

LEADERSHIP CONFERENCE EDUCATION FUND

CIVIL RIGHTS MONITOR

vol. 1, no. 5

JUNE 1986

INSIDE...

FIGHT OVER JUDICIAL NOMINATIONS HEATS UP.....	p. 1
CHIEF JUSTICE WARREN BURGER RETIRES.....	p. 2
SENATE COMMITTEES REJECT ADMINISTRATION NOMINEES.....	p. 2
SUPREME COURT RULING SUPPORTIVE OF AFFIRMATIVE ACTION.....	p. 3
JUSTICE CONTINUES ITS ATTACK ON AFFIRMATIVE ACTION.....	p. 5
MOVEMENT TO DEFUND CIVIL RIGHTS COMMISSION GAINS MOMENTUM.....	p. 6
EEOC FAILS TO ENFORCE CIVIL RIGHTS LAWS.....	p. 6
JAPANESE AMERICANS REDRESS BILL.....	p. 10
THE CONTINUING IMPACT OF GROVE CITY.....	p. 12
DEATH PENALTY BILL MOVING THROUGH THE SENATE.....	p. 14
PARENTAL LEAVE BILL GAINS MOMENTUM.....	p. 16
UPDATE ON NORFOLK DESEGREGATION.....	p. 17

FIGHT OVER JUDICIAL NOMINATIONS HEATS UP

The Senate Judiciary Committee by a vote of 9-9 refused to approve a motion to report favorably Daniel Manion's nomination to the 7th Circuit Court of Appeals. However, the Committee did approve a motion to report the nomination without recommendation. On June 26th, the Senate voted 43-46 to approve the nomination. But because of considerable controversy surrounding the vote, opponents immediately moved to reconsider the vote. Such a vote is expected mid-July, after the July 4 recess.

Opposition to Manion has focused on his lack of qualifications and extreme views about the Constitution and role of federal courts. He was given the lowest "passing" rating by the ABA Committee (a minority of whom found even that rating too high), and the Chicago Council of Lawyers found him unqualified because of his lack of federal experience. While he has some experience in the federal courts, it has been as co-counsel on cases not involving important issues of constitutional or public law. By his own admission, he has published no writings on the law, scholarly or otherwise.

Manion has expressed opposition to the application of the Bill of Rights to the states and support of stripping jurisdiction from the Supreme Court as well as lower federal courts. He has also lauded the work of the John Birch Society, and heaped praise on Birch spokesman Larry McDonald for a book which repudiates the function of judicial review of state actions and attacks Supreme Court decisions including *Brown v. Board of Education* that exercise such review. Manion also cosponsored a bill in the Indiana state legislature to authorize the posting of the Ten Commandments in public schools even

though, he admits, he knew the bill was unconstitutional.

William Taylor, Director of the Center for National Policy Review, stated that the Manion vote is very important because it will determine whether the Senate is willing to set standards for judicial nominees that go beyond questions of racism or ethical impropriety -- standards that will evaluate a nominee's qualifications, as well as one's understanding and support for the role of the federal judiciary in protecting civil rights in the country.

For more information contact People for the American Way, 1424 16th Street, NW, Washington, D.C. 20036, (202)463-4777; or the Judicial Selection Project, Alliance for Justice, 600 New Jersey Avenue, NW, Washington, D.C. 20001, (202)624-8390.

CHIEF JUSTICE WARREN BURGER RETIRES

Washington was caught by surprise with the announcement that Chief Justice Warren E. Burger is retiring, and Justice William H. Rehnquist will be nominated to replace him. Further, U.S. Court of Appeals Judge Antonin Scalia will be nominated to replace Rehnquist if he is confirmed by the Senate. While the impact of the changes on future civil rights cases was not readily accessible, civil rights leaders expressed the hope that the Senate would thoroughly review the nominations and not rush to confirm.

Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights stated: "[The] Senate should not rush to judgment. Both nominations should be carefully scrutinized."

Nancy Broff of the Judicial Selection Project said that "as with all judicial nominations, it is very important that the Senate take its 'advise and consent' role seriously and not simply rubber stamp the President's nominations. A thorough review of the records of both Justice Rehnquist and Judge Scalia is certainly appropriate."

SENATE COMMITTEES REJECT ADMINISTRATION NOMINEES

On June 5, the Senate Judiciary Committee by a vote of 10-8 refused to approve a motion to report favorably Jefferson B. Sessions' nomination to U.S. District Court for the Southern District of Alabama. The Committee also failed to approve a motion to report the nomination without recommendation by a 9-9 vote, killing the nomination in Committee.

Civil rights groups had strongly opposed the nomination because of Sessions lack of racial sensitivity. Several witnesses at hearings before the Committee testified that:

Sessions described the National Council of Churches, the NAACP, the ACLU, and the Southern Christian Leadership Conference as "un-American" organizations teaching "anti-American" values.

Sessions described a prominent white civil rights attorney in Mobile as a "disgrace to his race."

Sessions stated, with regard to the Ku Klux Klan, that he thought its members were OK until he heard that they used drugs.

Following a disagreement between a black and white member of his staff, Sessions admonished the black to be "careful what he said to white folks."

Sessions referred to a black lawyer in the office of the U.S. Attorney as "boy."

Further, as U.S. Attorney, Sessions prosecuted for voter fraud several prominent black civil rights activists, including Albert Turner, one of the leaders of the original march to Selma. The trial judge dismissed most of the counts for lack of evidence, and the jury acquitted the defendants on all the remaining counts. Attorneys for Turner and other civil rights workers raised questions about misconduct by Sessions' office in the handling of the case; they complained in particular that Sessions had refused to investigate evidence of voting fraud by whites.

Senator Howell Heflin, a conservative Democrat from Alabama, was credited with casting the decisive vote. The Senator stated: "This is not an easy vote for me, and it will be one that many will disagree with, particularly in my home state... but as long as I have reasonable doubts, my conscience is not clear and I must vote no." Senator Heflin continued:

I regret that I cannot vote for confirmation, but my duty to uphold the Constitution and my duty to the justice system is greater than any duty to any individual (Philadelphia Inquirer, June 7, 1986).

Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights characterized Heflin's vote as "key, courageous and decisive." Senator Joseph Biden (D-DEL), ranking Democrat on the Judiciary Committee, said the bipartisan vote demonstrated that "on issues of race, the U.S. Senate Judiciary Committee is not prepared to compromise." Althea Simmons, Director of the Washington Bureau of the NAACP, stated: "We are quite elated. We felt all along that the Senate could not in good conscience place Mr. Sessions on the bench for a lifetime" (Los Angeles Times, June 6, 1986).

In similar action, on May 20, 1986 the Senate Labor and Human Resources Committee by a vote of 10-5 rejected the nomination of Jeffrey Zuckerman, Chief of Staff for the Equal Employment Opportunity Commission, to be general counsel of the Commission. Civil rights groups had strongly opposed Zuckerman's nomination asserting that his "strong and open opposition to accepted fair employment principles disqualifies him from serving in the critically important enforcement position of general counsel."

SUPREME COURT RULING SUPPORTIVE OF AFFIRMATIVE ACTION

In the first of three affirmative action Supreme Court opinions expected this term, the Court indicated its approval of affirmative action, including hiring goals, to remedy discrimination. While invalidating a particular provision of an affirmative action agreement involving layoffs, the ruling (Wygant v. Jackson Board of Education) rejected the Justice Department's position that

affirmative action benefit only proven victims of discrimination, and that goals therefore are not permissible.

The issues before the Court were whether a judicial finding of discrimination was a prerequisite for the adoption of a voluntary affirmative action plan, and whether the particular plan in this case was constitutionally permissible. In dispute was a formula contained in the bargaining contract between the Jackson, Michigan Teachers Association and the school board on how teachers were to be laid off during economically stringent times. The formula provided for the use of seniority in layoffs "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of layoff." While the Court (5-4) rejected the side-stepping of seniority, seven members expressed support for hiring goals. The nine Justices wrote 5 opinions, no one of which commanded a majority. Justice Powell wrote for himself and Justices Burger and Rehnquist:

We... hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes -- such as the adoption of hiring goals -- are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

Further, Justice Sandra Day O'Connor in a separate concurring opinion wrote:

The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.

Her opinion continues:

It appears, then that the true source of disagreement on the Court lies not so much in defining the state interests which may support affirmative action efforts as in defining the degree to which the means employed must "fit" the ends pursued to meet constitutional standards... Yet even here the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to remedying of specific instances of identified discrimination for it to be deemed sufficiently "narrowly tailored," or "substantially related" to the correction of prior discrimination by the state actor.

Justice O'Connor's opinion was viewed positively by civil rights advocates as she is likely to be a pivotal vote in future cases. Richard Larson of the ACLU was quoted predicting victory in the two other affirmative action cases before the Court "if O'Connor is to be read literally" (Wash. Post, May 20, 1986, A10).

The Supreme Court's decisions in the other affirmative action cases will be reviewed in the next MONITOR, Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), cert. granted, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985) (No. 84-1999); and Local 638 v. Equal Employment Opportunity Commission, 753 F.2d 1172 (2nd Cir. 1985), cert. granted, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985) (No. 84-1656). For a comprehensive review of the three cases, see the December

1985 MONITOR.

JUSTICE CONTINUES ITS ATTACK ON AFFIRMATIVE ACTION

Assistant Attorney General for Civil Rights William Bradford Reynolds seized upon the Supreme Court's decision in Wygant to attempt to further the Justice Department's efforts to gut Executive Order 11246 on affirmative action. Claiming that the Court had held that evidence of prior discrimination is necessary in order to use race-conscious remedies, Reynolds asserted that the Executive Order's requirement that federal contractors take positive steps, including goals and timetables, to bring women and minorities into their workforce is unconstitutional because it "is not predicated on any finding of discrimination" (New York Times, May 23, 1986). Reynolds also claimed that the Court's finding that a governmental agency must choose a remedy that "intrudes least upon the rights of innocent third parties" eliminated goals and timetables as acceptable tools, because less burdensome remedies are available, namely, recruitment and training (New York Times, May 23, 1986). This assertion was made despite the clear acceptance of goals in the Powell and O'Connor opinions (see above). The Powell opinion states that the layoff plan was "not sufficiently narrowly tailored;" and in the very next sentence continues, "Other, less intrusive means of accomplishing similar purposes--such as the adoption of hiring goals--are available."

Civil rights advocates found Reynolds' assessment intellectually dishonest. In a prepared statement on the decision, the Lawyers Committee for Civil Rights Under Law provided an analysis in sharp contrast to the Assistant Attorney General's:

Justice Powell's opinion, joined by the Chief Justice and by Justice Rehnquist, held that a simple imbalance between the proportion of employees who were members of a minority group and the representation of minorities in the relevant labor market is enough justification for a race-conscious [affirmative action plan]. This is a simple test, and it will be easy for public employers to administer it. No Justice suggested that any more difficult standard be applied... This is the identical "under-utilization" standard used by the Labor Department in its enforcement of Executive Order 11246. As a result of Wygant, the Labor Department's program should be immune from further attack by the Justice Department.

Further, Barry Goldstein of the NAACP Legal Defense Fund, in an analysis prepared for the Leadership Conference on Civil Rights, wrote:

Mr. Reynolds has announced that the Supreme Court decision in Wygant... reverses the rulings over the past 15 years by the Executive, Legislative and Judicial branches and determines that the contractor compliance program has "a serious constitutional flaw." Wygant, it should be understood, was a case that in no way involved the federal executive order. It dealt with layoffs, not hiring, and with a specific ratio for laying off people, not a goal. As in the past, it is Mr. Reynolds' analysis which is seriously flawed. Actually, Mr. Reynolds' analysis is inexplicable unless we understand that Mr. Reynolds looks at issues through narrow ideological blinders.

A spokesperson for the Labor Department was quoted as saying the decision "provides a basis for cautious optimism by proponents of reasonable and flexible goals and timetables, for it is clear that at least seven members of the Court view some type of goals as a valid method to effectuate affirmative action" (New York Times, May 23, 1986, A1).

The differing interpretations of the decision within the Administration reflect the division over changing the Executive Order. Since last August, Reynolds and Attorney General Edwin Meese have been trying to revise the Order to eliminate goals and timetables as a requirement for federal contractors. Secretary of Labor William Brock has been waging a valiant fight to retain the Order's goals and timetables requirement. Despite the overwhelming, bipartisan opposition to revising the order, expressed by more than 270 members of Congress (including 69 Senators), key business leaders, a substantial number of Reagan cabinet members, unions, and civil rights and religious groups, Meese and Reynolds remain doggedly devoted to gutting the Order. The battle is not over, and your expressions of support are very much needed. Write or call the President to express your support for the Executive Order (202/456-1414). Also, contact Secretary of Labor William Brock and thank him for his efforts (202/523-8271).

MOVEMENT TO DEFUND CIVIL RIGHTS COMMISSION GAINS MOMENTUM

On June 26, the House Appropriations Committee voted 27-16 to defund the U.S. Commission on Civil Rights. An amendment to the Appropriation Bill, offered by Rep. Julian Dixon (D-CA), approved \$11.8 million for the Commission to be used to close down the operations of the Commission by December 31, 1986. The LCCR in a letter to Committee members urged support for the Dixon amendment because "...there is no longer an independent Civil Rights Commission. It died three years ago when Ed Meese repudiated the congressional compromise worked out in November of 1983. As Clarence Pendleton and Linda Chavez have indicated numerous times, the Commission is now considered a part of the Reagan Administration. Indeed, it has become nothing more than the propaganda arm of the Department of Justice. Such a result is a perversion of the Commission's historic statutory role." The letter continues: "The vote to defund the Civil Rights Commission will be one of the most important votes for civil rights in the 99th Congress." The measure is expected to be before the full House in July.

The FUND has available for dissemination a SPECIAL REPORT on the U.S. Commission on Civil Rights which details the controversy that has surrounded the agency since its reconstitution in 1983 (\$2.50).

EEOC FAILS TO ENFORCE CIVIL RIGHTS LAWS

The Chair of the House Education and Labor Committee has charged that EEOC is deliberately refusing to enforce the nation's civil rights laws. Based upon the findings of an investigation of enforcement at the Equal Employment Opportunity Commission, Chair Augustus Hawkins (D-CA), has instructed his legal staff to explore the feasibility of filing a lawsuit to compel Administration officials to enforce the nation's equal employment opportunity laws, and also called for an examination of whether EEOC Chair Clarence Thomas' refusal to enforce existing consent decrees containing goals and

timetables as legal remedies constitutes contempt of court and is sufficient grounds for his removal as Chairman. Representative Hawkins further stated:

During the time that these avenues are being explored, I intend to take an active role in bringing the gross deficiencies of the current commission to the attention of my colleagues on the Senate Labor and Human Resources Committee, who will be considering Mr. Thomas' renomination in the next few weeks. The first step in forcing the Commission to enforce the law may well be Senate rejection of Mr. Thomas for a second term as Chairman of the EEOC.

Clarence Thomas' first term expires July 1, 1986. The Senate Labor and Human Resources Committee will be holding hearings most likely in mid-July.

Background

The Equal Employment Opportunity Commission was established by Title VII of the Civil Rights Act of 1964 to enforce the law's prohibition of employment discrimination. EEOC has the power to investigate charges of discrimination, to attempt resolution through conciliation, and to file and pursue lawsuits when conciliation fails. EEOC, over the years, has developed guidelines to interpret Title VII and to let employers know what the law requires of them. Among these are Guidelines on Affirmative Action and the Uniform Guidelines on Employee Selection Procedures. EEOC's affirmative action guidelines adopted in 1979 approve the use of goals and timetables and other affirmative action mechanisms in complying with Title VII. Further, through the affirmative action guidelines, EEOC "deliberately set out to give employers a broad privilege to [use] affirmative action, including... goals and timetables, and other race conscious remedies, in situations where the beneficiaries were not the [actual] victims of prior discrimination, and where there were no prior "findings" of discrimination" (Alfred W. Blumrosen, "The Binding Effect of Affirmative Action Guidelines," The Labor Lawyer (1985)). The Uniform Guidelines on Employee Selection Procedures were first adopted in the 1960's and led to the Supreme Court's historic decision in the Griggs case invalidating tests that harmed minority applicants if they were not justified by business necessity. The latest version of the guidelines was adopted in 1978 by EEOC and the other federal agencies with responsibility for enforcement of the equal employment laws. They provide a unified position on the proper use of tests and other selection or promotion procedures. The guidelines were adopted after public notice and comment, and a public hearing was held to receive oral comments on the uniform guidelines. Supporters of the guidelines assert that if the Commission wants to revise them the same process should be followed.

The Investigation

Staff of the House Committee on Education and Labor conducted a series of on-site reviews of selected district offices of EEOC to assess the extent to which EEOC's enforcement of Title VII is consistent with Congressional intent.

The investigation found...

EEOC's Acting General Counsel, Johnny J. Butler, orally directed regional attorneys not to recommend the use of goals and timetables in consent decrees,

not to intervene in cases in which goals and timetables are proposed as a remedy, and not to seek the enforcement of goals and timetables in existing consent decrees as well as in future ones. The staff report asserts:

Goals and timetables and other numerical remedies have been approved by the U.S. Supreme Court and have been ordered by courts in many instances when necessary to remedy the effects of class-wide discrimination. Moreover, this directive flies in the face of earlier positions taken by the EEOC and by the Acting General Counsel, in defense of goals and timetables. It also conflicts with the EEOC's current Affirmative Action Guidelines... and the Uniform Guidelines on Employee Selection.

The Acting General Counsel justified his directive as based upon his assessment of where the Commissioners stood on this issue. In testimony before the House Subcommittee on Employment Opportunities, Chair Thomas stated:

...EEOC has not adopted any policy that precludes the use of goals and timetables in settling cases of employment discrimination. Each of us on the Commission, however, has some degree of skepticism about the value of goals and timetables, relative to the value of other available remedies, in providing equal employment opportunities and eradicating discrimination.

Critics of EEOC's position assert that Mr. Butler's directive and Chair Thomas' "passive support" of the action are in violation of the affirmative action guidelines which have the force of law. Until EEOC proposes revision of the guidelines, with appropriate public notice and an opportunity for public comment, its enforcement procedures must conform with the present guidelines including the appropriate use of goals and timetables.

The committee staff also found that class action cases or charges which do not identify "actual victims" are now reported to be unacceptable to the Commission. Remedies for discrimination are apparently limited to "identified victims." Previously, EEOC sought relief such as the establishment of goals and timetables to correct an employer's discriminatory employment practices, and to bring more women and minorities into the workforce. The staff report states:

Often, identifying specific victims requires the development of a full trial record. Thus, in cases such as those in which there are many more unhired female or minority applicants than there are vacancies which would have gone to women or minorities in the absence of discrimination, it is impossible to identify which specific individuals would have been hired... For these reasons, courts have preferred a "class-wide" approach under which all members of the class adversely affected by the discriminatory act are presumptively entitled to individual relief. Courts have also used prospective relief such as goals, in order to attack systemic discrimination. Providing relief for only a few identified victims, when the discriminatory practices were more pervasive, was viewed as inadequate.

The effect of this shift in EEOC's enforcement posture will be to preclude many, if not most, of a group of discriminatees from obtaining any relief, particularly when, after years of litigation, it is impossible to identify all of the individuals who would have been hired or promoted in the absence of unlawful discrimination.

Also, through oral fiat, EEOC has "renounced the adverse impact theory to prove discrimination," as a matter of enforcement policy despite the Supreme Court's firm support of this theory in Griggs v. Duke Power Company, and EEOC's uniform guidelines which provide, in part:

the use of any selection procedure which has an adverse impact on the hiring, promotion or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines.

EEOC lawyers must in effect present more proof than the law requires to prove discrimination when referring class action cases to headquarters for approval.

Other findings...

-EEOC is placing greater emphasis on the rapid closure of cases at the expense of quality investigations. Moreover, attempts may have been made to "pad" the number of charges processed in order to make the case statistics and some district offices "look good." ...In the Birmingham District Office, EEOC staff alleged that there was a wholesale closure of cases at the end of fiscal year 1985, in order to "pad" the workload statistics and to show that that district office had processed an impressive number of charges that year.

-Some EEOC staff admitted that because of the "push for numbers," they are being forced to produce a work product of poorer quality and minimal thoroughness. As a result, they have less pride in their work and feel that the mission of the agency is being undermined.

-The EEOC's "Statement of Enforcement Policy" of September 11, 1984, has been interpreted by many in the Commission's district offices to permit, in practice, a new, higher standard of proof to establish "reasonable cause" to believe that an individual or a class has suffered illegal discrimination. One possible effect... is that fewer charges are given a "cause" determination. A "cause" determination means that the EEOC has found that there is reasonable cause to believe that a charging party or class has suffered discrimination. For example, in fiscal year 1985, more than 56.2 percent of all new charges were determined to be "no cause," compared with 28.5 in 1980. This new, more-stringent standard may contravene the "reasonable cause" standard set forth in Title VII...

Report Recommendations

The report recommends that the Acting General Counsel immediately rescind his oral directive to regional attorneys that they not refer proposed consent decrees which contain goals and timetables to headquarters for approval, and that he enforce existing consent decrees which contain goals and timetables, until such time as the courts have ruled that this remedy is inappropriate or no longer permissible. Additionally, the report states that the Commission should make clear to compliance staff as well as to the employer community and the general public that the EEOC will enforce the law as it exists and that it

will continue to seek goals and timetables and other forms of prospective relief, where necessary, to remedy the effects of discrimination. Further, the report recommends that changes in EEOC policy be made openly, and in conformity with the requirements of the Administrative Procedure Act and the Sunshine Act. The Administrative Procedure Act requires that substantive regulations issued after notice and opportunity for public comment be modified only by the same procedure. The Sunshine Act would require that proposed revisions of the guidelines be voted on at a public Commission meeting.

For a copy of the report write to the House Committee on Education and Labor, 2131 Rayburn HOB, Washington, D.C., 20515; Investigation of Civil Rights Enforcement by the Equal Employment Opportunity Commission. After reviewing the report, you should feel free to share your comments with Representative Augustus Hawkins, Chair of the Committee, and Representative Matthew Martinez, Chair of the Subcommittee on Employment Opportunities.

JAPANESE AMERICANS REDRESS BILL

Leading legislators in the House and Senate are seeking redress for the internment of Japanese Americans during World War II through enactment of the Civil Liberties Act of 1985 (H.R.442/S.1053). The bill would implement the recommendations of the Commission on Wartime Relocation and Internment of Civilians which found that the exclusion and detention of Japanese Americans during World War II was based on racial prejudice, war hysteria and the lack of political leadership -- not military necessity. Specifically, H.R. 442 provides that:

there be a formal apology by Congress and the President recognizing the grave injustices committed by the Federal Government against Japanese Americans.

Congress establish an educational and humanitarian trust fund to educate the American people about the dangers of racial intolerance.

individual compensation of \$20,000 be paid to each surviving internee, in recognition of individual losses and damages.

The bill is supported by the Japanese American Citizens League, and other civil rights groups including the American Civil Liberties Union, and the Anti-Defamation League. The Leadership Conference on Civil Rights is also strongly supportive of the bill. Joseph L. Rauh, Jr., Counsel to the LCCR, in testimony before the House Subcommittee on Administrative Law and Governmental Relations, April 28, 1986, eloquently stated the basis for the Conference's support of the bill.

Nothing can ever adequately compensate the Japanese-Americans for the wrongs done them, not even H.R. 442, not even the proposed \$20,000 payment, not even a larger figure. The dislocation of their lives, the branding as dangerous to their country, the cruel insult of captivity -- all this is beyond monetary recompense. But what this bill can do is make it possible for this nation once again to hold its head high in remorse and thus in decency. We can demonstrate that a great nation can recognize and give recompense for the severest blow it ever afflicted upon the civil liberties

of its people and thus give new vitality to its commitment to civil freedom. Future generations of Americans will recall this action, not only as good for the national soul, but as a stabilizing force if similar panic once again should confront our nation.

Background

On February 19, 1942 -- two months after Japan's military attack on Pearl Harbor -- President Franklin Roosevelt signed Executive Order 9066 which "broadly authorized any military commander to exclude any person from any area." In support of the Executive Order, Congress passed Public Law 77-503 "which authorized a civil prison term and fine for a civilian convicted of violating a military order" (The National Committee for Redress, Japanese American Citizens League, The Japanese American Incarceration: A Case for Redress (May 1980)). While the Executive Order did not mention any specific group or mention detention, the commander of the Western Defense Command "ordered all persons of Japanese ancestry to turn themselves in at temporary detention camps near their homes." During the war approximately 120,000 persons were incarcerated in camps mainly in Arizona, California, Oregon and Washington, surrounded by barbed wire and guarded by military police. The internees, able to take only what they could pack and carry, left behind businesses, property, homes, farmland and personal goods, most of which was never recovered. Assets were frozen by the U.S. Government.

After almost three years of internment, on December 17, 1944 the exclusion and detention orders were rescinded by the Western Defense Commander. In January 1945, Japanese Americans began returning to their homes. Many were met by violence and bigotry, and others found their homes, businesses etc. occupied by whites unwilling to vacate them.

Property losses alone were conservatively estimated by the Federal Reserve Bank in San Francisco to be in excess of 400 million dollars based on 1941 figures. Congress appropriated partial [funds for] restitution for property losses, but only 8 1/2% of property losses were ever compensated. Nothing was done to compensate for the tremendous increase in land values during the war years, lost income, unnecessary deaths, mental sufferings and loss of freedom (A Case for Redress).

Executive Order 9066 was formally rescinded by President Gerald R. Ford on February 19, 1976. In rescinding the Order, President Ford stated:

An honest reckoning must include a recognition of our national mistakes as well as our national achievements. Learning from our mistakes is not pleasant, but as a great philosopher once admonished, we must do so if we want to avoid repeating them (A Case for Redress).

Status of the Bill

The Civil Liberties Act of 1985 was introduced in the House on January 3, 1985 by Representative Jim Wright (D-Tex), and referred to the House Subcommittee on Administrative Law and Governmental Relations. The bill has 129 co-sponsors. Hearings were held on April 26, 1986 in a packed hearing room of approximately 200 persons. The companion Senate bill (S. 1053) was introduced on May 2, 1985 by Senator Spark M. Matsunaga (D-HI) and referred to the

Subcommittee on Civil Service, Post Office, and General Services. There are currently 28 co-sponsors.

The Department of Justice opposes enactment of the legislation. It questions the conclusion of the Commission on Wartime Relocation and Internment of Civilians that the internment actions were based on "racial prejudice, or hysteria, and a failure of political leadership." In a letter to Representative Peter Rodino (D-NJ), Chair of the House Committee on the Judiciary, Assistant Attorney General John R. Bolton wrote: "In most instances, the persons so accused are not alive to defend themselves today. Moreover, some of the Commission's conclusions and its selection of evidence marshalled in support of its conclusions are suspect. These are matters best left to historical and scholarly analysis rather than debated by Congress." The letter also expressed the Department's opposition to reparations.

By enacting the 1948 American-Japanese Claims Act, Congress recognized long ago that many loyal Americans of Japanese descent were injured by the wartime relocation and internment program. Although the Commission's report challenges the amount of compensation chosen by Congress as inadequate, Congress has spoken after considerable debate, and there is no good reason to question that settlement now three-and-one-half decades later.

The Japanese American Citizens League states that the ultimate goal of their redress campaign is to help ensure that what Japanese Americans experienced in 1942 does not happen again to any other group of people in this country:

Our fundamental objective is to educate the American public of our experiences and thereby fortify the principles of the Bill of Rights and the Constitution. We are determined that Congress will not deny this basic objective of redress, for such denial would represent approval of the right of the government to abrogate the Constitution during times of national crisis. If this should happen, the rights of all Americans will be in jeopardy.

A special Leadership Conference on Civil Rights task force has been established to work for enactment of the bill. The task force is co-chaired by Grace Uyehara, Executive Director, Japanese American Citizens League/Legislative Education Committee; Wade Henderson, Associate Director, ACLU Washington National Office; David Brody, Director, Washington Office of the Anti-Defamation League; and Ralph G. Neas, Executive Director, LCCR. For additional information about the bill and the task force, contact Grace Uyehara at the JACL/LEC, 1730 Rhode Island Ave. Washington, D.C. 20036 (202)223-1240 or Wade Henderson, ACLU, 122 Maryland Avenue, N.E., Washington, D.C. 20002, (202)544-1681.

THE CONTINUING IMPACT OF GROVE CITY

While the Civil Rights Restoration Act of 1985 remains stalled in Congress, the Grove City decision continues to have a harmful impact on the Federal Government's ability to enforce the nation's civil rights laws.

The Grove City decision, 104 S.Ct. 1211 (1984), which found that the anti

discrimination prohibitions of four civil rights statutes extend only to the specific program or activity receiving the funds and not to the entire institution or entity receiving the funds, continues to limit severely the ability of the Federal Government to prevent discrimination. A report that provides numerous examples of the decision's impact on federal enforcement of the nation's civil rights statutes is available from the NAACP LDF, 806 15th Street, NW, Washington, D.C. 20005 (202)638-3278 or ACLU, 122 Maryland Avenue, NE, Washington, D.C. 20002 (202)544-1681. On large orders, shipping or postage may be charged. **Excerpts from the report, *Justice Denied: The Loss of Civil Rights After the Grove City College Decision*, follow:**

Limitations on the enforcement of Section 504 of the Rehabilitation Act of 1973...

-When traveling, what is the destination? Neil Jacobson, a man with cerebral palsy, found that the place to which he was flying was the key factor in determining the extent of his civil rights. When he attempted to buy a plane ticket for a trip from Birmingham, Alabama, to Los Angeles, California, Delta Air Lines refused to let him board the flight unless he signed a "medical release form." The form would allow the airline to refuse service or remove him at any point in the flight if it became necessary for the comfort and safety of other passengers. Mr. Jacobson sued in federal court, claiming that the airline was the recipient of three types of federal assistance and therefore was in violation of Section 504. Delta benefited from the following forms of federal funding:

1. direct payments for carrying U.S. mail;
2. subsidies for serving small communities; and
3. indirect assistance through federal support for airport construction, provision of weather reports, air traffic controllers, etc.

Despite Delta's obvious benefit from a broad range of federal programs, Mr. Jacobson lost his case. Why? Since he was traveling between two large cities, there was no jurisdiction. If, on the other hand, he had been flying between two small communities, based on the special subsidy program to the airline, he might have had a successful case under the post-Grove City College narrow interpretation of Section 504.

Segregated schools permissible in Fort Wayne, Indiana...

Race-based pupil assignment plans have been a way of life in Fort Wayne (Indiana) Community Schools for decades. In 1984 the Office for Civil Rights of the Department of Education (OCR/ED) issued formal findings based on extensive evidence that the school system had maintained segregated schools through the construction, expansion and closing of facilities, manipulation of attendance boundaries and assignment of teachers. When Fort Wayne officials refused to comply voluntarily with Title VI, OCR/ED sent the case to an administrative law judge, the first enforcement stage leading to a cutoff of federal funds. The school system responded by filing suit in federal court against the Department, claiming that the discrimination does not occur in any federally-assisted programs and therefore funds should not be terminated. [Administrative proceedings were

delayed for three months while the issue was litigated.]

Age discrimination cases affected...

A student at the University of Vermont charged that her dismissal from the Master's English program violated the Age Discrimination Act. [She said that] the professor who caused her dismissal had said that she was "too old" to get a degree. Despite federal money going to the University in the form of student financial aid money, this woman's complaint was never investigated. The Department of Education's Office for Civil Rights (OCR/ED) wrote back that "your dismissal from the Graduate English Program was not investigated because we found that the affected program was not funded by the Department of Education."

Sex discrimination permissible on college campuses...

Frances Zangrillo was a professor at the Fashion Institute of Technology in New York City which received almost a quarter of a million dollars in federal funds in 1983 and 1984. When she was denied seniority rights while on maternity leave, Ms. Zangrillo took two steps: she filed a Title IX complaint with the federal government and brought suit in federal court. Her case, it turned out, hinged not on whether she had indeed suffered discrimination, but on the definition of the program in which she was employed. Despite the large federal contribution to the Fashion Institute of Technology, both the administrative complaint and the lawsuit were dismissed because the funds could not be tied directly to the curriculum area in which she taught.

The Civil Rights Restoration Act of 1985 (H.R. 700/S. 431) which would restore full coverage to the civil rights statutes continues to be stalled in the House. The delay is due to amendments which would repeal long-standing Title IX regulations protecting students and employees against discrimination in education programs if they choose to have an abortion, and would broaden a Title IX "religious tenets" exemption so that it could be invoked by institutions that are religiously "affiliated" not just those that are religiously controlled. The Leadership Conference on Civil Rights continues to hold firm on its position that the bill should simply restore the civil rights statutes, and any amendments that change substantive law are unacceptable.

DEATH PENALTY BILL MOVING THROUGH THE SENATE

The Washington Office of the American Civil Liberties Union is coordinating opposition to a bill which provides that the death penalty can be imposed for peacetime espionage and attempted assassination of the President. The Supreme Court has held that because of the punishment's severity, it is appropriate only in extremely limited circumstances and then only in accordance with tightly drawn procedures (*Furman v. Georgia*, 408 U.S. 238 (1972)). This bill attempts to outline acceptable procedures for federal offenses.

The bill (S.239) was voted out of the Senate Judiciary Committee (12-6), but opponents were successful in adding amendments to limit the reach of the bill. Amendments were added to bar the execution of minors; to preclude the

execution of an accomplice for an offense causing death without proof that the defendant killed, attempted to kill or contemplated that lethal force would be used; and to clarify that the sentencer must consider all mitigating factors offered by a defendant as grounds for imposing a sentence other than death.

Opponents of the bill are determined to force Senate debate on troubling issues surrounding imposition of the death penalty. These include discrimination in the imposition of the death penalty, the lack of evidence showing a deterrent effect, and moral and constitutional concerns over the method of execution. Senator Carl Levin (D-MI) has agreed to lead the extended debate on the bill, to be joined by Senators Cohen, Evans, Harkin, Kennedy, Kerry, Mathias, Matsunaga, Metzenbaum, and Simon.

In the House, hearings were held on April 16 and May 7, 1986.

The issue of discrimination

One of the reasons many civil rights groups oppose the death penalty bill is the discriminatory manner in which the penalty is meted out. The ACLU reports:

A careful study of the death penalty between 1972 and 1977 showed that black killers and killers of whites were substantially more likely to receive the death sentence than others. In Florida, for example, a black offender convicted of killing a white person was forty times more likely to be sentenced to death than someone (white or black) who killed a black person.

A more recent study of death sentencing in Georgia, from 1976 to 1980, revealed that an individual convicted of murder was ten times more likely to receive a death sentence if the victim was white. During this period, 35 whites killed blacks, but only one was sentenced to death. Although 310 blacks killed other blacks, only eleven received the death penalty.

The NAACP has historically opposed the death penalty as inhumane, violative of the 8th amendment to the U.S. Constitution and discriminatorily applied against blacks.

A preliminary review of the literature by the National Council of La Raza found some evidence that Hispanics are discriminated against in capital punishment sentencing, and that the lives of Hispanic victims like Black victims are undervalued in the sentencing process. That is, those who kill Hispanics and Blacks are less likely to receive the death penalty than those who kill whites. Analysis of crime statistics for the state of Texas revealed that, regardless of the race of the offender, those who killed Whites received the death penalty about 40 percent of the time. Offenders who killed Blacks or Hispanics received the death penalty less than 1 percent of the time.

Moreover, the Federal Public Defender for the District of New Mexico in a letter to Senator Jeff Bingaman detailed the racially disparate impact that a federal death penalty would have on Indians.

If the current version of S. 239 were to pass, it would result in the applicability of the death penalty to all first degree murder cases [on

federal land]... In New Mexico the death penalty can only be imposed in those instances of first degree murder where there are... aggravating circumstances... The practical effect of this disparity would be that Indians [on federal reservations] would be subject to the death penalty in circumstances where other New Mexicans would not be. For example, any premeditated first degree murder, or murder in the course of arson, burglary, or robbery would carry a death penalty for a reservation Indian but not for a non-Indian New Mexican prosecuted in state court.

The Defender urged the Senator "to seek the deletion of murder and rape on federal land from the proposed death penalty bill for the reason that a federal death penalty will have a racially disparate impact."

The Leadership Conference on Civil Rights in a letter to the Senate stated: "as civil rights advocates, we are particularly concerned with the racially discriminatory manner in which the death penalty has been sought and obtained in most parts of the nation. Data collected by the NAACP Legal Defense Fund unequivocally show a link between the imposition of the death penalty and the race of the defendant..."

Persons interested in receiving additional information on the bill or learning about the coalition opposing the death penalty should contact Diann Rust-Tierney, ACLU Washington Office, 122 Maryland Ave., NE, Washington, D.C. 20002, (202)544-1681.

PARENTAL LEAVE BILL GAINS MOMENTUM

When she accepted a position at the National Institutes of Health six years ago, Dr. Joann Urquhart, then the only female physician in one of the best cardiology fellowship programs in the country, was told to "finish the pregnancy" before she began work. Unable to rush the gestation period along, Dr. Urquhart arrived at the nation's premier medical research institution five months pregnant. She was asked repeatedly how much time she planned to take off work after the baby was born; it was apparent that if she did not return quickly she would not be considered serious enough about her career to be given the resources she needed to do her research. Dr. Urquhart returned to work full time three weeks after her child was born and completed definitive research in her field. She was very reluctant to leave her daughter at such a young age, but was compelled to do so to avoid jeopardizing the career for which she had spent 13 years preparing. According to Dr. Urquhart, who testified at a Congressional hearing on the Parental and Medical Leave Act of 1986, the bill "is crucial because it establishes a norm for everyone so that it will not be held against those who choose to take parental leave."

8
The Parental and Medical Leave Act of 1986 would address the conflict between work and family described by Dr. Urquhart by requiring employers to provide 26 weeks of unpaid, job-guaranteed leave for all employees who are temporarily unable to work due to a serious health condition such as disability due to pregnancy, and 18 weeks of unpaid, job-guaranteed leave for employees who choose to stay home to care for a newborn, newly-adopted or seriously ill child. The bill would also set up a commission to recommend means for implementing wage-replacement during such leaves.

Originally introduced in the House a year ago by Representative Pat Schroeder (D-CO) as the Parental and Disability Leave Act of 1985 (H.R. 2020), the bill has won serious bipartisan support. On March 4, 1986, the bill was reintroduced as H.R. 4300, the Parental and Medical Leave Act of 1986. Representative William Clay (D-MO), Chair of the Subcommittee on Labor-Management Relations, joined Representative Schroeder in reintroducing the bill. Eighty-eight members have signed on as cosponsors of H.R. 4300. In the Senate, similar legislation (S. 2278) has been introduced by Senator Chris Dodd (D-CT).

In April, joint hearings were held by the House Subcommittees on Civil Service and Compensation and Employee Benefits, and the Subcommittees on Labor Standards and Labor-Management Relations. The bill has been ordered to be reported out of both the Post Office and Civil Service Committee and the Education and Labor Committee.

Opposition to the bill has surfaced from the U.S. Chamber of Commerce, which has pledged to fight any attempt to make parental leave a federal requirement. According to the Chamber, the imposition of federally mandated benefits would discourage the creation of new jobs and would particularly burden small employers. The Administration has not yet taken an official position on the bill. Supporters predict that if Congressional momentum continues, the bill could pass the House this session.

For additional information on the bill, contact Karen Keegan at LCCR, 2027 Massachusetts Ave, NW, Wash., D.C. 20036, (202) 667-1780.

UPDATE ON NORFOLK DESEGREGATION

Contrary to a June 17 story on page 1 of the Washington Post, the Supreme Court has not formally decided whether the Norfolk, Va. School Board will be permitted to abandon its desegregation plan and initiate a new "neighborhood" assignment system that will resegregate elementary schools.

The Norfolk Board successfully sought permission from the District Court and Court of Appeals for the Fourth Circuit to implement its plan (See March 1986 MONITOR). Lawyers for the black parents sought review in the Supreme Court. Aware that the Court might not decide whether to review the case until October, they asked for an injunction to prevent the Norfolk Board from reinstituting segregated schools while the petition was pending. It was this request that the Court denied by a 7-2 vote on June 16. Justices Marshall and Blackmun dissented and Justice Stevens would have expedited consideration of the appeal.

The Court will not decide whether to accept the main appeal before October.

LC EDUCATION FUND, INC.
2027 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 667-6243

Ralph G. Neas, Executive Director
Karen McGill Arrington, Deputy Director

The CIVIL RIGHTS MONITOR is published by the Leadership Conference Education Fund, Inc., an independent research organization which supports educational activities relevant to civil rights. The MONITOR is written by Karen McGill Arrington. William L. Taylor, Vice President of the LC Education Fund serves as Senior Editor. Editorial assistance is also provided by Arnold Aronson, President of the Fund. Items presented in the MONITOR are not to be construed as necessarily reflecting the views of the LC Education Fund. Legislative updates are for educational purposes and are not meant to suggest endorsement or opposition of any legislation. Subscriptions are available for \$30.00 a year (October - September). COMMENTS ABOUT THE MONITOR OR ANY ARTICLE CONTAINED IN THE MONITOR ARE MOST APPRECIATED.