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REHNQUIST NOMINATION MOVES TO FLOOR

The fight over the Reagan Administration's nomination of William H. Rehnquist to be Chief Justice of the United States will move to the Senate floor in September. On August 14, the Senate Judiciary Committee reported the nomination favorably by a vote of 13 to 5. (The Committee approved the nomination of Antonin Scalia as an Associate Justice by an 18 to 0 vote). Some Senators who voted for the Rehnquist nomination, among them Minority Leader Robert Byrd (D-W.VA) and Charles McMathias (R-MD), expressed reservations and civil rights groups vowed to take their case to the Senate floor.

Background

On June 17, 1986 in announcing the retirement of Chief Justice Warren E. Burger, President Reagan stated his intention to nominate Associate Justice William H. Rehnquist to replace Burger, and U.S. Court of Appeals Judge Antonin Scalia to replace Rehnquist. Four days of hearings were held on the Rehnquist nomination, and three days on the Scalia nomination. Civil rights groups while opposing both nominations, focused their attention on Rehnquist. The reasons were stated by Benjamin L. Hooks, Chair of the Leadership Conference on Civil Rights, in his testimony opposing the Rehnquist nomination. Hooks said: "For thirty-five years, William H. Rehnquist has consistently demonstrated a marked hostility to the victims of discrimination. He is an extremist, a man dramatically out of step with the bipartisan consensus on civil rights in this country." Hooks continued:

We believe that Mr. Rehnquist's extremism on civil rights is incompatible with that high and special office. Whatever the arguments over the scope

of the 14th amendment to the Constitution, we believe that it is unarguable that the three Civil War Amendments wrote into our basic charter a special national concern for the status and rights of those Americans whose ancestors came here as slaves. That group of Americans today, as when the Amendments were adopted, suffers the consequences of that terrible institution and the practices and attitudes it reflected and begat. One who is out of sympathy with those purposes cannot fulfill the responsibilities of the Chief Justice not only of the Supreme Court but of the Nation... It is our role here,...commensurate with our own history, to protest the proposed elevation of an enemy of civil rights.

Eleanor Smeal, President of the National Organization for Women, focused her testimony on Rehnquist's "reactionary" views on sex discrimination and the rights of women in our society. She said: "If his views on the legal status of women were to become the dominant view of the Court, there is no doubt that a half century of hard-won gains for women would be undone by the Court..." Smeal continued:

In the crucial constitutional areas of due process and equal protection under the law, which are guaranteed to us by the 14th Amendment to the U.S. Constitution, Justice Rehnquist has consistently opposed the review of sex-based classifications with any measurable level of scrutiny. He would uphold sex-discrimination as long as it was "rational." In real terms, this means that he would uphold sex discrimination whenever and wherever a legislator or other government official could come up with a traditional generalization about "all women." He would support sex discrimination on the grounds of administrative convenience alone.

Pre-Court Activities

Rehnquist's anti-civil rights opinions on the bench were foreshadowed by his anti-civil rights activities as a lawyer. These activities became a major issue in the hearings and Rehnquist's explanations placed his credibility in issue.

Voter Challenging... Rehnquist denied in 1971 and in his recent testimony that he ever challenged or intimidated minority voters while volunteering for the Republican party in Phoenix some twenty-five years ago. His testimony was contradicted by four witnesses who testified that they observed him challenging minority voters in Phoenix, Arizona in the early 1960's. Dr. Sydney Smith testified that while serving as a Democratic poll-watcher he saw Rehnquist along with one or two other men approach two black men waiting in line to vote, and state "You're not able to read, are you? You have no business being in line. I would ask you to leave." Dr. Smith characterized Mr. Rehnquist's actions as intimidation. Dr. Smith stated that his daughter and son (a registered Republican) convinced him that it was his patriotic duty to tell what he knew about the incident. "I am here so I won't lose the respect of my children."

A fifth witness, James J. Brosnahan, a former federal prosecutor in Phoenix, stated that he investigated charges of intimidation and challenging of minority voters at a Phoenix precinct in 1962, and had Rehnquist pointed out to him by unhappy voters as the person who had been doing the intimidating. Brosnahan stated that he spoke with Rehnquist and advised him that his

behavior was improper. Brosnahan indicated that he knew Rehnquist at the time, and remembered the incident because from that day he has thought differently about Rehnquist. After repeated suggestions from Senator Orrin Hatch (R-UT) that Brosnahan was probably confusing Rehnquist with a Republican challenger Wayne Benson, Brosnahan replied: "I didn't get Bill Rehnquist mixed up with anybody named Benson. I knew him then. And I could spot him now. And there's no question about that." In response to Senator Hatch's questioning of just how sure Brosnahan was that he saw Rehnquist, Brosnahan replied:

Do you think I really would be here to testify about the qualifications of the chief justice, after 27 years of trying lawsuits, if I wasn't absolutely sure? If it was even close, I would be at Jack's [in San Francisco] for my Friday afternoon lunch.

Brown v. Board of Education... Questions were also raised about a memorandum Rehnquist wrote analyzing the Brown v. Board of Education cases while serving as a law clerk to Associate Justice Robert Jackson in 1952. The memorandum urges support for the 1896 Supreme Court decision in Plessy v. Ferguson which upheld the concept of "separate but equal." Rehnquist now alleges that he was expressing Justice Jackson's views on the case, and that he had not formed an opinion on the merits of the cases. Justice Jackson joined in the unanimous Brown decision in 1954 which held the separate but equal concept unconstitutional. Mrs. Elsie L. Douglas, secretary to Justice Jackson for many years, stated in 1971 and in a August 8, 1986 letter to Senator Edward M. Kennedy (D-MA) that Mr. Rehnquist's explanation is inaccurate.

It surprises me every time Justice Rehnquist repeats what he said in 1971 that the views expressed in his 1952 memorandum concerning the segregation case then before the Court were those of Justice Jackson rather than his own views. As I said in 1971 when this question first came up, that is a smear of a great man for whom I served as secretary for many years. Justice Jackson did not ask law clerks to express his views. He expressed his own and they expressed theirs. That's what happened in this instance.

Rehnquist on the Court

The NAACP Legal Defense Fund in a review of Rehnquist's record since joining the Court in 1971 found that "among the 83 cases in which members of the Court have disagreed about the interpretation or application of a twentieth century civil rights statute, Justice Rehnquist has joined on 80 occasions for the interpretation or application least favorable to minorities, women, the elderly, or the disabled" (NAACP LDF August 8, 1986 Letter to Senator Strom Thurmond, Chair of the Senate Judiciary Committee).

On the Court, Rehnquist has been a lone dissenter in cases involving basic civil rights issues. In the first northern school desegregation case, from Denver, Colorado, Justice Rehnquist dissented alone (Keyes v. School Dist. No. 1, 413 U.S. 189, 254 (1973)). Rehnquist did not agree with the majority that Northern districts that deliberately engaged in practices of racial segregation of their schools committed violations of the Constitution in the same way as Southern districts that did so through statutes or official policies. He also attacked a landmark in the Court's modern civil rights jurisprudence -- the Green case of 1968 (391 U.S. 430) in which the Court -- unanimously -- disposed of the notion that the Constitution does not establish

an affirmative duty to integrate but only forbids discrimination.

Similarly, Rehnquist dissented alone in the Bob Jones Case (461 U.S. 574) when the Court rejected the Administration's decision to abandon the position that segregated private schools do not qualify for tax exemption under federal law. Bob Jones is the case in which the Justice Department shifted the Government to the side of the segregated schools. Justice Rehnquist espoused the view that the IRS regulation denying tax exempt status was unauthorized by Congress. The Justice was so eager to rule against civil rights that he would have reached out to decide that if Congress were to grant tax-exempt status to organizations that practice racial discrimination, that action would not constitute a violation of the Equal Protection Clause.

Other Concerns...

Questions about Mr. Rehnquist's veracity also arose concerning his testimony about homes purchased in Arizona and Vermont that carried restrictive covenants barring sale to nonwhites and Jews. At first he testified that he was unaware of the covenants. Then in a letter to the Judiciary Committee he admitted that his lawyer had sent him a letter advising him of the covenant on the Vermont property.

Questions were also raised concerning the Justice's failure to recuse himself from cases which presented issues on which he had worked while in the Justice Department. Branzburg v. Hayes, 408 U.S. 665 (1972), involved the government's attempts to subpoena unpublished information from news reporters. Rehnquist did not recuse himself from the case despite the fact that he had acted as a chief Administration spokesman for the subpoena power while serving in the Nixon Administration. Similarly, Laird v. Tatum, 408 U.S. 1 (1972), involved a challenge to the Nixon Administration's domestic military surveillance policy, a policy for which Rehnquist had expressed support during testimony before a Senate Judiciary Subcommittee while serving in the Administration. In both cases, the Supreme Court ruled 5-4 against the plaintiffs.

Others focused on the symbolism of confirming Rehnquist as Chief Justice. Senator Paul Simon (D-ILL) stated "the chief justice ought to be a symbol of justice for the country, just like the Statue of Liberty. Justice Rehnquist's record is not such that a lot of people are likely to view him as a symbol of justice." Althea Simmons, Director of the Washington Office of the NAACP, in discussing the Justice's lack of compassion for minorities and women reasoned that "even though a person is a genius, if he lacks compassion, it distorts reality and cripples objectivity."

Bill Moyer's commentary on CBS Evening News eloquently summarized the opposition to William Rehnquist.

We are told William Rehnquist is brilliant, the best and the brightest, so opponents of his nomination are advised to sit down and shut up, and not to question his credentials to be Chief Justice. But the issue isn't merely how sharp one's mind, how deep one's learning, how great the powers of pen and tongue. The issue is to what purpose such talents are given. When I was growing up, the argument that Blacks should remain second class citizens was often made by men with first class minds... They were dazzling

in defense of segregation, but they were blind. As the Civil Rights struggle began to take hold, they resisted it with all their learning and wisdom, William Rehnquist among them. He opposed the Supreme Court ruling that desegregated the schools, opposed the Civil Rights legislation of the 60's, opposed efforts in his home town to outlaw racial discrimination in public facilities...

We've come a long way since then, but not with the help of William Rehnquist... America is still trying to prove that a pluralistic, multi-racial society can work. We inch slowly and painfully forward, only to slip back when we cease to be vigilant. It is still a struggle, this quest for equal rights. And now we are about to get a Chief Justice who never believed in it in the first place, opposed it all along the way, and for all his learning and intellect, is no friend of it today.

SUPREME COURT REBUFFS JUSTICE DEPARTMENT ON AFFIRMATIVE ACTION

In two cases decided July 2, 1986, the Supreme Court rejected the Department of Justice's central position on affirmative action, namely, that only identifiable victims of discrimination can benefit from affirmative action. In repudiating the DOJ position, the Court strongly endorsed the use of racial goals in remedying past employment discrimination. Thus, employers found to have engaged in discrimination can be required to establish goals and timetables to increase the representation of minorities. The Justice Department's position would require an employer found guilty of discrimination only to promise to end the discrimination, and to hire any proven identifiable victims of the discrimination. The Department would also bar the use of goals and timetables, even when voluntarily agreed to in a consent decree. The decisions were widely viewed as a major defeat for Attorney General Edwin Meese and Assistant Attorney General William Bradford Reynolds who over the last five and a half years have been doggedly committed to the proposition that the Constitution prohibits the use of race conscious remedies such as goals and timetables.

In Local Number 93, International Association of Firefighters, v. City of Cleveland, 54 U.S.L.W. 5005 (1986)(No. 84-1999), the Court's 6-3 vote upheld a consent decree proposed by the city and the Vanguard, an association of black and Hispanic firefighters, which included goals for the promotion of minority firefighters. The opinion reads in part:

We have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII [which prohibits employment discrimination]...It is equally clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination... [As we concluded in Weber] it would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

In Local 28, Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission, 54 U.S.L.W. 4984 (1986)(No. 84-1656), the Court upheld 5-4 a court order requiring a New York sheet metal workers local to institute a minority membership goal of 29 percent to be achieved by July 31, 1987, and to establish a training fund to increase nonwhite membership in the apprenticeship program and ultimately in the union. The opinion states:

Petitioners, joined by the Solicitor General, argue that the membership goal, the Fund order, and other orders which require petitioners to grant membership preferences to nonwhites are expressly prohibited by 706(g)... which defines the remedies available under Title VII. Petitioners and the Solicitor General maintain that 706(g) authorizes a district court to award preferential relief only to the actual victims of unlawful discrimination. They maintain that the membership goal and the Fund violate this provision, since they require petitioners to admit to membership, and otherwise to extend benefits to black and Hispanic individuals who are not the identified victims of unlawful discrimination. We reject this argument, and hold that 706(g) does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination. Specifically, we hold that such relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.

Reaction to the decisions...

Civil rights leaders hailed the decisions as a major victory. Benjamin L. Hooks, Executive Director of the NAACP and Chair of the Leadership Conference on Civil Rights, described the decisions as a "great victory," and a "significant rebuke to the Reagan administration's pernicious efforts to destroy affirmative action" (Wash. Post, July 3, 1986, A11). Some business leaders also expressed strong support for the rulings. William McEwen, Director of Equal Opportunity Affairs for the Monsanto Company, and spokesperson for the National Association of Manufacturers discussed the importance of affirmative action as upheld by the court:

We have been utilizing affirmative action plans for over 20 years. We were brought into it kicking and screaming, but over the past 20 years, we've learned that there's a reservoir of talent out there, of minorities and women, that we hadn't been using before. We've had to practice better management. The byproduct of affirmative action is, it makes us treat all people better. We found that it works... I cringe to think what would have happened [if the court had ruled differently]...It's very, very difficult to identify those people who are victims of discriminatory acts (Wash Post, July 3, 1986).

The Justice Department, while grudgingly admitting defeat, asserted that the Court had accepted "the general position that racial preferences are not a good thing to have." Attorney General Edwin Meese added that "what they have done is carved out various exceptions to that general rule, even while affirming the rule itself." Assistant Attorney General Reynolds even asserted that the decisions would not alter his efforts to eliminate the goals and timetables requirements of Executive Order 11246 which requires federal

contractors to take positive steps including goals and timetables to bring women and minorities into their workforce. (Reynolds and Meese have been trying since August 1985 to eliminate this component of the Order. Secretary of Labor Brock, whose Department administers the Executive Order program, has waged a fight to retain the present Order. A Labor Department spokesperson was quoted as saying the rulings clearly supported the legal basis for goals, but the Administration's policy debate over goals would continue.)

Ralph Neas, Executive Director of the Leadership Conference on Civil Rights said Meese and Reynolds were engaged in "blatant misrepresentation. Their interpretations are just Orwellian. The Supreme Court has repudiated the Meese-Reynolds attempt to gut affirmative action."

The immediate impact...

Clarence Thomas, Chair of the Equal Employment Opportunity Commission, facing opposition from Senate civil rights proponents to his renomination, did an about-face on his agency's position on goals and timetables. In testimony before the Senate Labor and Human Resources Committee, he admitted that in light of the Supreme Court decisions EEOC's directive not to use goals and timetables was incorrect. He pledged to instruct EEOC attorneys "to seek goals and timetables and race-and sex-conscious remedies permissible under the ruling of the Supreme Court." Thomas admitted that he still has personal reservations about using such remedies, but acknowledged that the Court's acceptance of them "is the law of the land."

While Meese and Reynolds continued to portray the decisions as "limited defeats," the DOJ has begun "quietly dropping" some of the lawsuits it filed last year against more than 50 state and local governments to force revision of affirmative action consent decrees which require goals and timetables. Suits have been dropped in Indianapolis and Chicago. Assistant Attorney General Reynolds embarked on his anti-goals and timetables campaign in 1984 asserting that the Stotts case, 104 S.Ct. 2576, (1984), which addressed the issue of layoffs, applied to hirings and promotions as well. The Court had ruled only that a bona-fide seniority system takes precedence over an affirmative action plan which does not address the issue of layoffs.

A Reynolds assistant stated before an American Bar Association meeting in August that the Department's challenges to some of the decrees were withdrawn because the Supreme Court in Vanguards held such plans acceptable. DOJ's original attempt to overturn those plans was "premised upon a view of the law that the Court tells us is not correct" the Deputy Assistant Attorney General admitted (Wash Post, Aug. 13, 1986).

For a comprehensive description of the three affirmative action cases addressed by the Court this year, see the December 1985 CIVIL RIGHTS MONITOR. For a discussion of the decision in Wygant v. Jackson Board of Education, see the June 1986 CIVIL RIGHTS MONITOR.

COURT ACCEPTS AFFIRMATIVE ACTION CASES FOR THE NEXT TERM

The Supreme Court apparently is ready to deal with other unanswered questions on affirmative action. It has granted review of two other decisions for the

1987 term, beginning in October: (1) Johnson v. Transportation Agency, Santa Clara County, Calif. and Service Employees Union Local 715, 748 F.2d 1308, (9th Cir. 1985), cert. granted, 54 U.S.L.W. 3861 (U.S. July 7, 1986) (No. 85-1129), and (2) United States v. Paradise, Paradise v. Prescott, 767 F.2d 1514, (11th Cir. 1985), cert. granted sub nom., U.S. v. Paradise, 54 U.S.L.W. 3961 (U.S. July 7, 1986) (No. 85-999).

JOHNSON

In the Johnson case the Court may determine whether an agency which implemented an affirmative action plan by promoting a qualified women over a "more qualified" man runs afoul of Title VII. Attorneys for Mr. Johnson maintain that the agency promoted a less-qualified female candidate over him, in compliance with an affirmative action plan "adopted solely to eliminate a statistical disparity in the work force, unrelated to sex discrimination." The Santa Clara County transportation agency, in a brief filed in opposition to a petition for review, states that the issue before the court is whether:

...an employer [can] consider gender as a factor in promoting a qualified woman where none of 238 persons employed in the job category were female and where the employer's voluntary affirmative action plan set no quotas, but permitted gender to be a factor in employment decisions until such time as the employer's workforce is representative of the local area labor force?

Background

In 1978 the transportation agency voluntarily adopted an affirmative action plan "to attain a work force whose composition in all major job classifications approximated the distribution of women, minorities, and handicapped persons in the County labor market." The plan did not specifically discuss discrimination, but stated "that women had been traditionally underrepresented in the relevant job classifications" and recognized an "extreme difficulty in increasing 'significantly the representation' of women in certain of those technical and skilled-craft jobs."

At that time the agency had 238 skilled craft positions not one of which was held by a woman. In 1979, Paul Johnson and Diane D. Joyce applied for a road dispatcher position. Both applicants were long-time agency employees with similar experience. Ms. Joyce, the only female applicant, placed fourth on an oral examination with a score of 73. Mr. Johnson placed second with a score of 75. After a second oral interview, Mr. Johnson was recommended for the job by the examining board. However, the Affirmative Action Coordinator recommended to the agency Director that Ms. Joyce be appointed to the position pursuant to the affirmative action plan. Ms. Joyce was promoted to the position, and Mr. Johnson filed a suit with the Equal Employment Opportunity Commission and received a right-to-sue letter. Johnson claimed the agency's promotion of Joyce over him violated Title VII's prohibition against sex discrimination.

The district court found that Mr. Johnson was the better qualified applicant, and that but for the issue of gender he would have been promoted to the position. The agency was ordered to promote Mr. Johnson, award him back pay, and desist from further discrimination. The judge reasoned that the affirmative action plan did not meet the standards established by the Supreme

Court in Weber, 443 U.S. 193 (1979) which found affirmative action plans permissible if they:

1. are designed to eliminate old patterns of racial [gender] segregation and hierarchy; 2. do not unnecessarily trammel the interests of the white [male] employees; 3. do not create an absolute bar to the advancement of white [male] employees; and 4. are established as a temporary measure, not intended to maintain racial [gender] balance but simply to eliminate a manifest racial [gender] imbalance.

The Agency appealed and the U.S. Court of Appeals for the Ninth Circuit reversed the trial court's decision.

We conclude that the Agency's plan, like the Weber plan, "falls on the permissible side of the line." We hold that the Agency's selection of Joyce, pursuant to the plan, was a lawful effort to remedy an entrenched pattern of manifest imbalance. We are not unsympathetic to the complaint of Johnson and others before our court that employers' attempts to remedy past discrimination sometimes visit burdens upon individual members of the non-minority group. As the Agency plan recognizes, however, "the mere existence of an opportunity for members of [discriminated] groups to apply for jobs ... will **not** by itself result in timely attainment of parity for currently underrepresented groups." Affirmative action is necessary and lawful, within the guidelines of Weber, to remedy long-standing imbalances in the work force.

Mr. Johnson appealed and on July 7, 1986 the Supreme Court agreed to review the case.

PARADISE

The question before the Court in Paradise is whether a one-black-for-one-white promotion plan imposed upon a state agency by the district court is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the Constitution. In the Vanguards case, the Court approved such a promotion plan, but it had been instituted pursuant to a consent decree. Solicitor General Charles Fried, and Assistant Attorney General Wm. Bradford Reynolds state in their petition for a writ of certiorari that the question is whether the plan is impermissible because "it accords preferential treatment to black applicants for promotion who have not been identified as actual victims of racial discrimination."

Background

In 1972 a federal district court found that the Alabama Department of Public Safety had "engaged in a blatant and continuous pattern and practice of discriminating against blacks in hiring." The district court found that "in the thirty-seven-year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers. This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment." The state was ordered to hire one black trooper for each white trooper hired until the force was approximately 25 percent black. The Fifth Circuit Court of Appeals upheld the order.

In 1975 and 1979 additional relief was granted, and the issue of promotions for minority state troopers arose. After the parties were unable to agree on a promotion procedure, the district court on December 15, 1983 ordered that at least 50 percent of all promotions to corporal and to higher ranks be filled by qualified black troopers. The court found that:

On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, **there is still not one black.** Of the 25 captains, **there is still not one black.** Of the 35 lieutenants, **there is still not one black.** Of the 65 sergeants, **there is still not one black.** And of the 66 corporals, **only four are black.** Thus the department still operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is still without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers.

On February 6, 1984 eight black and eight white troopers were promoted to the corporal position. The United States, the Alabama Department of Public Safety, and white state troopers appealed to the U.S. Circuit Court of Appeals for the Eleventh Circuit. That court affirmed the district court's one-for-one promotion plan on August 12, 1985. Review was granted by the Supreme Court on July 3, 1986.

JUSTICE DEPARTMENT'S POSITION ON AIDS BLASTED

The Consortium for Citizens with Developmental Disabilities and the Leadership Conference on Civil Rights have called upon the Justice Department to withdraw, reconsider, and revise its position on Section 504 of the Rehabilitation Act of 1973 as it applies to Acquired Immune Deficiency Syndrome (AIDS). Despite Section 504's prohibition of discrimination against handicapped persons by employers who receive federal funds, the Justice Department asserts that such employers can discriminate against persons with AIDS if the basis of the discrimination is fear of contagion, and not the disabling effects of the disease. DOJ further asserts that asymptomatic carriers of AIDS have no "impairment" for Section 504 purposes and, therefore, are not protected by the law regardless of the nature or motivation of employer actions against such persons.

[W]e have concluded that section 504 prohibits discrimination based on the disabling effects that AIDS and related conditions may have on their victims. By contrast, we have concluded that an individual's (real or perceived) ability to transmit the disease to others is not a handicap within the meaning of the statute and, therefore, that discrimination on this basis does not fall within section 504...[Further] it seems clear that

a

person who carries but is personally immune to a communicable disease cannot on that basis qualify as handicapped under section 504... [T]he mere fact that he is, was, or is thought to be able to communicate a debilitating disease, standing alone is not enough (Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Re: Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus).

The medical community disagrees...

The Justice Department's memorandum was prepared in response to a request from the Department of Health and Human Services which has received complaints from health workers alleging discrimination because they have AIDS, or AIDS related complex, or they test positive for AIDS antibodies. After receiving the DOJ memorandum, the Assistant Secretary for Health found it necessary to issue a press release to emphasize "that there is no medical or scientific evidence that the AIDS virus is spread through casual contact occurring in the workplace, schools or similar settings."

In contrast to the Justice Department position, the American Medical Association in an amicus curiae brief filed in the Supreme Court in the case of Arline v. Nassau County School Board, 772 F.2d 759 (11th Cir. 1985), cert. granted, 54 U.S.L.W. 3687 (U.S. April 21, 1986)(No. 85-1277), argues that section 504 protects persons with AIDS and other infectious diseases from discrimination "based on irrational concerns that they might spread the disease... Although one effect of a handicap may be that it poses a risk of harm to others, employers should not ... be allowed to discriminate irrationally against a handicapped individual based on a fear of such risk," the brief reasons. The Arline case involves the firing of a teacher because of her "chronic susceptibility" to tuberculosis, but lawyers on both sides have stated that the case will have a greater impact on persons with AIDS.

Civil rights community responds...

In a letter sent to Attorney General Edwin Meese, on August 11, the Consortium and the Leadership Conference state: "The interpretation of Section 504 contained in the DOJ memo cannot be allowed to stand since it assaults the very purpose of this statute, disregards clear Congressional intent in enacting Section 504 and seriously undermines the scope and applicability of this crucial civil rights law." The letter continues:

Specifically with regard to AIDS, the Department of Justice memo is flawed by the implicit assumption that AIDS is easily communicable. Employer fear in this context is irrational precisely because all medical evidence shows AIDS to be communicable only through blood or semen. Of the 22,000 documented AIDS cases in the United States, there is no confirmed case of transmission through casual contact. Thus, to allow irrational fear to support AIDS discrimination is as sound medically and legally as allowing similar discrimination on the basis of employers' fears that an employee with cancer or epilepsy will infect his or her co-workers. When irrational fear is introduced as a factor in employment decisions, no one's civil rights are safe. Negative stereotyping of groups of people will replace individualized assessments, and the very purpose of Section 504 will become

unattainable.

Representative Henry A. Waxman (D-CA) at a press conference on August 11, 1986 stated that "A sound legal opinion -- consistent with the medical facts and with the disability law -- was drafted by the Justice Department and rejected by the Administration. That position is available to the Administration still. The Attorney General should withdraw the Cooper memorandum and replace it with one stating the government's commitment to public health and to protection from discrimination." Rep. Waxman said the only justification he could see for the memo was DOJ's desire to respond punitively toward homosexuals.

For additional information, contact Curt Decker at the Consortium, (202)387-1968, or Bonnie Milstein at the Center for Law and Social Policy, (202)328-5140.

HANDICAPPED CHILDREN'S PROTECTION ACT BECOMES LAW

On August 6, 1986 the President signed into law the Handicapped Children's Protection Act. The bill, a major civil rights victory, amends the Education for All Handicapped Children Act (P.L. 94-142) to provide for the payment of legal fees for parties who successfully sue under the Act. P.L. 94-142 provides funds to assist states and local agencies in educating handicapped children. Parents must be allowed to assist in the development of an Individual Education Plan (IEP) for their children and are entitled to a hearing by the state education agency in the event they find the IEP inappropriate. If dissatisfied with the hearing decision, they can file suit in state or federal district court.

The bill was introduced in response to the Supreme Court's decision in Smith v. Robinson, which established that while P.L. 94-142 should be the primary legal device for enforcing handicap rights in education, it does not authorize payment of legal fees. The bill had been stalled since its passage by both the House and Senate last year because of two amendments unacceptable to the disability community. The Senate version had an amendment, pushed by Senator Orrin G. Hatch (R-UT), which provided that any organization receiving federal, state, or local monies could be reimbursed only for the actual cost of bringing the litigation and could not receive attorneys fees at the prevailing market rate. The 'cost based provision' would have penalized poor families who generally have access only to public-interest and legal services lawyers, because school districts would have had much less incentive to settle with these lawyers, than with private attorneys. Operating under such a provision, poor people's lawyers would have had limited resources with which to represent their clients. This amendment was also seen as an attempt to limit the civil rights activities of legal service type organizations. In the House bill, a "sunset" amendment would have restricted attorneys fees for the administrative process that precedes court action to four years. This could have led school districts to delay cases to allow the four year period to expire.

Both restrictive amendments were dropped in Conference as opponents successfully argued that the amendments would place an undue and unique burden on the parents of poor handicapped children, a major proportion of whom are minorities. Senator Lowell P. Weicker Jr. (R-CONN) was quoted as saying: "Without this remedy, many of our civil rights would be hollow pronouncements

available only to those who could afford to sue for enforcement of their rights" (Cong. Quarterly, July 26, 1986, p. 1690).

A notable feature of the bill is a retroactive provision allowing successful parties to all cases initiated and pending since the Supreme Court's decision to collect legal fees.

EQUAL ACCESS FOR THE DISABLED SOUGHT ON AIRLINES

On June 27, the Supreme Court in a 6-3 decision held that Section 504 of the Rehabilitation Act of 1973 was not applicable to commercial air carriers who were not direct recipients of federal financial assistance, Department of Transportation v. Paralyzed Veterans of America, 54 U.S.L.W. 4854, June 27, 1986 (No. 85-289). The Court held that Section 504's scope is limited to those who actually receive federal monies and does not cover airlines because "it is clear that the airlines do not actually receive the aid; they only benefit from the airports use of the aid." Justice Thurgood Marshall in the dissenting opinion wrote:

The appropriate question is... not whether commercial airlines 'receive' federal financial assistance. Rather, it is whether commercial airlines are in a position to 'exclud[e handicapped persons] from the participation in,... deny them] the benefits of, or ... subjec[t them] to discrimination under' a program or activity receiving federal financial assistance or conducted by an Executive agency. I believe they are, and I therefore dissent.

The case was initiated to prevent practices by some airlines such as requiring the blind to sit on blankets in case they are incontinent or requiring the signing of waivers of liability for the transport of wheelchairs.

The Air Carrier Access Act of 1986, sponsored by Senator Robert Dole (R-KAN) and Representatives John Paul Hammerschmidt (R-ARK) and Norman Mineta (D-CA), and introduced in response to the decision, would amend Section 404(a) of the Federal Aviation Act of 1958 to require the Secretary of Transportation to issue regulations ensuring "nondiscriminatory treatment of qualified handicapped persons consistent with the safe transportation of all passengers" (Gordon H. Mansfield, Paralyzed Veterans of America, July 31, 1986 letter to Ralph Neas, Executive Director, LCCR).

Background

In 1983 the Paralyzed Veterans of America, the American Coalition of Citizens With Disabilities, and the American Council of the Blind challenged the Civil Aeronautics Board's (CAB) regulations implementing Section 504 of the Rehabilitation Act of 1973. Specifically, they challenged CAB's reasoning that Section 504 provided jurisdiction only over those carriers that receive funds under a program that subsidizes airlines for serving small communities.

The Court of Appeals for the District of Columbia agreed with the challengers that Section 504 gave the CAB jurisdiction over all air carriers due to federal funding of airport and airway construction, and federal support through air traffic controllers. The Supreme Court, however, found the

appellate court's reasoning "overbroad and unpersuasive" and reversed and remanded the case.

The Paralyzed Veterans of America has stated that passage of the legislation "will provide the opportunity to secure proper protection for disabled air travelers and a clear enunciation of air carriers' responsibility":

During the promulgation of regulations, PVA, along with other representatives of major disability rights organizations hopes to encourage, 1) comprehensive coverage of the rule to all commercial air carriers; 2) a definition of qualified handicapped individuals to include an interpretation consistent with the letter and spirit of Section 504 of the Rehabilitation Act of 1973, as amended; 3) provision for airline personnel and equipment to assist in enplaning and deplaning; 4) prohibition of unreasonable requirements (i.e. sitting on blankets, signing waivers of liability for the transport of wheelchairs); 5) requiring that handicapped persons be accompanied by an attendant; 6) encourage the use of on-board aisle chairs, and other aids wherever feasible; 7) making reasonable accommodations for the storage of battery powered wheelchairs; and 8) distinguishing handicapped persons from those who are sick.

For additional information, contact the PVA at (202) 872-1300, 801 "18th" Street, NW, Washington, D.C. 20006.

UPDATE ON CIVIL RIGHTS COMMISSION

On August 14, 1986 the Senate Appropriations Committee joined the House of Representatives in slashing the funds of the Civil Rights Commission. The Committee reported out an appropriation bill which reduces the Commission's budget by 50 percent and places restrictions on the expenditure of the monies. In fiscal year 1987 the Commission would receive \$6 million, down from \$11.8 in 1986. Further, the funds could not be used to employ consultants, temporary or special needs appointees, or more than 10 Schedule C employees (political appointees) of which 8 would be special assistants to the commissioners. The Committee also limited the number of days commissioners and their special assistants could bill the government, and the grade level at which special assistants could be paid. The agency is also prohibited from making any new, continuing or modifications of contracts for performance of mission-related external services.

The Committee's action responded to a General Accounting Office audit which found serious mismanagement at the agency and detailed abuses in personnel practices, travel payments, and financial records. Specifically, GAO found that the Commission had hired consultants and temporary and political employees in place of career staff, and that while Commissioners are appointed as part-time employees of the Federal Government, Chairman Clarence Pendleton and his assistant had billed the government at an almost full-time rate. In FY 1985, Pendleton billed the government for 240 days (assuming a 5 day work week, there are 260 days in a year) for a total of \$67,334. In FY 1987, the Chair would be limited to 100 days, so that assuming the same rate, the Chair would receive a maximum of \$28,056. Similarly, the Chair's assistant who received \$41,328 for 239 days in 1985 would be limited to 150 days in 1987 at a GS level 11 or approximately \$20,000.

In July the House passed an appropriation bill that eliminates future funding for the Commission. An amendment offered by Rep. Julian Dixon (D-CA) and accepted by a 26-17 vote in the House Appropriations Committee provides \$11.8 million to be used to close down the operations of the agency by December 31, 1986. If the Senate Appropriations Committee's provision passes the full Senate in September, the differences will be worked out in conference. The compromise is sure to curtail the Commission's operations.

EFFORTS TO GUT VOTING RIGHTS ACT REJECTED

In Thronburg v. Gingles, decided June 30, 1986, the Supreme Court ruled unanimously that Congress clearly intended that local election laws may be discriminatory if their result, regardless of the intent, is to dilute minority voting strength. The ruling gave strong support to the 1982 amendments to the Voting Rights Act, which the Justice Department had sought to weaken. The Court further found that the occasional election of a minority candidate does not prove the absence of discrimination.

The case involved a North Carolina redistricting plan which Black voters alleged diluted their voting power. The multimember districts engulfed concentrations of black voters thus preventing them from electing their own candidates. In another area, the plan fractured into separate voting minorities a concentration of black voters.

The Administration, which opposed Congressional efforts in 1982 to strengthen the Voting Rights Act -- acquiescing only when it became apparent that a Presidential veto would be overridden -- had attempted in this case to do what it couldn't do in Congress, weaken the Voting Rights Act. The Department of Justice had filed a friend of the court brief in the case asserting that "minority voters have no right to the creation of safe electoral districts merely because they could feasibly be drawn." Further, the brief contended that since some blacks had won under the multimember district system, "the district court erred by concluding that use of that system "results" in a denial of "equal access" to the electoral process for minorities."

Julius Chambers, who argued the case for the NAACP Legal Defense and Educational Fund, said the "opinion gives us a powerful new tool for ensuring the equal rights of minorities to register, to vote and to have their votes counted with equal weight" (Wash Post, July 1, 1986).

For a thorough description of the case, see the CIVIL RIGHTS MONITOR, October 1985.

NOTE: Bill Taylor, Vice President of the LC Education Fund, will be leaving his post as Director of the Center for National Policy Review at the end of August. He will have offices at the Advocacy Institute, 1730 M Street, NW, Suite 600, Washington, D.C. 20036, (202) 659-5565. He will specialize in litigation and other forms of advocacy on behalf of children and in civil rights, and will continue to serve as Vice President of the FUND and as Senior Editor of the MONITOR.

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