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ONE HUNDRED ELEVENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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### MEMORANDUM

TO: Members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties

FROM: Jerrold Nadler  
Chairman

RE: Hearing on Civil Rights Under Fire: Recent Supreme Court Decisions

DATE: October 28, 2009

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On Tuesday, October 8, 2009, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on Civil Rights Under Fire: Recent Supreme Court Decisions. To ensure stenographer accuracy, please find a **verbatim** transcript of the hearing attached for your review. The Judiciary Committee's Rule III (e) pertaining to the printing of transcripts is as follows:

*The transcripts...shall be published in verbatim form, with the material requested for the record...as appropriate. Any requests to correct any errors, other than transcription, shall be appended to the record, and the appropriate place where the change is requested will be footnoted.*

Please return the transcript edits to the Subcommittee by November 18, 2009, to the attention of: Matthew Morgan, at B353 Rayburn House Office Building. If you have any further questions or concerns, please contact Mr. Morgan at (202) 225-2825.

1139 The gentleman from Arizona, Mr. Franks, is recognized.

1140 Mr. FRANKS. Well, thank you, Mr. Chairman.

1141 I thank all of you for being here today.

1142 Mr. Adegbile, I know that your statement focuses on the  
1143 VRA reauthorization, but the hearing topic today--and,  
1144 indeed, the discussion--has been significantly more broad  
1145 than that than just the voting issues. And I want to focus  
1146 on this disparate impact theory for a moment. It has come  
1147 under fire in recent years, as you know, and some even think  
1148 the theory is wrong on principle and even should be  
1149 discarded. And I admit to having some of my own ambivalence  
1150 and misgivings and doubts.

1151 I realize the disparate impact theory is traditionally  
1152 applied in employment law, but it has also been found to be  
1153 pervasive or persuasive by liberal members of the Supreme  
1154 Court when policy harms a particular group in other areas,  
1155 such as when a state administrator driver's license exam is  
1156 given in English only.

1157 So I want to throw out some facts here. And it is going  
1158 to be on a--certainly a different topic here, but I would  
1159 like to ask you to listen carefully for the disparate impact  
1160 aspect, even if the issue itself is rather awkward.

1161 Some African-American groups have pointed out to me and  
1162 other members of Congress that the federal government's  
1163 subsidization of abortion has disparate impact on the black

1164 | community. And their evidence is essentially as follows.

1165 |         An estimated 80 percent of abortion clinics are located  
1166 | in black or minority neighborhoods. According to the Alan  
1167 | Guttmacher Institute--that is, of course, the research arm  
1168 | for Planned Parenthood, the nation's largest abortion  
1169 | provider--approximately 50 percent of all black unborn  
1170 | children are aborted, as compared to 20 percent of white  
1171 | babies.

1172 |         And that means that 25 percent of the black  
1173 | population--or 1 in 4--is missing because they were aborted.  
1174 | And that creates a smaller population and certainly lessens  
1175 | the political power, the voting power of African-Americans.

1176 |         And, of course, they also cite the ill effects of  
1177 | abortion and the disparate impact on black women because it  
1178 | is now, as you know, well established in dozens of studies  
1179 | worldwide that abortion is strongly linked to extreme preterm  
1180 | birth in subsequent pregnancies. After just one elective  
1181 | abortion, a woman is 2 to 12 times more likely to have an  
1182 | extreme preterm birth, and her baby is 129 times more likely  
1183 | to have cerebral palsy than a full-term baby.

1184 |         And, of course, since the higher abortion rate for black  
1185 | unborn children, it also equates to about four to five times  
1186 | the rate of extreme preterm for black women and white women.  
1187 | And they are never given this information.

1188 |         And I know I have said enough about the evidence here.

1189 Getting to the disparate impact issue, the clinics that place  
1190 themselves in the black community that do these abortions are  
1191 heavily subsidized by the federal government with taxpayer  
1192 dollars. And many of these clinics were founded by the old  
1193 American Eugenics Society. Some of these clinics were caught  
1194 on tape taking money earmarked for black babies abortion  
1195 only, in other words, that they could only earmark this money  
1196 to abort a black child by racist donors. And after this  
1197 expose, the federal government continued to increase its  
1198 support of these clinics the following year.

1199 Now, my civil rights advocates argue very simply: Is  
1200 the disparate impact theory applicable here, where we are  
1201 talking not necessarily about the denial of a benefit, say,  
1202 on hiring or a promotion to a job, but the infliction of a  
1203 harm, where some surmise that the disproportionate harm of  
1204 abortion in the black community has even been intentional on  
1205 some people's parts?

1206 Is there a disproportionate or disparate impact here on  
1207 the black community? And why or why not?

1208 Mr. ADEGBILE. I, of course, have not studied those  
1209 specific facts that you have laid out. My understanding of  
1210 the disparate impact standard is that it is a statutorily  
1211 created approach in a number of different statutes. We see  
1212 it in Title VII. We see the effects test, which is similar,  
1213 in Section 5 of the Voting Rights Act.

1739 | job, both parties, year after year, is the most encouraging  
1740 | and hopeful sign that I have ever seen.

1741 | Chairman CONYERS. Before I turn this over to my  
1742 | colleague, Trent Franks of Arizona, Ms. Lithwick, did you  
1743 | have a comment to make on this?

1744 | Ms. LITHWICK. I couldn't improve on what Professor  
1745 | Derfner just said if I tried.

1746 | Chairman CONYERS. Trent?

1747 | Mr. FRANKS. Well, thank you, Mr. Chairman.

1748 | Mr. Chairman, the main reason I came back was just to  
1749 | give you the opportunity to put those things on the record  
1750 | you wanted to, so I don't have any questions.

1751 | But I guess I would be remiss if I didn't just express  
1752 | the fact that I was touched by Mr. Derfner's remarks. And,  
1753 | you know, sometimes I guess we forget that America was built  
1754 | on a--kind of a different premise than other nations. You  
1755 | know, other nations often sought to put individuals or  
1756 | certain people in charge of things, and we did a new  
1757 | experiment that we would take away government's power and we  
1758 | would empower the individual, because we held the truth that  
1759 | all of us were God's children and deserve to be--have our  
1760 | lives protected, our freedom protected, and our property,  
1761 | and, you know, the pursuit of our dreams.

1762 | And I know that there is a great deal of differences on  
1763 | this committee over how to do that sometimes. And I realize

1764 | that it takes society a while to develop certain ideas. And  
1765 | I am reminded that there was a time when Congress outlawed  
1766 | petitions--for a period of 8 years, outlawed petitions  
1767 | against slavery. In other words, we didn't want to even be  
1768 | lobbied on that issue, because that was a set deal. In other  
1769 | words--we decided, by God, we are going to have slavery, and  
1770 | that was it, and we weren't going to listen to any of these  
1771 | wacko abolitionists.

1772 |         And I know sometimes I frustrate this committee by my  
1773 | constant return to what I believe the civil rights issue of  
1774 | the day is, and that is the protection of unborn children,  
1775 | because I believe that, you know, the same court that said  
1776 | Dred Scott was not a human being said that the unborn was not  
1777 | a human being. And it took time for us to develop in a  
1778 | different way.

1779 |         But by the grace of God, we did. And Congress played a  
1780 | big role in that. Congress was the first body to say that we  
1781 | are going to have civil rights, finally woke up and said--you  
1782 | know, the people woke up. And the courts struck those early  
1783 | ones down. We forget. You know, they struck those early  
1784 | civil rights laws down.

1785 |         Finally, the court woke up and joined the rest of us and  
1786 | said, okay, we are wrong. And we finally put aside this  
1787 | tragedy of slavery. And the issue that I mentioned  
1788 | today--again, I know that it frustrates people. I don't mean

1839 | sure, we had disagreements over it, but we changed it."

1840 |       And I would welcome the opportunity for a hearing like  
1841 | that. Would you be open to that, Mr. Chairman?

1842 |       Chairman CONYERS. Could I see the bill first?

1843 |       Mr. FRANKS. Absolutely. I will bring you the bill, Mr.  
1844 | Chairman.

1845 |       Chairman CONYERS. Well, I can look it up, now that you  
1846 | have told me about it.

1847 |       Mr. FRANKS. Okay. It is the Prenatal Nondiscrimination  
1848 | Act. We have forwarded it to your office before.

1849 |       Chairman CONYERS. What is the bill number?

1850 |       Mr. FRANKS. I think--I apologize. I don't remember the  
1851 | bill number, but we will get it.

1852 |       Chairman CONYERS. Oh, that is all right. Don't worry  
1853 | about it.

1854 |       Mr. FRANKS. But in any case, I just want to thank the  
1855 | panel here and thank the chairman. The chairman is a  
1856 | gentleman. And forgive me for the--sort of the--I don't know  
1857 | what it was, the--just the discussion, but I appreciate all  
1858 | of you, because I believe that one thing we hold in common in  
1859 | this room is that we really do desire to see the imago dei,  
1860 | the image of God, in every human being respected and  
1861 | protected. And I just hope we figure out who we all are.

1862 |       Thank you, sir.

1863 |       Chairman CONYERS. Thank you very much.