 and accompanying text (legislative history).

plaintiff and other *amici* supporting her, take the position that no subjective practice which has a discriminatory impact can be lawful unless it has been validated.[39]

The author believes that the Court should not accept that position, either, because both the business necessity concept of *Griggs* and the guidelines of the federal enforcement agencies[40] recognize that there may be circumstances in which validation is not feasible or appropriate. In the limited circumstances where subjective practices are the only ones available and cannot be validated, the employer has an adequate defense under *Griggs* to the use of such procedures without the need for a formal study.

THE 1964 ACT AND ITS LEGISLATIVE HISTORY

Section 703(a)(2) of title VII makes it unlawful for an employer "to limit, segregate or classify . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race. . . ."[41] Nor does that section impose a requirement that intent or purpose be present for a practice to be unlawful.[42] The only immunity granted under title VII for an unlawful practice is the "very narrow" one for conduct undertaken "in good faith, in conformity with and in reliance upon any written interpretation or opinion of the Commission,"[43] a grant of immunity which does not suggest a general requirement that the employer have a discriminatory intent. There is no exception or exclusion in section 703(a)(2) for "subjective" practices, and no defense for matters committed to the discretion of employers.

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39. *See* APA Brief, *supra* note 31, at 9-10.

40. *See infra* notes 99-112 and accompanying text.

41. Civil Rights Act of 1964, § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2). The Equal Employment Opportunity Act of 1972 amended section 703(a)(2) by adding the words "or applicants for employment" after "employees." *See infra* notes 85-99 and accompanying text.

42. Section 706(g) does require the court to determine that the respondent (employer or labor organization) "intentionally" engaged in the practice before entering equitable relief. This term was inserted by an amendment of Senator Dirksen, however, to insure that before granting relief, the court determined that the act engaged in was deliberate rather than "an accidental act." *See* 110 CONG. REC. 8194 (1964); Cooper & Sobol, *Fair Employment Criteria*, 82 HARV. L. REV. 1598, 1674-75 (1969). *See also* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir.) (quoting legislative history), *cert. denied*, 397 U.S. 919 (1969); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971).

43. *See* Civil Rights Act of 1964, § 713(b), 42 U.S.C. § 2000e-12(b); *Albemarle Paper Co.*, 422 U.S. at 423 n.17.

For these reasons, the Court in *Griggs* held that the intent of Congress was "plain from the language of the statute," and that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" are unlawful under its terms if they "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[44]

The Bank, the Government and other *amici* supporting the employer do not base their arguments on the language of title VII or the language of *Griggs*. Instead, they argue that the primary purpose of title VII was the eradication of intentional discrimination and that *Griggs* was in effect a judicial innovation, unsupported by congressional intent. They also contend that the Court has already accepted their position,[45] and more seriously, that the nature of subjective practice makes it impossible or difficult to validate.[46] The Bank makes the statement about primary congressional purpose baldly and without citation, while the Government does so more subtly, quoting the Court for the proposition that purposeful discrimination was the "most obvious evil" Congress addressed in enacting title VII, and then proceeding to suggest that the Court's decision in *Griggs* was a response to the views of "Title VII enforcement officials and other civil rights advocates," rather than to the language or intent of Congress.[47] Both briefs are bare of any other discussion of the history or purpose of title VII. Other amicus briefs supporting the employer also ignore or pay scant attention to evidence of congressional intent in adopting the 1964 Act.[48] And except for plaintiff's short reference to and quotation of the Senate Labor Committee Report, and a short reference to the primary purpose of title VII in the brief for the

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44. *Griggs*, 401 U.S. at 429-30.

45. They rely upon McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Furnco Construction Co. v. Waters, 438 U.S. 567 (1978). *See* Bank Brief, *supra* note 29, at 13-18; Gov't Brief, *supra* note 27, at 9-12. The plaintiff in *McDonnell Douglas*, however, asserted claims of purposeful discrimination against him as an individual under sections 703(a)(1) and 704, but no claim under section 703(a)(2), and no contention that any practice had an adverse impact against blacks. 411 U.S. at 796. In *Furnco*, not only was the challenged practice the objective one of refusing to accept and consider applications for employment made at the gate, but the plaintiff there did not introduce any evidence showing that the practice had a disproportionately racial impact or effect, and the courts below found none. 438 U.S. at 571, 572. It was for that reason that there was no remand for consideration of the disparate impact theory. *Accord id.* at 584-585 (opinion of Marshall, J.).

46. Bank Brief, *supra* note 29, at 5.

47. Gov't Brief, *supra* note 27, at 6-7.

48. The EEAC Brief contains no references to the legislative history of the 1964 Act and describes *Griggs* as a "judicial gloss" on section 703(a)(2). EEAC Brief, *supra* note 27, at 11. The ASPA Brief similarly is silent on the legislative history of the 1964 Act. The Merchants & Manufacturers Brief does contain a brief reference to that history, arguing that the Congress intended to prohibit only purposeful discrimination. Merchants & Manufacturers Brief, *supra* note 29, at 15.

NAACP Legal Defense Fund,[49] the briefs in support of the plaintiff's position are silent regarding congressional intent in adopting title VII.

The position of the Bank and the Government that the primary purpose of title VII to eradicate intentional discrimination is at odds not only with the language in *Griggs* that "Congress directed the thrust of the Act to the consequences of employment practices,"[50] but also with the decisions on which they rely, and the subsequent holdings of the Court in *Albemarle Paper Company v. Moody*[51] and *United Steelworkers of America, AFL-CIO-CLC v. Weber*.[52] Nevertheless, if in fact Congress had only intended to prohibit purposeful discrimination, and *Griggs* were a judicial innovation unsupported by or contrary to congressional intent, the Court would be obliged to consider seriously the possibility of limiting *Griggs* to its facts or even overruling it, although none of the parties has suggested overruling it.[53]

Title VII is only one part of a comprehensive civil rights act with eleven titles. Apparently for tactical reasons of the sponsors, the report of the House Judiciary Committee on the full bill was particularly uninstructive as to the purposes and scope of the bill which became law. Because the Senate Judiciary Committee was viewed as a graveyard for such legislation, the bill which passed the House was not referred to a committee of the Senate and therefore was not directly the object of a Senate committee report. Moreover, substantial changes to title VII were made while the bill was on the floor of the Senate, during the extensive debate which was the major obstacle to its passage.[54] For such reasons, the legislative history of title VII is

49. *See* Brief for the Petitioner at 23; NAACP Brief, *supra* note 29, at 13-14.

50. *Griggs*, 401 U.S. at 429. "The primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices which have fostered racially stratified job environments to the disadvantage of minority citizens.' " *International Bhd. of Teamsters*, 431 U.S. at 349 (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802).

51. 422 U.S. 405 (1975). The Court held that because Congress had directed title VII to the consequences of rather than motives for an employer's conduct, back pay normally should be granted for a violation of title VII, even in the absence of any discriminatory purpose or motive. *Id.* at 422.

52. 443 U.S. 193 (1979). The primary purpose of Congress in adopting title VII was to provide equal employment opportunities to blacks in occupations which traditionally had been denied to them. *Id.* at 203.

53. Three Justices recently voted to overrule *Weber* in a case in which none of the parties asked the Court to do so. *See* Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

54. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 at 10 (no date) [hereinafter

difficult to follow, and the intent of Congress is not always apparent. It is perhaps for the same reasons that it is little discussed in the briefs of the parties in *Watson* or the articles of the commentators. A review of that history, however, does cast some light on congressional purpose concerning the issue presented in *Watson.*

The Equal Employment Opportunity Act of 1962 was drafted by the House Committee on Education and Labor and reported favorably.[55] It was revised by that Committee in 1963, reported favorably again,[56] and then incorporated into the bill that became the Civil Rights Act of 1964 as title VII.[57] The Committee called for legislation to set forth and implement "a national policy on equal employment opportunity, predicated on individual merit, competence and capability."[58] The Committee noted that discrimination in employment was pervasive throughout the country, sometimes manifesting itself in patent rejection, but "more frequently" in more subtle forms including relegation of nonwhites to " 'traditional' positions," and to the maxim "last hired first fired."[59]

Relying upon the statistical material on comparative rates of unemployment from testimony of Secretary of Labor Wirtz, the Committee stated that the continuing progress of a democratic society called for the full utilization of manpower resources, and that this goal could only be reached by the enactment of legislation of the kind it recommended. It noted that, at least in part because of discriminatory practices, nonwhite "male breadwinners" were three times as likely to be unemployed as their white counterparts; that nonwhites were disproportionately concentrated in unskilled or semiskilled jobs, regardless of their education and other qualifications; and that technological changes meant that the number of such positions were decreasing. It noted that "[a]rbitrary denial of equal employment opportunity is heavily concentrated in certain rapidly growing industries — traditionally prime employers of young people

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LEGISLATIVE HISTORY].

55. *See* H.R. REP. NO. 1370, 87th Cong., 2d Sess. (1962) *reprinted in* LEGISLATIVE HISTORY, *supra* note 54, at 2155-76 (on H.R. 10144). That Bill was introduced by Congressman Adam Clayton Powell, Chairman of the Committee.

56. 109 CONG. REC. 13,009 (Congressman Powell reporting H.R. 405 in H.R. REP. NO. 570, 88th Cong., 1st Sess. (1963)).

57. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 45 (1963) (view of Congressman Meader). *Compare* title VII as reported by the House Judiciary Committee, H.R. REP. NO. 914 at pp. 9-15, *with* H.R. 405, *reprinted in Hearings on Equal Employment Opportunity before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 3-11 (1963).

58. *See* H.R. REP. NO. 570, *supra* note 56, at 2. Republican Committee members Frelinghuysen, Griffin, Bruce, Findley and Snyder opposed the recommendation on grounds that court enforcement was preferable to cease and desist administrative authority. Only two members of the Committee, Congressmen Martin and Findley, opposed the enactment of any legislation.

59. H.R. REP. NO. 570, *supra* note 56, at 2.

— such as banks and financial institutions, advertising agencies, insurance companies . . . . Such concentration holds portent of increasing problems for the nation if remedies are not provided."[60]

In language directly parallel with the language now found in section 703(a)(2), the bill recommended by the Committee made unlawful any practice by an employer or union to limit or classify "in any way which would deprive or tend to deprive" any person of employment opportunities because of race, etc.[61] The prohibitions of sections 5(a)(2) and 5(c)(2) of House Bill 405 were incorporated by the House Judiciary Committee into the omnibus civil rights bill as section 704(a)(2) and 704(c)(2) of title VII, and the Report described the prohibitions in language identical to that quoted from the 1962 and 1963 Reports of the House Education and Labor Committee.[62] Opponents of the bill were quick to point out the breadth of the language and the lack of precise definition of the terms used.[63] On the floor of the House, opponents continued to attack the bill on those grounds and the bill's potential for interference with the prerogatives of management, particularly as they affected subjective employment practices.[64] With the addition of sex as one of the prohibited bases for unlawful employment practices, however, the bill passed the House without amendment to its prohibitions.

In the Senate, Senator Humphrey had, in June 1963, introduced Senate Bill 1937, which was referred to the Senate Committee on Labor and Public Welfare. Hearings before the Subcommittee on Employment and Manpower, chaired by Senator Clark of Pennsylvania, were held in July and August 1963, on that and other bills on equal employment opportunity.[65]

Senator Humphrey testified before the Subcommittee that many of the problems associated with lack of employment opportunities for minorities "were not directly related to overt discrimination," and that there were "many impersonal institutional processes" which denied employment opportunities to nonwhite employees. He stated that his bill was a departure from the traditional nondiscrimination

60. *Id.* at 3; *see id.* at 2-4.

61. *Id.* at 8 (describing sections 5(a)(2) and 5(c)(2)). The Committee had used the same structure and much the same language in 1962. *See* H.R. REP. NO. 1370, *supra* note 55, at 10, *reprinted in* LEGISLATIVE HISTORY, *supra* note 54, at 2164.

62. H.R. REP. NO. 914, *supra* note 57, at 9.

63. *See, e.g., id.* at 110-11 (the minority views of Congressmen Poff and Cramer).

64. *See* 110 CONG. REC. 2726 (Feb. 10, 1964).

65. *Hearings on Equal Employment Opportunity Before the Subcomm. on Employment of the Senate Comm. on Labor and Pub. Welfare*, 88th Cong., 1st Sess. (1963) (on S. 733, S. 1210, S. 1211, and S. 1937).

approach of state fair employment practices laws, in favor of the broader, more comprehensive obligation of promoting equal employment opportunities.[66] Secretary of Labor Wirtz, who was also the Vice Chairman of the President's Commission on Equal Employment Opportunity, testified in favor of the bill. He stated that the discrimination had become "institutionalized," and had in part become "the product of inertia," and that the key to an effective bill was the phrase "practices," because even after the principle of equality is accepted by the employer, it is still essential but difficult to effectuate changes in employment practices.[67]

In a report submitted by Senator Clark on February 4, 1964, while the omnibus civil rights bill was on the floor of the House, the Senate Labor Committee reported the Humphrey bill favorably.[68] The Committee stated that "[i]mprovement of the condition of the Negro American is essential to the maintenance of a healthy and strong economy"[69] and summarized its views as follows:

> Overt or covert discriminatory selective devices, intentional or unintentional, generally prevail throughout the major part of the white economy. Deliberate procedures operate together with widespread built in administrative processes through which nonwhite applicants are automatically excluded from job opportunities. Channels for job recruitment may be traditionally directed to sources which by their nature do not include nonwhites; trainees may be selected from departments where Negroes have never worked; promotions may be based upon job experience which Negroes have never had.[70]

To remedy the problem, the Senate Labor Committee recommended the Humphrey bill which contained procedures (including cease and desist authority by an Equal Employment Opportunity Board and review by the courts of appeals) which materially differed from title VII in enforcement procedure, but which contained substantive prohibitions directly paralleling what is now section 703, differing from it in only one material respect.[71] The bill reported favorably by the Senate Labor Committee was "designed specifically to reach into all of the institutionalized areas and recesses of discrimination, including the so called built in practices preserved through form, habit or inertia."[72] The substance of the bill received the support of the overwhelming majority of the Committee's fifteen mem-

66. *Id.* at 144-45.
67. *Id.* at 389-418, 392, 396.
68. S. REP. No. 867, 88th Cong., 2d Sess. (1964). Senator Hill, the chairman of the Committee, was in dissent.
69. *Id.* at 2.
70. *Id.* at 5 (quoted in Brief for the Petitioner at 23).
71. The provision which paralleled section 703(a)(2) made an unlawful employment practice any practice which, because of race, etc. "results or tends to result in a material disadvantage to any individual in obtaining employment or the incidents of employment." S. REP. No. 867, *supra* note 68, at 3-5.
72. *Id.* at 11.

bers. Only Senators Hill, Tower, and Goldwater dissented, each filing his views individually.[73]

Senator Humphrey introduced the omnibus House Bill 7512 on the floor of the Senate on March 30, 1964.[74] In supporting title VII, Senator Humphrey argued that "[a]t the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignments," and that the "Negro is the principal victim of discrimination in employment," citing the unemployment rates relied upon by Secretary Wirtz.[75] He stated that the "crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them," and then described the provisions of the bill designed to effectuate the necessary changes.[76]

Senator Kuchel, co-leader for the omnibus bill on the floor with Senator Humphrey,[77] supported title VII by reference to and quotation from the "key facts" found by the Senate Labor Committee in its report, noting the conclusion of that Committee "that if the Negro labor force at its present level of educational attainment were fairly and fully utilized, then the gain in our gross national product would reach $13 billion."[78]

In the debate on the floor of the Senate (as on the floor of the House), opponents of the omnibus Civil Rights Act attacked title VII on the grounds, among others, of its asserted imprecision, lack of definition of discrimination, and intrusion into the prerogatives of management, focusing on the "tend to deprive" language.[79] Proponents of the bill, co-leaders for title VII, Senators Clark and Case, without reference to that provision, asserted that the language of the bill was clear and straightforward, and stated that discrimination as used in the bill meant treating persons differently on the basis of

73. *See generally* S. REP. No. 867, *supra* note 68 (individual views of each, and the concurring views of Senator Javits, who would have made the administrative agency independent of the Labor Department).

74. 110 CONG. REC. 6528 (Mar. 30, 1964). He stated that title I, the voting rights title, was necessary because while literacy tests are frequently used to discriminate against "Negroes," it is often difficult to prove so in court. He supported the voting provision of the bill on the grounds that registrars "have exercised an almost uncontrolled discretion to reject" black applicants, but that proof of what happened depends upon "conflicting and undocumented testimony." *Id.* at 6530.

75. *Id.* at 6547.

76. *Id.* at 6548, 6549-51.

77. Senator Kuchel described need for the voting rights provisions in language similar to that of Senator Humphrey. *See id.* at 6554.

78. *Id.* at 6562.

79. *Id.* at 5810 (Mar. 20, 1964); 5875-77 (Mar. 21, 1964).

race or other prohibited grounds.[80]

In the Senate debate, most of the disagreement and the discussion was on procedural matters or on issues such as racial balance, seniority, or the use of professionally developed ability tests. The provisions defining what constituted an unlawful employment practice remained unaltered on the floor of the Senate, and were enacted as section 703(a) of title VII.[81]

The sentence of section 703(h) pertaining to professionally developed tests (the Tower Amendment) was added to title VII on the floor of the Senate to insure the use of professionally developed ability tests would, if valid, be lawful under the Act.[82] From the language and context of the debates, it was and is clear that at least if the proviso is satisfied professionally developed ability tests were to be accorded favored treatment under title VII.

The legislative history of the 1964 Act casts considerable light on congressional purpose and intent in enacting title VII. Three points are established from the history described above. The first is that the Court has correctly identified the primary congressional purpose in adopting title VII — to remove the arbitrary and artificial barriers to equality of job opportunity, particularly for blacks and particularly in jobs to which they traditionally had been denied access, so that they could participate in and contribute to the economy.[83] That purpose is reflected not only in the remarks of Senator Humphrey and the other proponents of the bill on the floor of the Senate, but also in the reports of both of the committees which held hearings on federal equal employment opportunity legislation.

The second point is that there is considerably more support in the legislative history for the decisions in *Griggs* than most of the commentators have recognized. Perhaps because it was issued while the omnibus bill was on the floor of the House, and was attached to a bill which was not enacted, the report of the Senator Labor Committee on the Humphrey bill and the hearings which preceded it have received little attention from the commentators.[84] That omission is

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80. *See* Clark-Case Memorandum, 110 CONG. REC. 7212-15 (Apr. 8, 1964). The proponents did not discuss the meaning or significance of the "deprive or tend to deprive" language of section 703(a)(2).

81. Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a).

82. *See* 110 CONG. REC. 11,251 (May 19, 1964); 13,492, 13,504 (June 11, 1964). *See also Griggs*, 401 U.S. at 430-432.

83. Without reference to or reliance upon the Senate Labor Committee Report, two early commentators expressed their view that the hearings in both houses and the House Report "make it clear that title VII was designed to be a powerful force in alleviating minority unemployment." Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1675-76 (1969). *Accord* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 141-42 (1966).

84. *Cf.* Hishon v. King & Spalding, 467 U.S. 69, 75 (1984).

particularly striking since Senator Humphrey not only was the author of that equal employment opportunity bill but also was the principal manager on the floor of the Senate of the bill which became the Civil Rights Act of 1964. Senator Clark, chairman of the subcommittee which held hearings on the Humphrey bill, was the captain for title VII on the floor of the Senate. That report reflects unequivocally the intent to reach and root out all institutionalized discriminatory practices, whether the product of intent, inertia, or inadvertence.

The proponents of the legislation were well aware that "discrimination had become institutionalized" and that many of the obstacles which excluded "nonwhites" were independent of purposeful discrimination. Moreover, the testimony of Senator Humphrey and Secretary Wirtz reflect that the terms "equal employment opportunities" and "unlawful employment practices" were deliberately chosen to move beyond the range of the traditional nondiscrimination approach of state fair employment laws and to reach institutionalized practices, whether purposeful or the result of inertia or inattention. The report of the House Labor Committee confirms that the "deprive or tend to deprive" language of section 703(a)(2) also was designed to outlaw all arbitrary and unnecessary barriers to equality of employment opportunities.

The third point established in the 1964 legislative history is also apparent from the language of section 703(h) of the Act itself — that valid professionally developed tests, because of their capacity to distinguish between candidates who would do well on the job and who would not, were to be granted a preferred status over homemade practices.

THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972[85]

The decision in *Griggs* was rendered in March 1971, while Congress was considering legislation to broaden and strengthen title VII. The decision found favor in Congress. The committees from both houses endorsed the decision generally, and specifically as it applied to the use of professionally developed tests.[86] Both committee reports reflected agreement with the reasoning and holding of the decision, and an intent to extend its benefits to all applicants for employment, and to employees in state and local governments and in the federal

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

86. S. REP. No. 415, 92d Cong., 1st Sess. 5, 14-15 (1971); H.R. REP. No. 238, 92d Cong., 1st Sess. 20-22, 37 (1971).

government. Both committees sought to extend the benefits of *Griggs* to state and local governments to provide state and local government employees with the protection that title VII, as interpreted by *Griggs*, had provided to employees in the private sector, so as to reach and correct "institutional" as well as overt discrimination, and to weed out "invalid selection techniques" including "stereotypical misconceptions by supervisors regarding minority group capabilities."[87]

Both committees were particularly concerned that the principles of *Griggs* be extended to the employment practices of the federal government, because the Civil Service Commission appeared to view employment discrimination incorrectly "solely as a matter of malicious intent" and failed to recognize that its general rules and procedures were themselves replete with artificial requirements which in the private sector had been found in *Griggs* and other court decisions to perpetuate patterns of discrimination.[88] Lastly, both committees sought to amend section 703(a)(2) to include "applicants for employment" as well as employees, to make it clear that applicants as well as incumbent employees were entitled to its benefits. While the House Report linked this change directly to *Griggs*, the Senate Report described the change simply as a clarifying amendment without that direct linkage.[89]

As had been the case in 1963 and 1964, much of the controversy surrounding the Equal Employment Opportunity Act of 1972 pertained to the procedures for the enforcement of the law. Both the House and Senate Labor Committees had sought to confer cease and desist authority on the EEOC,[90] and to transfer responsibility for enforcement of Executive Order 11246[91] from the Department of Labor to the EEOC;[92] the House Committee had sought to transfer responsibility for federal government employment practices from the Civil Service Commission to the EEOC.[93] While the Nixon Administration supported increased EEOC enforcement responsibility in the form of authority to initiate court action, it opposed cease and desist authority for the agency.[94]

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87. *See* S. REP. No. 415, *supra* note 86, at 9, 14-15; H.R. REP. No. 238, *supra* note 86, at 17-18. The Senate committee used the term "stereotypical," while the House committee used the term "stereotyped."

88. S. REP. No. 415, *supra* note 86, at 14-15; H.R. REP. No. 238, *supra* note 86, at 23-25.

89. S. REP. No. 415, *supra* note 86, at 43; H.R. REP. No. 238, *supra* note 86, at 20-22.

90. H.R. REP. No. 238, *supra* note 86, at 8.

91. Executive Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

92. H.R. REP. No. 238, *supra* note 86, at 22; S. REP. No. 415, *supra* note 86, at 13.

93. H.R. REP. No. 238, *supra* note 86, at 22-26.

94. *See* 118 CONG. REC. 3973, 3975 (Feb. 15, 1972).

After an extensive filibuster and unsuccessful efforts to invoke cloture, the position of the Administration and the Republicans in Congress prevailed on these procedural issues in the form of an amendment by Senator Dominick to substitute court enforcement for the cease and desist powers of EEOC recommended by the committees.[95] The 1972 Act became law without cease and desist authority in the EEOC and without transfer of the Executive Order program to the EEOC.

Absent from the arena of dispute was the *Griggs* decision and its applications. The Administration had supported the Court's adoption of the *Griggs* principle, as had the civil rights groups and other proponents of enhanced coverage and enforcement of title VII. Representatives of business and state and local governments focused their opposition on cease and desist authority and other specific enforcement procedures.

While the procedural aspects of the bills reported by the House and Senate Labor Committees did not become law, each of the substantive goals addressed in the committee reports was satisfied in the legislation finally enacted. EEOC was granted enhanced enforcement authority to bring its own lawsuits in the private sector, coverage of title VII was extended to state and local governments and to the federal government, so that *Griggs* was equally applicable to employees in the governmental sector, and section 703(a)(2) was amended to make it clear that its provisions (and *Griggs*) applied to applicants as well as employees.[96]

In 1972, therefore, Congress did more than cite *Griggs* with approval. Congress extended title VII and *Griggs* to state, local, and federal governmental practices and to "applicants for employment" of all kinds. Congress sought "to provide state and local government employees with the protection that Title VII, as interpreted by *Griggs*, had provided to employers in the private sectors."[97]

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95. *See id.* at 3965-66.

96. *See* Pub. L. No. 92-261, 86 Stat. 103.

97. *Teal*, 457 U.S. at 449-50. The Court already has recognized the relevance of the 1972 legislative history to section 703(a)(2). *See id.* at 447-49 nn.8-10. The 1972 legislative history is relevant not only because Congress in the 1972 Act extended title VII to employees of and applicants to state and local governments, and the federal government, but also because in the 1972 Act section 703(a)(2) itself was amended to include "applicants for employment," to be certain that that provision, as interpreted by *Griggs*, offered protection to applicants for employment as well as employees. Where Congress left a provision (§ 703(h)) of title VII unchanged and unaffected by the 1972 Act, the Court has stated that the legislative history of the 1972 Act, while it "in no way points to a different result," was "entitled to little if any weight" in its interpretation,

There can be little doubt that Congress in 1971-72 read *Griggs* as applicable to "practices, procedures, or tests," and indeed to "any given requirement" not protected by a congressional exception. The committee reports sought to extend title VII to state, local, and federal government employment so as to reach and correct "institutional" as well as overt discrimination, and to weed out "invalid selection techniques," including "stereotypical misconceptions by supervisors regarding minority group capabilities."[98] The Supreme Court already has noted that "arbitrary" supervisory ratings which had a discriminatory impact were a kind of practice Congress sought to prohibit when it adopted the 1972 Act.[99]

The arguments of the briefs urging the position of the employers that *Griggs* should be limited to its facts because it did not reflect congressional intent, therefore, appear to be inconsistent with the intent of Congress as expressed in the language and legislative history of the Civil Rights Act of 1964 and even more directly inconsistent with the language and legislative history of the Equal Employment Opportunity Act of 1972.

Administrative Interpretation of Title VII

At least since 1966, the agencies charged with enforcement of title VII have interpreted it as requiring a showing of some form of validity to justify the use of a professionally developed test which has an adverse impact. As noted above, the Supreme Court relied upon the 1966[100] and 1970 Guidelines[101] of the Equal Employment Opportunity Commission (EEOC Guidelines) to support its holding in *Griggs*.[102]

While the focus of the EEOC Guidelines was on the showing required to justify use of a professionally developed test, because such tests were the subject of the Tower Amendment (section 703(h)), those Guidelines also addressed the use of "other selection techniques," such as "unscored or casual interviews," and stated that where the data indicated a differential rate of applicant rejection, or disproportionate representation in groups of incumbents, based on

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because it was the "intent of the Congress that enacted § 703(h) in 1964 . . . that controls." *International Bhd. of Teamsters*, 431 U.S. at 354 n.39.

98. *See supra* note 87 and accompanying text.

99. *See* Teal, 457 U.S. at 449-50 n.10.

100. EEOC, Guidelines on Employment Testing Procedures (1966).

101. Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (1970) [hereinafter EEOC Guidelines].

102. The 1966 Guidelines were addressed to the meaning of "professionally developed ability test" as used in section 703(h) of title VII. *See Griggs*, 401 U.S. at 433 n.9. Respondent employer in *Watson* notes that EEOC earlier had issued an opinion letter suggesting that educational requirements having an adverse impact would not violate the Act. *See* Bank Brief, *supra* note 29, at 28. The Bank does not argue that *Griggs* was wrongly decided for that reason or for other reasons.

race or gender, the employer would be obliged to produce the same kind of validity evidence that he would produce to justify use of a test.[103] The testing order adopted by the Department of Labor under Executive Order 11246 in October 1971 used the same approach and similar language.[104]

Following the enactment of the Equal Employment Opportunity Act of 1972, with the legislative history indicating the congressional view that the procedures of the Civil Service Commission should be brought into compliance with the decision in *Griggs*, the executive agencies, through the Equal Employment Opportunity Coordinating Council,[105] commenced a six year effort to obtain agreement among the agencies on a uniform set of guidelines for employee selection procedures.

Although the agencies sharply disagreed on many of the psychological, legal, and practical issues surrounding the development of a uniform set of guidelines, there was no substantial disagreement among the agencies on the coverage of the *Griggs* principle, and no advocate among the agencies for granting subjective or "unscored, informal" procedures a preferred status. Such subjective procedures

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103. EEOC Guidelines, *supra* note 101, at 12,335 § 1607.13.

104. 41 C.F.R. § 60-3.13 (1971).

105. Section 715 of title VII, which was included in the 1972 Act, provided for such a Council, to consist of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, and the Chairman of the Civil Service Commission. Among the purposes of the Council was to "eliminate conflict . . . and inconsistency" among the agencies charged with enforcement of federal equal employment opportunity laws. 42 U.S.C. § 2000e-14. The Attorney General designated the Deputy Attorney General to act for him under section 715, and the Secretary of Labor designated the Under Secretary to do so. The Deputy Attorney General was selected to be chairman of the Coordinating Council. Each agency designated a staff representative, and the staff representatives together constituted the Staff Committee of the Council. *Id.*

The author of this Article served as the Department of Justice's staff representative, and therefore as chairman of the staff committee from its inception until the duties of the Council were transferred to EEOC by the Reorganization Plan No. 1 of 1978, 92 Stat. 3781.

The author of this Article wrote a memorandum for the Deputy Attorney General in support of the Coordinating Council draft Uniform Guidelines in 1976, criticizing the then-current EEOC Guidelines on the grounds that they appeared to require that all procedures must be validated. That memorandum was subsequently made public and printed in the Congressional Record, and was cited and quoted in the amicus brief for the EEAC in *Watson* for the proposition that subjective decisionmaking should be excluded from *Griggs* and section 703(a)(2). EEAC Brief, *supra* note 27, at 20. The author believed then, and does now, the Uniform Guidelines to be superior to the EEOC Guidelines in effect in 1976 on that and other scores. But there was no suggestion in that memorandum, or in the draft Guidelines that it supported, that subjective practices were not covered by *Griggs* or the Guidelines. Memorandum for the Deputy Attorney General from David L. Rose, Apr. 12, 1976, 122 CONG. REC. 22,950 (July 19, 1976).

were the antithesis of what the profession of industrial psychology prescribed, and were for the proponents of civil service systems virtually synonymous with the twin enemies of favoritism and political influence. Similarly, for civil rights advocates and enforcement agencies, subjective decisionmaking was viewed as a method of perpetuating past discrimination, particularly when, as was usually the case, it was exercised by an all or predominantly all white (or male) group of supervisors against the interests of minorities and women.[106] Moreover, as noted above, in amending section 703(a)(2) and broadening the coverage of title VII, Congress sought to eliminate practices based on "stereotypical misconceptions by supervisors regarding minority group capabilities."[107] For many of the same reasons, the representatives of industry or other employer groups did not advocate a preferred status for unscored or other subjective procedures.

There was, however, a recognition that validity was not appropriate or feasible for some legitimate employment practices, and that such practices might be justified on business necessity grounds, rather than validity. The result was that in most of the draft guidelines circulated, and the Federal Executive Agency (FEA) Guidelines which were adopted by three of the four enforcement agencies in 1976, all kinds of selection procedures were covered, and there was recognition that for some procedures, business necessity, rather than validation, was the appropriate basis for justifying a procedure which had an adverse impact.[108] The Questions and Answers adopted to implement the FEA Guidelines made clear the intention of the agencies that the Guidelines were intended to apply the *Griggs* principle to all of the selection procedures to which they applied.[109]

The Uniform Guidelines on Employee Procedures were adopted after further extensive comment, consultation, and a public hearing, and have remained unchanged since 1978.[110] Like their predecessors, they specifically include unscored and informal procedures within the definition of selection procedures, and express their intent to apply *Griggs* and its "business necessity" standard to those procedures

106. *See, e.g.*, Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

107. *See* S. REP. NO. 415, *supra* note 86, at 10; H.R. REP. NO. 238, *supra* note 86, at 17.

108. *See* Equal Employment Opportunity Coordinating Council Discussion Draft, Uniform Guidelines on Employee Selection Procedures § 2b (1973) (on file with the author); Equal Employment Opportunity Coordinating Council, Uniform Guidelines on Employee Selection Procedures, 41 Fed. Reg. 29,017, §§ 3c, 14 (1976); Federal Executive Agency Guidelines, 41 Fed. Reg. 51,734, 51,736, 51,751, §§ 3c(ii), 14(i) (1976) [hereinafter FEA Guidelines].

109. *See* 42 Fed. Reg. 4052 (1977) (Question and Answer 2). The Questions and Answers were signed on Jan. 17, 1977, before the change in the Administration.

110. *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-1607.18 (1987) [hereinafter Uniform Guidelines].

which are not capable of validation.[111]

The Uniform Guidelines expressly address the question of what an employer should do if it uses "informal or unscored" selection procedures which have an adverse impact. In such circumstances, the user should modify its practices to scored procedures, determine if they can be validated, and if so, validate them. Only if the employer determines that validation is inappropriate should he rely on other justification under federal law.[112] And as the introduction to the Guidelines makes clear, such justifications are measured under the *Griggs* standard, involving some form of business necessity.[113]

SUBJECTIVE PRACTICES AND *Griggs*

Are Subjective Practices Having an Adverse Impact Ever Defensible Under Griggs?

The core argument of the Bank, the Government, and other *amici* supporting the Bank's position is that it is impossible, almost impossible, or excessively costly to justify discretionary or subjective procedures under *Griggs*, so that Congress could not have intended to include them within section 703(a)(2) as an unlawful selection procedure, and the Court should create an exception for such procedures. This argument was made most starkly and clearly in the Government's brief on the petition for certiorari, in which it argued that

111. *Id.* at §§ 1606.6B, 16Q. Regulations incorporating the Uniform Guidelines include 28 C.F.R. § 50.14 (1987) (Department of Justice); 41 C.F.R. §§ 60-3.1 to 60-3.18 (1987) (Office of Federal Contract Compliance Programs); 5 C.F.R. § 300.103(c) (1987) (Office of Personnel Management). The "basic principle" of the Guidelines, that practices having an adverse impact are illegal unless justified by "business necessity," is found in the overview published in the Federal Register. *See* 43 Fed. Reg. 38,290-91 (1978).

112. Uniform Guidelines, *supra* note 110, at § 1607.6B.

113. *See* 43 Fed. Reg. 38,290-91.

The Government follows an approach wholly at odds with the Uniform Guidelines. Rather than limiting the use of invalidated subjective procedures to those circumstances of business necessity where no viable alternatives exist, the Government would cloak with the protection it seeks for "subjective" procedures all procedures which involve both objective and subjective elements. The Government would limit the *Griggs* doctrine to circumstances in which the objective component is used separately to screen applicants from further consideration in the selection process, so that its adverse impact can be assessed separately; otherwise mixed procedures are to be assessed only as subjective, namely under the purposeful discrimination rubric. *See* Gov't Brief, *supra* note 27, at 11 n.9. Such a position goes far beyond its stated purpose of seeking to protect those procedures for which validity is impossible or prohibitively expensive to determine.

The regulations of the Department of Justice state that the Guidelines "will be applied by the Department [of Justice] in exercising its responsibilities under federal law relating to equal employment [opportunities]." 28 C.F.R. § 50.14 (1987).

"subjective selection methods are not susceptible to such rigorous evaluative criteria and, practically speaking, may not be susceptible to validation or other such objective substantiation at all." It follows, the brief argued, that application of the disparate impact theory to such procedures "will force employers either to replace those procedures with objective one or to eliminate any statistical disparities by using quotas."[114]

After the brief for the American Psychological Association asserted that validation of subjective procedures was indeed possible and feasible if the procedures were formal and scored,[115] the Government modified its position to emphasize the difficulty of validating such procedures, because of their inherent unreliability. The Government's brief on the merits states that "we have been unable to find a single reported case in which a subjective selection process was successfully substantiated by formal means," and further asserts that compliance with the *Griggs* standard, therefore, is too onerous and could not have been intended by Congress.[116] There appears to be no evidence in the record in *Watson* to support this position, since the defendant Bank apparently made no effort to show that validation was impossible, or prohibitively costly, or indeed to justify its system of using subjective practices on any grounds, since the Fifth Circuit precedent did not require any such justification.[117]

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114. Gov't Brief on Petition, *supra* note 23, at 15.

115. APA Brief, *supra* note 31, at D-5.

116. Gov't Brief, *supra* note 27, at 17-25. The authors of the brief might have read Wade v. Mississippi Coop. Extension Serv., 615 F. Supp. 1574 (N.D. Miss. 1985) (sustaining the use of a formal but subjective system for performance evaluation for purposes of promotion, over the objections and expert testimony of plaintiffs). *See also* Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 362 (8th Cir. 1980), *cert. denied sub nom.* City of St. Louis v. United States, 452 U.S. 938 (1981) (sustaining a systematic process for assessing of fire captain candidates by interview and training simulations in the face of a challenge by the government as well as private plaintiffs, although noting for the remand, required by the invalidity of the other elements of the promotion procedure, additional steps that would be appropriate to assure full compliance with the Uniform Guidelines); Tillery v. Pacific Tel. Co., 34 Fair Empl. Prac. Cas. (BNA) 54 (N.D. Cal. 1982); Wilson v. Michigan Bell Tel. Co., 550 F. Supp. 1296 (E.D. Mich. 1982). The latter two cases involved a formal procedure for assessment of candidates through subjective procedures validated by A.T. & T. with a criterion-related strategy and a significant correlation (.36) between performance on the procedure and performance on the job. See *Tillery*, 34 Fair Empl. Prac. Cas. at 57-58; *Wilson*, 550 Fd. Supp. at 1301.

117. Application of the Uniform Guidelines to the facts in the *Watson* case is instructive. The employer in *Watson* did not follow the Guidelines. Rather than conduct a self-assessment, as contemplated by the Guidelines, to determine which of its procedures had an adverse impact and what changes were warranted, the Bank utilized its subjective assessments until trial, and indicated that it would continue to use them unless the Court ordered otherwise. The Bank used the subjective appraisals of its supervisors for judging such objective facts as the employee's attendance record, physical fitness, and accuracy and quantity of work, and utilized standards as dubious as "appearance." *See supra* text accompanying note 16. Apparently, the Bank made no effort to find valid selection procedures for hiring and promotion to first line supervisors or to determine why blacks scored

Validation is not dependent on the nature of the process by which scores are recorded. The American Psychological Association amicus brief states that fundamental and generally accepted scientific principles of measurement disclose that subjective procedures can be validated if they are systematically recorded.[118] And the professional texts show that if assessments are systematically recorded, the validity of those assessments can be measured against future performance on the job, and the validity of the procedure determined, whether the score is subjectively assessed by raters, or whether the applicant answers the question.[119]

The application of *Griggs* to subjective decisionmaking, moreover, is quite separate from the question of whether all practices subject to *Griggs* must be susceptible to validation or other formal techniques of justification. For it is clear that some "objective" standards, such as a conviction for embezzlement or rape, may be justified under *Griggs* as a matter of business necessity without any formal validity study. Such requirements might well have an adverse impact on males or blacks, but it would be a foolhardy plaintiff who urged that they be held unlawful under title VII for particular jobs, and if urged the courts would be most unlikely to accept such a contention. These standards are as objective as the high school education requirement struck down in *Griggs*, but they have a "manifest relationship" to such jobs as cashier, bank teller, or door-to-door salesman. The Court itself noted in *McDonnell Douglas Corp. v. Green*, albeit in dictum, that unlawful conduct directed against the employer of the kind at issue there was not the kind of "artificial, arbi-

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less well than whites on such appraisals, although they appeared to perform as well on the job, and no effort to demonstrate that the objective facts warranted such disparities. In short, the Bank did nothing to utilize procedures which were as job-related as possible, and did nothing to minimize adverse impact.

118. APA Brief, *supra* note 31, at D-4 to D-5.

119. The assessment center technique, which involves structured but subjective assessments of candidates by raters (typically supervisors or other management personnel) of constructs such as decisionmaking and need for approval, has become widely used in evaluating candidates for promotion since 1958, not only in this country, but in many other parts of the world. *See* Huck & Bray, *Management Assessment Center Evaluations and Subsequent Job Performance of White and Black Females*, 29 PERSONNEL PSYCHOLOGY 13-20 (1976), *reprinted in* M. MINER & J. MINER, EMPLOYEE SELECTION WRITTEN IN THE LAW (2d ed. 1979). The authors report that the number of validation studies and their positive results are impressive. *Id.* at 302.

Only if the employer refrains from recording what factors are considered, and what weight they have, does a practice become impossible to validate. But that of course is true whether the factors actually considered are objective and verifiable, or "subjective." The definition based upon possibility of validation has not been pressed, and in any event is not viable.

trary" barrier to equal employment opportunity which Congress sought to prohibit.[120]

How Should Griggs *Be Applied To Subjective Practices?*

The Court in *Watson* is unlikely to provide much guidance about how *Griggs* should be applied to subjective practices, because the employer there offered no justification for the pervasive use of such practices. However, guidance to the application of *Griggs* is found in its language and reasoning and in the agency guidelines. As with other procedures, the first question is whether the procedures "tend to deprive" on the basis of race, sex, etc., that is, whether they have a discriminatory impact. If there is such an impact, and there are available alternative methods of measuring the same attributes, there can be little legitimate claim to business "necessity," and the employer has the obligation to attempt to use the alternative methods. For it is settled that the existence of such alternatives belies any claim to business or operational need.[121]

The existence of an available, validated selection procedure for the job or jobs in question would, of course, suggest that there is no need for use of the system of subjective selection procedures by the employer. In the *Watson* case, the jobs in question were entry level clerical positions and first line supervisors in banks — positions in which much validation work has been done, and in which validated procedures exist.[122]

When an attribute cannot be measured, or may be excessively expensive to measure objectively, the supervisors or other assessors must record their observations and impressions regularly and systematically. In some circumstances, once they are so "scored" or recorded, they can be subject to the same validity analyses as other scored instruments, such as written tests.[123] When formal validation is not feasible, however, such recorded observations provide a sounder basis for assessment by a reviewing court than unrecorded or haphazard observations, where it is not even clear whether the supervisors are following the same standards or any standards at

120. *McDonnell Douglas Corp.*, 411 U.S. at 806.

121. *See, e.g.*, Robinson v. Lorillard, 444 F.2d 791 (4th Cir. 1971). *Accord Albemarle Paper Co*, 422 U.S. at 425.

122. The author is aware of a large scale consortium validation study, conducted for a number of banks in different parts of the country, which shows a highly significant relationship between performance on the tests and performance on the job for a broad range of occupations in the banking industry. *See* RICHARDSON, BELLOWS, HENRY & CO., INC., SUPERVISORY PROFILE RECORD TECHNICAL REPORTS (1981); RICHARDSON, BELLOWS, HENRY & CO., INC., CANDIDATE PROFILE RECORD TECHNICAL REPORTS (1983); RICHARDSON, BELLOWS, HENRY & CO., INC., MANAGER PROFILE RECORD EXECUTIVE SUMMARY (1983).

123. *See* APA Brief, *supra* note 31.

all.[124] This record keeping requirement is contained in the Uniform Guidelines, and as a record keeping provision its observation is mandatory under section 709 of title VII.[125]

At this stage, too, the employer should eliminate or revise some of the criteria which are of questionable relationship to the job or are most susceptible to abuse or the supervisors' stereotyped misconceptions. Among the first to go might be "appearance," perhaps to be replaced in public contact positions by "neatness of appearance" and "appropriateness of attire." Similarly, while ambition and drive might be suitable attributes to assess, a reviewing official (or court) would find more reliable and informative the factual observations which lead the supervisor to the conclusion, rather than simply the conclusion itself.

What, however, of the more difficult situation in which objective, validated procedures or criteria are unavailable? What particularly of selection procedures in professional or managerial positions for which validated procedures are not available? The Government states that there is "no objective method for choosing law firm partners, for selecting professors for tenure, or for appointing business managers."[126] And, it might have added, such decisions are so close to the essence of running the firm, university, or business that a wholly objective system might intrude unduly into management prerogatives. Even if there are some objective grounds for selecting partners for law firms (such as a record of attracting clients, number of publications, grades, or recommendations) the point that some subjective assessments are also necessary for such positions appears to be well taken.

Two preliminary responses are in order. The first, of course, is that such a hypothetical is far from the facts of *Watson*, and need not and probably should not be resolved there. The second preliminary response is that showing adverse impact for the use of subjective procedures for such positions is impossible or difficult in most situations, because of the relatively few persons that are selected for such posi-

124. *See Albemarle Paper Co.*, 422 U.S. at 432-433 (discussing the use of subjective appraisals by supervisors as a basis for a formal validity study).

125. The Uniform Guidelines were adopted by EEOC after fulfillment of the hearing requirement of section 709, and were expressly adopted under section 709, as well as under section 713. *See* Uniform Guidelines, *supra* note 109. Because section 709 confers authority on EEOC to promulgate binding record keeping and reporting regulations, the record keeping provisions of the Uniform Guidelines are binding on employers, even though the EEOC has no substantive rulemaking authority. Civil Rights Act of 1964, § 709(c), 42 U.S.C. § 2003-8(c).

126. *See* Gov't Brief, *supra* note 27, at 16 n.13.

tions. Thus, one of the factors that makes the showing of validity difficulty may also make the showing of discriminatory impact difficult, and the issue of an adverse impact analysis is likely to be raised only rarely for such positions. But what should the courts do where it is properly raised for such positions?

The analysis described above, and which is contained in the Uniform Guidelines, adequately addresses the problem. Where "subjective" discretion and judgment are the only procedures available for certain positions, there is by definition no available alternative, and they might well pass muster under the "business necessity" standard of *Griggs*. Under the record keeping provisions of the Uniform Guidelines, however, the employer must record the basis for each of its decisions, with reference to the objective bases underlying the exercise of judgment. In such circumstances, the employer should be in a position to explain each of the decisions involved.

What would be the standard of proof in such a circumstance? If the employer were able to show that it had used objective procedures where they were available, that the only procedures available for use in the challenged positions involved the exercise of discretion and judgment of the kind it exercised, and that it had complied with the record keeping requirements of the Uniform Guidelines, it would have demonstrated business necessity for the use of the subjective procedures. In such circumstances, the court would be left with a "pattern or practice" challenge to the use of such procedures under a purposeful discrimination standard, and the case would be decided under such standards.[127]

Conclusion

The Government and the Bank in *Watson* argue that to apply the *Griggs* principle to subjective selection procedures would either place an improper incentive on the employer to use quotas or would unduly intrude into the prerogatives of management.[128] While it is true that Congress sought to minimize title VII's intrusion into management prerogatives, it is equally true that Congress recognized that some intrusion was necessary to insure against discrimination and to open job opportunities previously closed to blacks and others. Under the analysis described above, there is no more intrusion into management in "subjective" decisionmaking procedures and no more incentive to create quotas than in objective decisionmaking. In each, the employer is obliged to keep records and to consider use of available

127. *See* Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987), where the only inquiry allowed in a challenge to the practices of a large accounting firm in the selection of partners was one of purposeful discrimination, in a Circuit that recognizes that subjective practices usually can be challenged under a *Griggs* analysis.

128. Govt' Brief, *supra* note 27, at 17-25; Bank Brief, *supra* note 29, at 36-40.

alternatives that have less adverse impact. Discretionary or subjective procedures are always likely to appear unfair to the person assessed, and are always open to abuse, because the basis for the decision lies in the mind of the decision maker.

Even where there is no intent to discriminate, stereotypical misconceptions based on race or sex, etc., may well play a role where such procedures are used. For these reasons, their replacement by validated or objective procedures is consistent with the congressional intent to eliminate employment decisions based upon such misconceptions and to have employment turn on individual merit, competence, and capacity, and with the preferred status given by Congress to professionally developed tests.[129] Indeed, the arguments of the Bank, the Government and other employers that subjective practices should be given a favored status because their unreliability makes them difficult to validate is directly at odds with that intent.

129. *See* H.R. REP. NO. 570, *supra* note 56, at 2.