

Analysis of Written Responses of Thomas Griffith:
Mr. Griffith's Responses Underscore Concerns About His Views on Title IX and About His
Respect for the Rule of Law

The Title IX “three-part test” has been in place since 1979 and offers schools three independent ways to show that they are providing equal opportunities to men and women to participate in sports. The first, “proportionality,” prong of the test embodies the principle at the heart of Title IX: that men and women are entitled to equal access to educational opportunities without regard to their gender or stereotypes about their interests and abilities. As every federal court of appeals to consider the issue has recognized – and as every Administration since 1979 has understood – the three-part test is legally valid, and the proportionality prong does not impose quotas.

Despite this uniform guidance, Mr. Griffith, as a member of the Department of Education's Title IX Commission, proposed to altogether eliminate the proportionality prong. Mr. Griffith would have barred schools from proving that they are in compliance with Title IX by showing that they offer their male and female students equal opportunities to play sports. His approach would drastically limit schools' flexibility, enshrine the stereotype that women are not as interested as men in athletics, and limit further growth in women's participation opportunities. This proposal was so controversial that even the Commission – stacked with members hostile to Title IX – rejected it by a margin of 11 to 4.

Nothing in Mr. Griffith's responses allays the concerns raised by his record that he holds radical views on Title IX, and his failure to accurately describe and explain those views is very troubling.

- To attempt to explain his opposition to the proportionality test, Mr. Griffith now says simply that some have “misused” or “misinterpreted” the test to create quotas, and that he does not believe that the proportionality test “inevitably leads to the use of gender quotas.” (*See, e.g.*, Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy at 1, 3 (Dec. 3, 2004).)
- If Mr. Griffith truly believed that the problem is that the proportionality prong has been misused, the appropriate response would be to provide education on the proper interpretation of the law – not to propose, as Mr. Griffith did, that the proportionality test be eliminated in its entirety.
- In fact, Mr. Griffith's current description of his views on Title IX is inconsistent with his previous statements in which he has clearly stated that he opposes the proportionality test itself. As a member of the Title IX Commission, he stated that he opposed the proportionality test based on its use of “numeric formulas” to determine whether a college or university is complying with Title IX—and that those formulas violate the Equal Protection Clause of the Constitution and are “illegal,” “unfair” and “wrong,” and even “morally

wrong.” (Transcript of Commission hearing, Jan. 30, 2003, at 27.) In fact, contrary to his current claim that he thinks the proportionality test has simply been “misused,” Mr. Griffith said as recently as November 19, 2004, in a letter to Chairman Hatch, that “although the use of [numeric] formulas had been held by the court[s] to be permissible, I did not believe that such formulas accurately captured the imperatives of Title IX.”

Nothing in Mr. Griffith’s responses allays the concerns raised by his record that he has prejudged the validity of the three-part test under Title IX, and that his view is contrary to that of all the appellate courts to consider the issue.

- Mr. Griffith assures this Committee that he would “apply the law impartially regardless of my personal policy preferences.” (Responses of Thomas B. Griffith to the Written Questions of Senator Joseph R. Biden, Jr. at 3 (Dec. 3, 2004).) He tries to “clarify” his cavalier dismissal of the rulings of the no fewer than six federal appellate courts that have upheld the proportionality test, claiming that he meant only that “even if substantial proportionality is a permissible means, it is not a required means” of compliance with the statute and that “the Commission was free to recommend other means to expand opportunities for women.” (*Id.*)
- But these assurances are belied by Mr. Griffith’s previous statements that, *as a legal matter*, the courts that upheld the proportionality test “got it wrong” and that he does not “believe in the infallibility of the judiciary” (Transcript of the Commission hearing, Jan. 30, 2003 at 28, 106) – as well as by his proposal to the Commission to eliminate the proportionality test as a permissible means of compliance altogether. Mr. Griffith’s record on the Commission shows that, at a minimum, he has inappropriately prejudged a legal issue under Title IX that is likely to come before him, and that his views reflect his legal analysis – not “personal policy preferences.”

Mr. Griffith’s statements about the Commission recommendations he supported significantly understate his efforts to gut the three-part test.

- Mr. Griffith tries to obfuscate his hostility to the proportionality test while on the Commission by saying now that – in addition to his own proposal to eliminate the proportionality test, rejected by a Commission vote of 11 to 4 – he supported or sponsored three other Commission recommendations to address concerns about the proportionality prong that were both “modest” or “moderate” and were unanimously supported by the Commission. (Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy at 14 (Dec. 3, 2004).)
- These statements are, at best, highly misleading. In the first instance, two of the Commissioners withdrew their consent to one of the recommendations which Mr. Griffith persists in labeling unanimous. Moreover, Mr. Griffith’s statements ignore at least seven additional non-unanimous recommendations adopted by the Commission – recommendations that Mr. Griffith has never disavowed – that would have critically weakened Title IX’s athletics policies and would have resulted in substantial losses of participation opportunities and scholarships for women. Even apart from Mr. Griffith’s own proposal to eliminate

proportionality, the Commission's recommendations were so damaging to Title IX that they were ultimately rejected in their entirety by the Secretary of Education after a public outcry.

Mr. Griffith's responses confirm concerns about his opposition to the use of statistical evidence to identify discrimination in contexts beyond Title IX.

- Mr. Griffith says that his views on the proportionality test are not “a criticism of the use of statistical evidence in civil rights disputes.” (*See, e.g.*, Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy at 3 (Dec. 3, 2004).)
- But if, as Mr. Griffith has said, he believes that numeric measures in the Title IX context constitute quotas, cannot be used to measure the existence of discrimination, and are a “fundamentally unfair way of going about remedying discrimination,” (Transcript of Commission hearing, Jan. 30, 2003, at 107), it is very difficult to understand how he could accept numeric measures as measurements of discrimination in the context of employment or affirmative action.
- In fact, Mr. Griffith's responses to the Committee confirm that he views the use of statistical evidence with suspicion. He states that statistical evidence may permissibly be used to show a gender imbalance under Title IX, but then asserts that “numeric formulas [cannot] be used to grant members of one sex preferential treatment to correct an imbalance.” (Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy at 3 (Dec. 3, 2004).) But as Mr. Griffith should know, and as the courts have uniformly made clear, the use of statistical evidence to assess compliance with the proportionality test in no way constitutes preferential treatment for women. Mr. Griffith's reference to Title IX's “numerical formulas” as constituting “preferential treatment” suggests that he views any diagnostic or remedial use of statistics as imposing impermissible quotas.

Mr. Griffith's admission that he practiced law without a license for a period of several years, and his apparent failure to give accurate information about that lapse while under oath, add to the concerns about his general respect for the rule of law.

- Mr. Griffith has admitted that he practiced law in the District of Columbia for several years while he was suspended from the District of Columbia Bar for nonpayment of dues, and that since 2000 he has practiced law in Utah without being a member of the Utah Bar. (Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy, Dec. 3, 2004, at 2, 13, 15.)
- Mr. Griffith has attempted to explain his failure to join the Utah Bar by stating that it was his “understanding” that as in-house counsel to Brigham Young University he did not need to be a member of the state Bar. (Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy, Dec. 3, 2004, at 8.) However, documents made public at Mr. Griffith's hearing show that the General Counsel of the Utah State Bar instructed Mr. Griffith in writing in 2003 that “Utah does not have and has never had” a “general counsel rule exception.” (Letter from Katharine A. Fox to Thomas B. Griffith, dated May 14, 2003.)

- Additional documents made public at Mr. Griffith’s hearing raise serious questions about whether Mr. Griffith gave accurate information about his lapsed District of Columbia Bar membership while under oath to the Utah Bar. Specifically, in a sworn November 2003 application to take the Utah Bar examination, Mr. Griffith was asked whether he had ever been suspended as an attorney, and—despite the fact that he knew he had been suspended from the District of Columbia Bar—he answered “no.” Mr. Griffith’s explanation for his failure to disclose his suspension, namely that he “read the question as calling for information whether the applicant had ever been sanctioned for misconduct by a disciplinary authority,” (Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy, Dec. 3, 2004, at 9.) ignores the plain language of the question, which simply asks if the applicant has ever been “disbarred, suspended, censured, sanctioned, disciplined or otherwise reprimanded or disqualified” as an attorney. In the same application, Mr. Griffith was asked whether he had ever held himself out as an attorney in Utah. He answered that when he had acted as an attorney while at BYU, he had “done so as a member of the Bar of the District of Columbia.” This was despite the fact that he knew he had been suspended from the District of Columbia Bar for over a year while he was working at BYU. (Application of Thomas B. Griffith to the Utah State Bar Examination, November 2003, questions 52, 46.)

These ethical violations, Mr. Griffith’s failure to address them accurately, and his failure to describe his Title IX proposal accurately, together with his dismissive attitude towards court decisions with which he does not agree, demonstrate a pattern of lack of respect for the rule of law that is unacceptable in a candidate for a lifetime seat on the federal bench.