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JUSTICE CONTINUES ITS ATTACK ON THE VOTING RIGHTS ACT

Having failed in Congress and the Supreme Court to weaken the protections of the Voting Rights Act, the Justice Department is trying again, this time by changing its own Section 5 regulations. Under the Voting Rights Act, jurisdictions that are covered by Section 5 (those with a history of low registration and voting) must submit all proposed electoral changes to the Department, which is required to veto any that are discriminatory. In a speech to the American Political Science Forum on August 29, William Bradford Reynolds, Assistant Attorney General for Civil Rights, stated that the Department of Justice will no longer object to some voting changes that have a discriminatory result.

The new policy means that the Justice Department, in reviewing proposed voting changes from jurisdictions with a history of discrimination, will allow a voting change that has a discriminatory result on minority voters if it replaces a similarly discriminatory practice and the extent of the discrimination remains the same or decreases somewhat. This is contrary to directions given by Congress in amending the Voting Rights Act in 1982. In the 1982 amendments, Congress made clear that a "results standard" was to be used in judging proposed election changes under Section 5 as well as other types of electoral practices covered by Section 2 of the law. Application of that standard would cause Justice to object to a proposed voting change that provides minority voters with less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. A proposed change would succeed or fail on its own, not through a comparison with the practice it would replace.

Frank R. Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights, called the plan "a dramatic retreat from the policy the Justice Department has been implementing since 1982. It's a flouting of the intent of Congress. It would mean the Justice Department would be approving a large number of racially discriminatory voting law changes that would violate the Voting Rights Act" (Wash Post, Aug., 30, 1986, A1). And, the only recourse minority voters would have is to challenge the practice in court, during which time the discriminatory practice would remain in effect. Section 5 was enacted in 1965 to deal effectively with the tactics of some Southern jurisdictions which kept black citizens disenfranchised by replacing one discriminatory practice with another as soon as the first was struck down by the courts. Under Section 5, a change is not to go into effect if DOJ determines that it is discriminatory. Further, under Section 5, the burden is on the jurisdiction to prove that the practice is not discriminatory. In litigation the burden is on the plaintiff minority voters to prove discrimination.

Senate Majority Leader Robert Dole, a bipartisan majority of the Senate Judiciary Committee and the four primary House sponsors of the 1982 extension have signed letters to Attorney General Edwin Meese expressing their concern over reports that the Justice Department will no longer object to changes that violate Section 2 of the Act. A letter from the primary House sponsors of the 1982 extension of the Voting Rights Act reads, in part:

Congress' intent in 1982 was clear: the Department should not preclear changes that violate Section 2. The Senate Judiciary Committee report -- "the authoritative source for legislative intent," Thornburg v. Gingles, 54 U.S.L.W. 4877, 4881 n. 7 (June 30, 1986) -- states:

In light of the amendments to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.

Senator Robert Dole in his letter to the Attorney General wrote:

As one who was integrally involved in the 1982 extension effort, I have a vital interest in assuring that the Voting Rights Act is interpreted in accordance with sound policy and consistent with Congress' intent. Preclearing voting changes that violate Section 2 would threaten the integrity of Section 5 as a barrier to all illegal voting discrimination and be in direct conflict with that law's legislative history.

I hope I can receive your assurance that the Department will continue to object to any voting law change that violates Section 2.

To understand the extent to which the Justice Department position represents a retreat in its enforcement of the Voting Rights Act, it is necessary to examine the scope of Sections 5 and 2 of that Act and what Congress had in mind in its 1982 amendment. The following examination relies heavily on a memorandum: The Justice Department's Retreat on Voting Rights Act Enforcement: The Current Controversy on Enforcement of Section 5 of the Voting Rights Act by Frank R. Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law.

The 1982 Amendments to the Voting Rights Act

In 1982, after a year-and-a-half-long legislative battle and over the opposition of the Reagan Administration, bi-partisan coalitions in both houses of Congress by overwhelming votes extended the protections of Section 5 of the Voting Rights for 25 years and amended Section 2 of the Voting Rights Act to eliminate the requirement of proving discriminatory intent.

Section 5 of the Act, which currently is applicable to nine states (mostly in the South and Southwest) and parts of eight others, requires Federal approval ("preclearance") of any voting law changes, no matter how minor, before they may be implemented. Under Section 5, the state or locality has the burden of proving that the proposed change does not have a racially discriminatory purpose and will not have a racially discriminatory effect.

Section 5 has been the heart of the Act as it addressed the practice of jurisdictions replacing one discriminatory practice struck down in court with another discriminatory practice. Since Section 5 was first enacted in 1965 the Justice Department has objected to 584 submissions involving 1,404 voting law changes. Section 5 objections have been a critical factor in blocking efforts to dilute minority voting strength and to prevent the election of minority elected officials. For example, in part as a result of Section 5, more than half of the nation's 6,400 black elected officials are in jurisdictions subject to Section 5 preclearance.

However, the effectiveness of Section 5 was limited by a 1976 Supreme Court decision. In that case (Beer v. United States, 425 U.S. 130) the Court limited the Section 5 "effect" test to block only voting law changes which put minority voters in a worse position than they were before the change was adopted (the "Beer retrogression standard"). Thus, under this Beer retrogression standard, if a redistricting plan was 80 percent discriminatory, and the authorities adopted a new plan which was only 60 percent discriminatory, in the absence of evidence of discriminatory intent the new plan would pass muster under Section 5 because it actually improved the position of minority voters by 20 percent.

Section 2 of the Voting Rights Act, unlike Section 5, applies to all jurisdictions in the nation and permits court challenges to discriminatory voting practices. In 1980, the Supreme Court in City of Mobile v. Bolden decided that Section 2 was governed by an intent test, making discrimination difficult to prove. Congress responded in 1982 by amending Section 2 to specify a results test. Amended Section 2 describes a discriminatory result as any practice that provides minority voters with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The Section 2 "results" test recently was sustained by the Supreme Court in the Thornburg v. Gingles Supreme Court decision of June 30, in which the Court rejected efforts by the Administration to restrict and undermine the legal standards applicable in Section 2 cases [See CIVIL RIGHTS MONITORS, October 1985, August 1986].

Does Section 5 Incorporate the Section 2 "Results" Standard? The Intent of Congress

One of the issues before Congress when it was debating the 1982 amendment to

Section 2 of the Act was whether the Justice Department or the D.C. District Court, in reviewing requests for preclearance of voting law changes by covered jurisdictions under Section 5, should apply the new Section 2 "results" test. Each time that issue was addressed, the congressional committee or key legislators indicated their intent that the Section 2 standard should be applied in Section 5 proceedings.

The report of the Senate Judiciary Committee, which contains the definitive statement of how the new Section 2 is to be interpreted and applied, states: "In light of the amendment to Section 2, it is intended that a Section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2."

The Justice Department's Interpretation Until Now

Until now, the Justice Department has taken the position that Section 5 incorporates the Section 2 "results" test. A brief filed in 1983 in a Section 5 lawsuit so stated:

Thus, when the legislative history to the Voting Rights Act is examined...the inescapable conclusion is that Congress intended that Section 5 preclearance be denied if it is determined that a voting procedure violates Section 2.

For the above reasons we believe that the Section 2 standard is applicable in Section 5 proceedings.

Reynolds took the same position in new proposed regulations for the administration of Section 5 published on May 6, 1986.

The Consequences of this Policy Change

Is the change important? Concerned members of Congress, civil rights lawyers, and community activists who have been dealing with voting rights issues know that this change represents a major reversal of administration policy with substantial consequences. Under the policy proposed by Reynolds, the Department will preclear election changes which deny minority voters an equal opportunity to elect representatives of their choice.

Nevertheless, Reynolds has attempted to minimize the impact of the change, saying that the change is "no big deal."

Why is the Section 5 review standard important if the Justice Department says it will file suit anyway? Reynolds has argued that whether or not a voting law change violates Section 2 is too complicated to be determined in an administrative proceeding and is better left to the courts in a litigation setting with a full-scale trial.

The assertion is contradicted by existing practice. In numerous cases involving Section 5 submissions to the Department of Justice, the Department has analyzed the voting and electoral conditions in the covered community and made determinations meeting all the legal criteria relevant to a Section 2 violation, such as whether there is a past history of discrimination, whether minority-supported candidates have been defeated by white bloc voting, and the

like. Further, if any state or locality is dissatisfied with a Justice Department Section 5 objection, it has the option of seeking preclearance in D.C. District Court in a brand new proceeding with a full trial and legal protections.

Conclusion

Unless this recent policy change is reversed it is likely to have major consequences for the enforcement of the Voting Rights Act. Voting law changes will be approved under Section 5 of the Voting Rights Act, unless there is direct evidence of discriminatory intent or the change significantly diminishes preexisting minority voting strength.

Interested persons should share their views with Attorney General Edwin Meese and with Assistant Attorney General for Civil Rights William Bradford Reynolds, as well as with their Representative and Senators. Civil rights activists are working with the Congressional architects of the Voting Rights Act to prevent dismantling of the Act's protections.

BOTH HOUSES OF CONGRESS REPUDIATE CIVIL RIGHTS COMMISSION

Before adjournment, the House and Senate in Committee worked out a compromise on FY 1987 funding for the U. S. Civil Rights Commission which substantially reduces the Commission's budget and restricts use of the monies.

The Senate had reduced the Commission's appropriation by 50 percent --from \$11.8 to \$6 million -- and placed restrictions on the expenditure of the monies while the House eliminated future funding for the Commission, with \$11.8 million provided to close down the agency by the end of 1986.

The bipartisan compromise provides \$7.5 million for FY 1987, with \$2 million to be used for the Regional Offices, and \$700,000 for the Office of Federal Civil Rights Evaluation. The Staff Director had planned to close the Regional Offices, and to merge the Evaluation Office with the Office of General Counsel. Senators Warren B. Rudman (R-NH) and Neal Smith (D-IA) in a letter to the Commission Chair reiterated the intent of the Conference Committee concerning the Commission's appropriations.

The conference agreement... earmarks \$2,000,000 for regional offices to be operated by the Office of Regional Programs and \$700,000 for Federal civil rights monitoring to be performed by the Office of Federal Civil Rights Evaluation. In earmarking funding for civil rights monitoring activities, the conferees intend that the Office of Federal Civil Rights Evaluation increase its monitoring of Federal civil rights enforcement activities.

Additional restrictions provide that the agency may not spend more than \$20,000 on consultants, \$40,000 on mission-related contracts, or \$185,000 on temporary or special needs employees. Additionally, the agency may not employ more than 4 Schedule C employees (political appointees), and Special Assistants to the Commissioners are limited to 150 billable days at a GS 11 level. Similarly, the Chair may not bill the agency for more than 125 days, and the other Commissioners are limited to 75 days.

The Congressional action responded to a General Accounting Office audit that 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.

Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights, characterized the congressional action as "a bipartisan repudiation of the reconstituted Civil Rights Commission, which has become a sham and a national disgrace. Not one member, Democrat or Republican, stood up in committee or on the floor of the House or Senate to defend the commission" (Wash Post, 10/19/86, A11). Mr. Neas in a prepared statement said "The Leadership Conference applauds the bipartisan attempt to do something about the disgraceful situation at the Commission. Regrettably, the Commission has become a perversion of its original statutory role. Indeed, for the past several years, the Commission has been nothing but a propaganda office for the Meese Department of Justice."

Al Latham, staff director of the Commission, was quoted to say "We are disappointed as much about the earmarks and other restrictions as about the funding level itself, because it is an attempt to micromanage the agency from the outside. That really should be left in the hands of the people who are properly appointed here" (Wash Post, 10/19/86).

REHNQUIST CONFIRMED: NEGATIVE VOTES SET RECORD

On September 17, 1986, by a vote of 65-33 the Senate confirmed President Reagan's nomination of William H. Rehnquist to be Chief Justice of the United States. The confirmation vote occurred hours after the Senate voted 68-31 to invoke cloture, thus limiting debate on the nomination.

The Rehnquist nomination received the most negative votes of any successful Supreme Court nominee in this century. (Rehnquist holds second place also, for the 26 negative votes cast when he was first nominated to the court in 1971.) Opponents of the nomination had hoped that Rehnquist's record on the rights of women and minorities, as well as questions about his credibility and ethics would galvanize senatorial and public opposition to the nomination. While a majority of the American public became convinced that Rehnquist should not be confirmed (58% of those surveyed by a Harris Poll thought that the President should withdraw or the Senate should vote down the nomination), the civil rights community was not able to persuade the necessary number of Senators to vote against the nomination.

The confirmation of Rehnquist seems to have turned on the fact that many Senators believe that great deference is owed the President in nominations despite the Senate's advise and consent role, and that to reject a sitting Supreme Court justice would be tantamount to impeachment. Rejection of a sitting justice, it was argued, would hurt the integrity of the Court, and undermine its effectiveness. Opponents of the nomination sought unsuccessfully to convince troubled Senators that the President and the Senate share an equal role in the nomination process.

The Senate's concern over voting against a sitting judge resulted in the nominee for Chief Justice being held to a lower standard than a nominee to the district court. Civil rights leaders had argued that the nominee for Chief Justice should be judged against the highest standards: a thorough understanding of constitutional law, an unshakable commitment to the principles of equal justice, impeccable judgment on matters of ethics, and unquestioned credibility.

The August CIVIL RIGHTS MONITOR contained a discussion of issues raised during the hearings. Additional concerns that surfaced after the hearings are summarized below.

Opposition to Equal Justice

The principal reason the civil rights community opposed the Rehnquist nomination was his thirty-five year history of opposition to the fundamental principle of equal justice under the law --that every American enjoys equal rights under the law and that a central role of the courts is to protect these rights. William Rehnquist has "opposed fair and equal treatment of minorities at every turn: in the Legislature (where he opposed local public accommodations laws), at the polls (where he sought to block blacks and Hispanics from voting), and in his personal dealings (where he accepted racial and religious restrictive covenants on his real estate holdings)" (Leadership Conference on Civil Rights, The Case Against William Rehnquist, September 2, 1986).

Rehnquist's judicial record has shown the same opposition to fair and equal treatment of minorities. 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). Unless otherwise noted, the following arguments are excerpted from The Case Against William Rehnquist.

School desegregation: In the late '50s, Rehnquist challenged a plan to end the racial segregation of the Phoenix public schools. Writing to a local newspaper, he asserted that "...we are no more dedicated to an 'integrated' society than we are to a 'segregated' society..."

In March 1970, Rehnquist, as Assistant Attorney General in charge of the Office of Legal Counsel, wrote two memoranda to the Nixon White House proposing an amendment to the Constitution which would have sharply curtailed the powers of federal courts to remedy unlawful segregation of the public schools. Rehnquist's proposal, had it become law, would effectively have nullified the Supreme Court's landmark decision in Brown v. Board of Education and would have permitted the continuation of deliberate racial segregation of the public schools in both the North and the South. It is important to note that Rehnquist's amendment was not intended as an "anti-busing" proposal, i.e., one which would limit the use

of a particular remedy for segregation. Rather, the memo is a straight-out pro-segregation proposal explicitly designed to legitimate deliberate racial segregation (William Taylor, Analysis of Proposed Rehnquist Amendment).

Voting Rights: During his clerkship, Mr. Rehnquist urged upon Justice Jackson the constitutional validity of a Texas "whites only" primary, asserting that: "It is about time the Court faced the fact that white people in the South don't like the colored people; the constitution did not appoint the Court as a social watchdog to rear up every time private discrimination raised its admittedly ugly head." He advised Justice Jackson that invalidation of the white primary would "push back the frontier of freedom of association and majority rule." (The Court subsequently held the Texas primary to be unconstitutional in Terry v. Adams).

Public Accommodations: In the mid-1960's at the same time that Congress was considering the 1964 Civil Rights Act, the Phoenix City Council was considering an ordinance to desegregate public accommodations. The day before the Council unanimously approved this anti-discrimination measure, Mr. Rehnquist appeared to testify against it. After the ordinance was adopted, Mr. Rehnquist wrote to a local newspaper criticizing it as a "mistake," equating the plight of the minority victim barred from a place of public accommodation with that of the owner "victim" of the ordinance, and concluding resoundingly that: "It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this."

Women's rights: In May 1970, William Rehnquist, as Assistant Attorney General in charge of the Office of Legal Counsel, wrote a memorandum to the Nixon White House summarizing objections to the adoption of the Equal Rights Amendment. The memorandum states in part: "One practical effect of the amendment deserves attention, as an example of the sort of unsettling effect that the rigid doctrine of equality might have in many fields. Traditionally, the domicile of a married woman has been that of her husband, and if the husband decides to move from Boston to Chicago in order to take a different job, the wife is legally obligated to accompany him (as well as being obligated by virtue of traditional marriage vows and most religious teaching)." It continues "... the equal rights amendment apparently would leave both parties with the power to decide this question --with a result which could indeed, to paraphrase a famous English author, turn 'holy wedlock' into 'holy deadlock.'"

Issues of propriety and candor

Opponents also argued that Justice Rehnquist had in several instances "demonstrated that he lacks the requisite candor and sense of propriety to serve in the nation's highest judicial post." Of primary importance in this area, they asserted, was Justice Rehnquist's involvement in the Laird v. Tatum case.

In 1972, Justice Rehnquist cast the deciding vote in Laird v. Tatum. The issues in Tatum involved the role of the U.S. Army and the Department of Defense in domestic surveillance and infiltration activities during the

Vietnam War. The plaintiffs alleged that they were targets of the Army's program and that the program violated the First Amendment. After the case reached the Supreme Court on the issue of whether the plaintiffs had a legal claim -- that is, whether a trial should be held, the plaintiffs asked Justice Rehnquist not to participate. They alleged that as Assistant Attorney General for Legal Counsel, Justice Rehnquist had been involved in the formulation of the government policy.

Justice Rehnquist denied the motion in a 16-page opinion. The opinion failed to acknowledge two critical facts that showed that he had a prior involvement with the policy and had prejudged the case, and therefore should have disqualified himself. First, he neglected to mention the key role he had played as Assistant Attorney General in formulating the policy of government surveillance, a role that was subsequently revealed by a Rehnquist memo published in the Senate's Church Committee Report.

Second, Justice Rehnquist failed to deal with key testimony he had given in 1971 to the Ervin Committee in which he made it clear that he did not believe that Tatum and the other claimants had standing to pursue their case, then pending in the Court of Appeals. By omitting this testimony, he sought to make it appear that he and Senator Ervin were just having a "discussion of the applicable law" when in fact Rehnquist was saying how the case should be decided.

Geoffrey C. Hazard, Jr., Nathan Baker Professor of Law at Yale Law School and a leading scholar in the field of legal ethics, in response to Senator Charles Mathias' (R-MD) request that he provide an opinion about the propriety of Justice Rehnquist's conduct in the Laird v. Tatum case wrote:

First, in my opinion Justice Rehnquist's position as head of the Office of Legal Counsel constituted grounds of disqualification from participating in Laird v. Tatum, unless the significance of that relationship were overcome by additional evidence showing that he in fact was not involved in the matter while it was in the office. In a matter of such substance and complexity as the surveillance policy, it is implausible that the head of the government law office responsible for development of its legal aspects would not be personally involved in considerable detail concerning the facts and issues going into the policy and its formulation. On that basis, Mr. Rehnquist was the responsible counsel in the matter in question, and as well a potential witness concerning any factual issues regarding the policy. Each of these two relationships is independently a ground for disqualification.

Conclusion

When Ronald Reagan first nominated Rehnquist to be Chief Justice, only token opposition was expressed in the Senate. It was the record summarized above and the vigorous case made by a small group of Senators led by Edward Kennedy (D-MA) that led to the substantial dissenting vote.

When the process began with the Senate Judiciary Committee hearings in July, it was evident that among the Democrats who opposed Justice Rehnquist there was no consensus on a key question: whether it is ever appropriate to judge a Supreme Court nominee on the basis of ideology or whether legal

ability and character are the only proper standards.

...But by the end of the debate, the days of diffidence were over. Justice Rehnquist's record on the issues, both on and off the bench, was subject to such intense scrutiny from such an array of senators that it is unlikely that the subject of ideology will be regarded as off-limits in future debates (New York Times, 9/18/86, A24)

Nevertheless William Rehnquist is now the 16th Chief Justice of the United States. Some civil rights proponents take solace in the fact that the elevation of Rehnquist and substitution of Antonin Scalia for former Chief Justice Burger does not materially change the ideological balance on the Court. Some court observers have also expressed the view that moderate and conservative justices on the Court may seek to avoid decisions that go to the extremes that Rehnquist has advocated. And recently, in an interview in the New York Times Magazine, Justice William Brennan ventured a prediction that, as Chief Justice, Rehnquist may moderate his views to avoid finding himself the lone dissenter as he has been so often in the past.

Speculation aside, the Senate will be faced with many new judicial nominations in the next Congress, and will continue to struggle with its own role in the confirmation process.

FEDERAL COMMUNICATIONS COMMISSION REVERSES POSITION ON AFFIRMATIVE ACTION

The Federal Communications Commission (FCC) has abandoned its policy of granting preferences to women and minorities in the awarding of television and radio licenses. In a case pending before the full U.S. Court of Appeals for the District of Columbia that challenged the agency's grant of a license to a woman to construct a new FM radio station on St. Simons Island, Georgia (Steele v. FCC, 248 U.S. App. D.C. 279, 770 F.2d 1192 (1985)), the FCC filed a brief that did not defend its action. Instead, the agency's brief announced a policy reversal that placed it on the side of the plaintiff who went to court after losing to a woman in a license competition:

The racial and gender preference policies employed by the FCC in comparative licensing proceedings since 1978 are discriminatory classifications by government that are inherently suspect, presumptively invalid and subject to stringent scrutiny under the equal protection guarantee implicit in the due process clause of the Fifth Amendment.

Along with the brief, the FCC filed a motion asking the court to send the case back "for further consideration" in light of its new view "that race, sex or national origin per se should not be a basis for licensing determinations" and its new conclusion that there were "constitutional and statutory deficiencies" in its decision granting the license. On October 9, 1986, the Court of Appeals issued an order returning the case to the FCC.

Background

The Communications Act of 1934 gives the FCC authority to award television and radio broadcast licenses pursuant to the "public interest, convenience and

necessity." The Commission's Policy Statement governing evaluation of applicants sets forth two primary objectives (1) to provide the best practicable service to the public, and (2) to maximize diffusion of control of the media of mass communications, in order to maximize diversity of programming (See September 12, 1986 Brief for Federal Communications Commission, Steele v. Federal Communications Commission).

In conformity with the "best practicable service" objective, an applicant's integration of ownership and management is evaluated. In measuring the extent of the owner's active participation in the day-to-day management of the proposed station, the FCC considers the owner's residence in the community, participation in community activities, and prior broadcast experience.

The FCC did not initially consider an applicant's race or gender in the application process. In 1973, the Court of Appeals for the District of Columbia reasoned that increased minority ownership and management of radio and television stations was in the public interest (TV 9, Inc. v. FCC, 495 F.2d 929 (1973), cert. denied, 419 U.S. 986 (1974)). The court found that it was reasonable to expect that minority ownership would increase diversity, and thus credit should be accorded for that factor in the applicant process.

In 1978, the FCC adopted a policy of granting "merit" (a plus factor) to an applicant's minority ownership. Subsequently, the FCC extended the Court's reasoning to licensing women, as broadcasters i.e., "if it were correct to assume that minority ownership promotes diversity, then the goal of diversification of programming would by the same logic likely be furthered by a policy that gives some comparative credit for female ownership of broadcast stations, given that women, like minorities, were infrequent owners of broadcast operations" (See Brief for the FCC).

Steele v. FCC

In the Steele case, an Administrative Law Judge chose Dale Bell over James Steele because her company was owned by a woman, she had lived in the community since childhood, and she would manage the station on a full-time basis. In awarding the license the administrative law judge "preferred Bell on the critical issue of integration of ownership and management because... Bell's enhancement credit for female ownership and past local residence outweighed Steele's enhancement credit for previous broadcast experience" (FCC brief). Steele appealed to the FCC's Review Board which affirmed the ALJ's decision.

Steele then appealed to the U.S. Court of Appeals and in August 1985 by a 2-1 vote an appellate panel reversed the Commission's decision. The decision asserts: that the FCC's policy of granting preferences to females and minorities "run[s] counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy." The opinion, written by Judge Edward A. Tamm for himself and then Court of Appeals Judge Antonin Scalia, over a dissent by Judge Wald, continued:

[T]he Commission has been unable to offer any evidence other than statistical underrepresentation to support its bald assertion that more women station owners would increase programming diversity. Instead, a few

Commission employees without any evidence, reasoning, or explanation, gratuitously decreed one day that female preferences would henceforth be awarded... Presumably, the Board thought that it was a Good Idea and Would lead to a Better World. Contrary to the Commission's apparent supposition, however, a mandate to serve the public interest is not a license to conduct experiments in social engineering conceived seemingly by whim and rationalized by conclusory dicta.

Ms. Bell sought rehearing by the full appellate court. On October 31, 1985, a rehearing was granted and the panel's decision vacated. The parties were directed to submit briefs addressing (1) whether the FCC has statutory authority to award a merit to women broadcast owners in order to further the First Amendment interest in diversity of ideas and (2) whether such an award is constitutional. On October 12, 1986, as noted above, the full court granted the FCC's motion to return the case to the agency.

Although this case addressed only the issue of gender preference, the FCC's brief rejects its previous policy of awarding "plus" factors for both female, racial, and national origin ownership. This reversal of policy places the FCC in step with the Department of Justice's relentless attack on affirmative action. The brief reads, in part:

...[T]o the extent that racial and gender preferences may be viewed as a remedy for discrimination, there is no evidence of past discrimination in licensing by the FCC. It is clear that such a finding of prior discrimination is a critical underpinning of remedial measures such as the race and gender preference policies... [T]he broad discretion and ability to rely on assumptions and predictive judgment that normally accompany FCC actions to further diversity are inadequate to justify the Commission's adoption of these preferences. The heightened scrutiny that the Constitution mandates for suspect classifications such as race and gender licensing preferences requires a specific factual record establishing a nexus between the preference scheme and enhanced diversity. Reasonable expectation will not satisfy constitutional requirements. The Commission has never undertaken a proceeding to determine whether there is such a nexus as a general matter, and the Commission has not required demonstration of such relationship in specific cases under direction of this Court in TV 9.

A number of organizations joined in an amicus curiae brief supporting the FCC prior policy of giving consideration to the gender of the owner/manager in the applicant process. The brief for American Women in Radio and Television, Inc., NOW Legal Defense and Education Fund, National Association of Women Business Owners, and Women's Bar Association of the District of Columbia, states:

[A]ward of comparative "merit" to applicants to be owned by women managers does not unconstitutionally discriminate between male and female applicants. It is narrowly tailored to serve the agency's compelling First Amendment objectives. It does not preclude the complete evaluation of, much less the grant of licenses to, male-owned applicants. Rather, it encourages more women to seek broadcast licenses, and, in some close cases such as the one at bar, tips the balance of the various attributes of the competing applicants in favor of a woman owned and managed applicant which

is likely to further diversify the information sources available to the public.

Alan Kaufman, attorney for plaintiff Steele, has been quoted as saying that he thought the FCC had gone too far in its policy reversal, and that he viewed minority preferences as justified because of a history of industry discrimination against blacks (Wash Post, 9/16/86, A4). According to a FCC spokesperson, minorities own about 210 of the 12,000 television and radio stations nationwide (1.75%). A FCC study in 1982 found that women owned 2.8% of the television stations; 8.6% of the AM stations; and 9% of the FM radio stations.

CIVIL RIGHTS ENFORCEMENT SUFFERS AT HHS **by Trina Jones, Student Intern**

On August 6 and 7, 1986, the House Subcommittee on Intergovernmental Relations conducted oversight hearings on enforcement activities at the Office for Civil Rights, Department of Health and Human Services. During the two days of hearings, witnesses asserted that OCR "has failed over the past five years to minimally protect the rights of the populations entrusted to its care" (Testimony of David F. Chavkin, Directing Attorney, Maryland Disability Law Center). Lax enforcement has resulted in the Federal Government failing to address many of the civil rights problems in health and human services. For example, "Medicaid utilization by black recipients over 65 is still less than half that of white recipients. Many health care providers have no capacity to communicate with hearing-impaired patients and many hospitals still do not even have such basic equipment as a telecommunications device for the deaf. Other providers cannot communicate with or provide effective services to those who cannot speak English" (Chavkin Testimony).

Background

OCR has responsibility for ensuring nondiscrimination in HHS' federally assisted programs pursuant to Title VI of the Civil Rights Act of 1964 (race), Section 504 of the Rehabilitation Act of 1973 (disability), and the Age Discrimination Act of 1975. OCR is also responsible for compliance with the Hill-Burton Act which requires health care providers receiving federal funds to make their services "available and accessible" to their communities.

To ensure that the 230,000 federally-funded health and social service institutions comply with these statutes, OCR investigates complaints charging discrimination on the part of fund recipients and initiates compliance reviews of those institutions suspected of discrimination. The Department has three enforcement avenues: (1) initiating voluntary settlements (2) conducting hearings before administrative law judges and (3) referring cases to the Department of Justice.

The Hearings

A review of OCR documents by Subcommittee staff indicated that the Department has been placing increasing reliance on voluntary settlements in serious cases of discrimination. In the time period under investigation, 1981-1986, of the thousands of cases OCR has handled, only 2 have gone to administrative

hearings, and only four have been referred to the DOJ. In testimony before the Subcommittee, Martin Gerry, former Deputy Director of OCR, stated that negotiated settlements are inadequate because (1) they fail to remedy the effects of past discrimination, (2) they do not eliminate present discrimination (3) they do not prevent recurrences of discrimination and (4) they are often not monitored properly. Representative Ted Weiss (D-NY), Chair of the Subcommittee, in his opening statement reasoned that "remedies sought through negotiated settlements are often inadequate, and there is frequently excessive delay in handling cases of an emergency nature." OCR documents showed that the average age for investigated complaints has risen sharply. In 1985, the average age of investigated complaints was 244 days. In 1986, the number climbed to 330.

AIDS CASE

Thomas B. Stoddard, Director of Lambda Legal Defense and Education Fund, in testimony before the hearing recounted what he considered one of OCR's most egregious incidents of "malignant neglect." The case involved the first complaint ever brought under Section 504 on the basis of discrimination because of AIDS or the perception of AIDS. His testimony is summarized below.

On July 9, 1984, North Carolina attorneys affiliated with Lambda sent a letter to the Atlanta Regional Office of OCR. The letter alleged discrimination on the part of Charlotte Memorial Hospital which had forced a registered nurse, who was diagnosed with pre-AIDS symptoms, to take a medical leave of absence because of the diagnosis. On July 25, Lambda received a letter from the Director of the Atlanta Office stating that the Office had accepted jurisdiction and that an investigation would begin within 90 days and a determination would be issued within 105 days.

On November 8, 1984, 105 days after the letter had been received, no determination was forthcoming and Lambda had no knowledge of whether an investigation had even been commenced. Lambda then sent a letter of complaint to the regional office. On August 5, 1985, the Atlanta Regional Director, Marie Cretien, responded with the statement that an investigation had been completed and a report had been issued, but the report had yet to be reviewed by OCR.

After receiving no report or determination, Lambda sent yet another letter to the Secretary of HHS. On November 18, 1985, Lambda received a response from Betty Lou Dotson, current Director of OCR, which stated that OCR would issue its findings as soon as possible. On February 26, 1986 when the client died, a determination still had not been reached.

OCR rendered its final finding of discrimination on August 5, 1986, more than two years after the initial claim had been filed and more significantly one day before the oversight hearings.

Despite the growing magnitude of the AIDS epidemic (as of June 30, 1986, there were 22,173 known cases of AIDS, and the five year projection for new cases is 196,000), and HHS labeling AIDS its primary health concern in 1984, OCR failed to adopt a policy governing AIDS complaints under Section 504. HHS' General Counsel requested that the Department of Justice prepare a legal memorandum addressing the issue of whether Section 504 of the Rehabilitation Act covers

persons with AIDS. In June, Charles Cooper, Assistant Attorney General, Office of Legal Counsel, took the position that 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 asserted 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 (For additional information, see the CIVIL RIGHTS MONITOR, August 1986).

Conclusion

Review of OCR's enforcement activities reveals that not only are there both serious errors of judgment and unconscionable delays in OCR's handling of complaints and reviews, but OCR has no systematic way of preventing further problems. A Report on the hearings will be released early next year and the subcommittee and the General Accounting Office will continue to review the enforcement policies of OCR.

In a related matter, the Department has published proposed regulations for the Hill-Burton program. Bonnie Milstein of the Center for Law and Social Policy writes that "As expected, the Department is loosening the reporting requirements for hospitals, nursing homes and other health facilities that received federal Hill-Burton funds. The reporting requirements attach to health facilities' obligations to provide a specific amount of free care to qualified patients, and to serve all prospective patients in the facilities' service areas. These obligations were intended to ensure non-discriminatory provision of care, and to assure that at least some indigent patients received adequate health care."

The National Health Law Program asserts that the most important change in the proposed regulations is the method of HHS compliance and monitoring review. "The proposed regulations eliminate HHS review of individual patient accounts to verify compliance... Facilities would be certified as in compliance after cursory review of hospital procedures for implementing the uncompensated care program and its triennial compliance report, unless the facility shows a "pattern of substantial noncompliance." For additional information contact Bonnie Milstein, Attorney at Law, Center for Law and Social Policy, 1616 P Street, NW, Suite 350, Washington, D.C. 20036, (202) 328-5140 or Michael A. Dowell, Staff Attorney, National Health Law Program, Inc., 2025 M Street, NW, Suite 400, Washington, D.C. 20036.

CONGRESS PASSES IMPORTANT CIVIL RIGHTS STATUTE

State agencies that violate major civil rights laws can now -- or once again -- be held liable in federal court for damages. The Civil Rights Remedy Equalization Act, a provision authored by Senator Alan Cranston (D-CA) and passed by the Congress in early October as part of the Rehabilitation Reauthorization bill, overturns the Supreme Court's June 1986 decision in Atascadero State Hospital v. Scanlon, 53 U.S.L.W. 4985. The Court's opinion created a large loophole in civil rights protection by ruling that the States' Eleventh Amendment immunity to suit in federal court had not been lifted by Section 504 of the Rehabilitation Act of 1973.

Section 504 prohibits federal and federally-assisted programs from discriminating against otherwise qualified handicapped persons. Other major civil rights laws -- Title VI of the Civil Rights Act of 1964 (race), Title IX of the Education Amendments of 1972 (sex), and the Age Discrimination Act of 1975 -- have the same basic structure as Section 504 and could have been construed in the same fashion. Cranston's legislation has removed that possibility and plugged the loophole.

The Atascadero decision suprised many in Congress and in the civil rights community who had interpreted the law as lifting the States' immunity. In each of the civil rights statutes, State agencies receiving federal assistance are included in the category of those covered by the antidiscrimination mandates -- and none of the laws contains any suggestion that Congress intended States to be exempted from federal court jurisdiction for violations.

Based on a doctrine that has been evolving over the past several years, the Supreme Court in a 5-4 decision held that Congress can lift the bar of the Eleventh Amendment only through legislation expressly making the States answerable in federal court.

The provision faced an 11th hour attack by the National Governors' Association, which tried to get House members of the conference committee to object to it. However, a strong bipartisan coalition of Senators Weicker, Simon, Stafford, Hatch, and Thurmond stuck by the measure and, with help from Congressman Gus Hawkins, succeeded in having it included in the final version of the legislation which passed the House on October 2 and the Senate the next day.

Arlene Mayerson, Directing Attorney, Disability Rights Education and Defense Fund, stated that the passage of the bill was "extremely important because states are one of the primary recipients of federal monies, and because of the carryover effect the decision could have had on the other civil rights laws. Disabled persons, once again, have redress against state agencies found to have discriminated."

MEESE SAYS SUPREME COURT DECISIONS ARE NOT THE SUPREME LAW OF THE LAND

Attorney General Edwin Meese in a speech to the Tulane University Citizens' Forum on the Bicentennial of the Constitution, October 21, 1986, stated that Supreme Court interpretations of the Constitution are not "the supreme law of the land." Decisions of the Supreme Court, he argued, are not "binding on all persons and parts of government henceforth and forevermore." The following commentary on the Attorney General's speech is written by William L. Taylor, a Washington lawyer:

It is little short of astonishing that Edwin Meese, in his latest assault on the authority of federal courts in interpreting the Constitution, should choose as his principal example of judicial excess the Supreme Court's 1958 decision in Cooper v. Aaron, 358 U.S. 1, the Little Rock, Arkansas case.

Mr. Meese criticizes the statement of the unanimous Court in Cooper that its interpretation of the Fourteenth Amendment in the 1954 Brown case "is the

supreme law of land" with binding effect on the states. Mr. Meese replies that it is only the Constitution that is the supreme law of the land, not Supreme Court interpretations. The difference, in Meese's view, is that while the Brown decision was binding on the parties to the case and on the executive branch of government, it was not binding on other "persons and parts of government."

Cooper v. Aaron, it should be remembered, was the Supreme Court's first response to four years of massive resistance to the Brown decision, years in which Southern governors and legislatures supported by members of Congress (all in Mr. Meese's lexicon, "persons and parts of government"), solemnly asserted a right to interpose their authority to thwart rights declared under the Constitution by the Supreme Court. In Little Rock, Governor Faubus had called out the National Guard to prevent the enforcement of a federal court order requiring the admission of nine black students to Central High School. His actions and those of other segregationists created racial turmoil, threatened the safety of black and white students, stimulated requests for further delays in desegregation and resulted in closed schools in Little Rock for almost a year.

What was Faubus' justification for his actions? He argued in words now echoed by Mr. Meese, that federal court decisions were not the law of the land and were not binding on those who were not parties.

Certainly, as Justice Frankfurter said in Cooper, a Supreme Court interpretation of the Constitution does not stifle the right of dissent or call for criticism to be stilled. But it is ludicrous for Meese to equate Lincoln's criticism of the Dred Scott decision with the efforts of a Daniel Manion or an Orval Faubus to use their official positions to try to prevent enforcement of a Supreme Court decision.

In Cooper, the Court helped reestablish a fundamental principle that was then in peril -- that "no state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." Mr. Meese's consistent effort since becoming Attorney General has been to call that principle into question again. The rights of all citizens are more secure today because of the Court's decision in Cooper; they will be jeopardized anew if we do not understand and resist Mr. Meese's assault on the courts.

(William L. Taylor, as a lawyer for the NAACP Legal Defense Fund in 1958, contributed to the brief filed in the Supreme Court by plaintiffs in Cooper v. Aaron.)

FOR YOUR INFORMATION...

In September the U.S. Conference of Mayors issued a report citing the effectiveness of affirmative action. The report assesses the results of a 121 city survey on affirmative action programs. The report, Affirmative Action Programs in City Governments found:

Implementation of affirmative action programs has contributed to increased employee job satisfaction... as evidenced by:

fewer employee grievances or complaints in 63 percent of those cities;
decreased absenteeism in 40 percent of those cities;
decreased employee turnover in 45 percent of those cities.

Nearly one third of the cities responding reported that affirmative action programs have contributed a great deal to improved labor-management relations.

Well over one-third of the cities responding reported that affirmative action programs have contributed a great deal to improved efficiency and productivity.

Ninety-eight cities (89 percent of those responding to the question) reported that their affirmative action programs have helped to identify better relevant qualifications for certain jobs.

Copies of the report are available from the U.S. Conference of Mayors for \$10.00. Contact, Elynor Humber, U.S. Conference of Mayors, 1620 Eye Street, NW, Washington, D.C. 20006, (202) 293-7330.

The Potomac Institute has released a report: READING THE SUPREME COURT TEA LEAVES ON AFFIRMATIVE ACTION: AFFIRMATIVE HIRING GOALS REINFORCED, which reviews the Court's recent affirmative action decisions. The report concludes:

The three decisions, despite the welter of opinions, permit the courts and public employers in particular to draw some helpful guidance as they design or approve affirmative action plans. As will be seen from the discussion of each case, affirmative action is very much alive, as are "goals and time tables," despite efforts of the Administration to denigrate most affirmative action plans as requiring "quotas" or "reverse discrimination."

Individual copies of the report are available from the Potomac Institute, Inc., 1501 18th Street, NW, Washington, D.C. 20036, (202) 332-5566.

Supreme Court Oral Argument Schedule this Fall

November 12, 10:00 a.m. 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). The question before the Court 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.

November 12, 11:00 a.m. 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). The question before the Court is whether an agency which implemented an affirmative action plan by promoting a qualified woman over a "more qualified" man runs afoul of Title VII.

December 3, 10:00 a.m. 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). The Court will address (1) whether the contagious, infectious disease tuberculosis constitutes a "handicap" within the meaning of Section 504, and (2) whether one who is afflicted with the disease is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504.

Conferences

The Bureau of National Affairs, Inc. is sponsoring a Conference on "Affirmative Action: Rights, Remedies, and Responsibilities," November 5-6 in Washington, D.C. Top federal and local government officials will discuss affirmative action with corporate EEO officers, advocacy group representatives, and labor law attorneys. For additional information, contact BNA, 2445 M Street, NW, Suite 275, Washington, D.C. 20037, (800) 424-9890 or (202) 452-4420.

The Children's Defense Fund's national conference, ADOLESCENT PREGNANCY PREVENTION: ACTION '87 will take place March 11-13 in Washington, D.C. The conference will focus on policies, programs, services, and strategies for preventing teen pregnancy. For additional information, contact Evelyn Lieberman, CDF, 122 C Street, NW, Washington, D.C. 20001, (202) 628-8787.

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