LEADERSHIP CONFERENCE EDUCATION FUND

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INSIDE...

CIVIL RIGHTS LEGISLATION TO BE INTRODUCED IN THE 100TH CONGRESS

House and Senate civil rights advocates are planning to reintroduce in the 100th Congress key civil rights legislation that failed to pass the 99th Congress. According to Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights, the outcome of the Fall elections has put "civil rights champions in control of the process." While the previous three Congresses have generally been good on civil rights issues, passing many important bills and blocking the regressive efforts of the Radical Right, civil rights advocates have spent much time fighting rear-guard actions to preserve the accomplishments of the past. With the change in leadership, a much more positive agenda has emerged. More thorough oversight of the Reagan Administration's enforcement of civil rights statutes is also expected as civil rights friends take over as chairs of key committees. Senator Joseph R. Biden (D-DEL) will chair the Judiciary Committee which reviews judicial nominations, considers most civil rights legislation and monitors the civil rights performance of the Justice Department. Senator Edward Kennedy (D-MA) will chair the Labor and Human Resources Committee which considers several major civil rights measures, monitors the Equal Employment Opportunity Commission and the civil rights programs of the Departments of Labor, Education, and Health and Human Services (For further discussion, see Congressional Quarterly, November 29, 1986). Included among the legislation expected to be introduced are:

The Civil Rights Restoration Act: Introduced in the 98th Congress by Representative Paul Simon (D-IL) and Senator Edward M. Kennedy (D-MA), and in

the 99th Congress by Representative Augustus Hawkins (D-CA) and Senator Kennedy, the bill would restore four civil rights statutes barring discrimination in the use of federal funds to their institution-wide coverage before the Grove City decision. The Supreme Court ruled in 1984 in Grove City v. Bell that Title IX's prohibition against sex discrimination (Education Amendments of 1972) in federally-assisted education programs applied only to the specific "program or activity" receiving federal funds. Today, a university that receives federal funds for its computer center would be free so far as Title IX is concerned to discriminate against women in the chemistry laboratory or on the athletic field. Grove City applies as well to Title VI (race), Section 504 (disability) and the Age Discrimination Act, since these civil rights statutes use the same language to describe coverage.

After coming very close to passage in 1984, the bill was stalled in the 99th Congress because of amendments added by the House Committee on Education and Labor which would change substantive law including a provision to repeal long standing regulations protecting students and employees against discrimination in education programs if they choose to have an abortion. A second amendment would have extended exemption from Title IX coverage to schools that are religiously "affiliated," not just those that are religiously controlled. These amendments were opposed by civil rights groups as inconsistent with the principle of restoration. The Civil Rights Restoration Act will be one of the top priorities for civil rights activists in the 100th Congress.

Fair Housing Amendments: Introduced in the 99th Congress by Senators Charles McC. Mathias, Jr. (R-MD) and Edward M. Kennedy (D-MA) and Representatives Hamilton Fish, Jr. (R-NY) and Don Edwards (D-CA), the legislation would strengthen the enforcement provisions of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968), which prohibits discrimination in the rental, sale, marketing, and financing of the Nation's housing, and broaden the protected classes to include disabled persons and families with children. The bill was introduced in response to widespread evidence that families who encounter racial discrimination in the housing market do not have an effective remedy. The Department of Housing and Urban Development has primary responsibility for the enforcement of the Fair Housing Act but "is significantly hampered in its power to require compliance with Title VIII because if it finds discrimination, it can only use informal persuasion to bring about compliance" (U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974 Volume II To Provide...For Fair Housing (December 1974)). Enforcement through the courts, while ultimately effective, is a long and costly process. The amendments would strengthen HUD's enforcement mechanism by providing a simple and inexpensive administrative remedy: HUD would represent a complainant with a valid case before an Administrative Law Judge who would be able to award equitable and declaratory relief as well as compensatory and punitive damages to a prevailing complainant.

Similar legislation passed the House in 1980, but was killed by a filibuster in the Senate. Considered a top priority by the civil rights community, the Fair Housing Bill should see early action in the 100th Congress.

Family and Medical Leave Act: Introduced in the 99th Congress for the first

time by Representatives William Clay (D-MO), and Patricia Schroeder (D-COL) and Senator Christopher Dodd (D-CONN), the bill would address the conflict many experience between work and family concerns by requiring employers to provide 26 weeks of unpaid, job-guaranteed leave for all employees who are temporarily unable to work as the result of a serious health condition including disability due to pregnancy, and 18 weeks of unpaid, job-guaranteed leave for employees who choose to stay home to care for a newborn, newly-adopted or seriously ill child. The bill would also set up a commission to recommend means for implementing wage-replacement during such leaves.

Hearings were held and the bill was reported out by House committees in 1986, but no floor action was possible. Opposition to the bill has surfaced from the U.S. Chamber of Commerce, which has pledged to fight any federal requirement of family leave. According to the Chamber, federally-mandated benefits would discourage the creation of new jobs and would particularly burden small employers. The Administration has not yet taken an official position on the bill.

Federal Equitable Pay Practices Act: Introduced in the 99th Congress by Representative Mary Rose Oakar (D-OH) and Senators Daniel Evans (R-WASH) and Alan Cranston (D-CA), the bill would mandate a study of federal wage-setting practices in order to identify and eliminate any discrimination and promote pay equity in the Federal Government. It calls for the establishment of an 11 member, bipartisan commission to oversee the examination of the federal pay and job classification systems to determine consistency with Title VII (employment discrimination) of the Civil Rights Act of 1964 and Section 6(d) (Equal Pay Act) of the Fair Labor Standards Act. The study would review the content of various jobs in terms of required skill, effort, and responsibility and working conditions. The study would also analyze how factors such as education, seniority, merit and locality contribute to rates of pay. At the end of the 18-month project, the Commission would provide recommendations for the elimination of any discriminatory practices and improvement of the pay and classifications systems of the Federal Government.

The House approved the bill on October 9, 1985 by a vote of 259 to 162. The Senate took no action.

Japanese Americans Redress Bill: Introduced in the 99th Congress by Representative Jim Wright (D-Tex) and Senator Spark M. Matsunaga (D-HI) the bill would implement the recommendations of the Commission on Wartime Relocation and Internment of Civilians which found that the exclusion and detention of Japanese Americans during World War II was based on racial prejudice, war hysteria and lack of political leadership -- not military necessity. The bill provides for a formal apology by Congress and the President, recognizing the grave injustices committed by the Federal Government against Japanese Americans. The bill also would establish an educational and humanitarian trust fund to educate the American people about the dangers of racial intolerance and would provide individual compensation of $20,000 to be paid to each surviving internee, in recognition of individual losses and damages.

The Department of Justice opposed the legislation, questioning the conclusion

of the Commission that the internment actions were based on racial prejudice, or hysteria and a failure of political leadership. The DOJ concluded: "These are matters best left to historical and scholarly analysis rather than debated by Congress."

Hearings were held in the House in the 99th Congress, but no further action was taken.

Other priority issues for the 100th Congress include: Judicial Nominations, the Economic Equity Act including the Nondiscrimination in Insurance Bill, Welfare Reform, and Reauthorization of the Elementary and Secondary Education Acts.

CONGRESS PASSES DEPARTMENT OF DEFENSE SET-ASIDE FOR MINORITY FIRMS AND UNIVERSITIES

Before adjourning, the Congress agreed to a Department of Defense Authorization Bill with an amendment that provides a set-aside of five percent of defense contracts for socially and economically disadvantaged small businesses and historically Black colleges and universities over the next three years. The amendment will direct approximately $32 billion of the Department's military research, development, testing, construction, procurement, and maintenance funds to such institutions.

The "Procurement Reform Package," as introduced in the House by Representatives Gus Savage (D-IL) and John Conyers (D-MI) and passed by the House on August 14 (259-135), established a ten percent set-aside. The House-Senate conferees reduced this to five percent. Representative Conyers has indicated that he will offer legislation to increase the percentage to ten when the program is considered for reauthorization in 1989. A ten percent set-aside in the Department of Defense program would parallel set-aside programs in the Surface Transportation Act and the Public Works Employment Act.

Key provisions of the measure include:

The Secretary of Defense is to report to Congress semi-annually on the agency's efforts to meet the goal, reasons for failure, if appropriate, and continuing plans to meet the goal.

The Secretary has authority to make advance payments to minority contractors when necessary to alleviate capital shortage problems.

The Secretary is to furnish prospective minority contractors with information about the program, advice concerning procurement procedures, assistance in bid preparation, and other assistance as necessary to enhance their ability to do business with the Department of Defense.

Representative Conyers in announcing the passage of the amendment stated:

This set-aside program will help promote competition, create jobs in communities which suffer from high unemployment, and expand the capacity of business concerns and educational institutions whose services have been

vastly underutilized by the Federal Government. It does not represent a handout, but rather a serious opportunity for minorities to contribute their industry and creative genius to our nation's security.

Technical assistance for prospective contractors will be available from the Department of Defense's Office of Small and Disadvantaged Business Utilization as well as minority firms with expertise in this area. The Government Affairs Office of the United Negro College Fund is also available for information on any aspects of the program, 2100 M Street, NW, Suite 405, Washington, D.C. 20037.

ATTORNEY GENERAL HAS HIRED NO BLACKS OR WOMEN IN SENIOR POSITIONS

A recent article in the Washington Post (Nov. 26, 1986) reported that during Edwin Meese's 21 months as Attorney General not one Black or woman has been hired in a senior policy making position. The Attorney general inherited three high-ranking women and one high-ranking Black from his predeccesor William French Smith. However, only one of the females remains and the Black resigned in November 1986.

The article also reported that few minorities or women have been selected for federal judgeships or U.S. attorney positions, both of which are screened by the Justice Department. The Reagan Administration has appointed 292 federal judges in six years, of whom 27 have been women (9.25 percent), and 17 have been black or Hispanic (5.8 percent). Of the 93 U.S. attorneys appointed during this period, two have been women and two have been black (2.15 percent). In contrast, the Carter Administration appointed a total of 298 federal judges, of whom 45 were female (15.1 percent) and 68 were minorities (23 percent). During the Carter Administration, 87 U.S. Attorneys were appointed, 4 women (4.6 percent) and 11 minorities (12.6 percent) (U.S. Commission on Civil Rights, Equal Opportunity in Presidential Appointments, June 1983).

Attorney General Meese and Assistant Attorney General for Civil Rights Bradford Reynolds have been the architects of the Administration's anti-affirmative action policy. The central position of that policy has been that only identifiable victims of discrimination can benefit from affirmative action. The Department would bar the use of goals and timetables, maintaining that the Constitution prohibits the use of race conscious remedies such as goals and timetables. The Justice Department and the National Endowment for the Humanities have refused to set goals for the hiring of minorities and so report to the Equal Employment Opportunity Commission.

Ralph G. Neas, executive director of the Leadership Conference on Civil Rights, stated that "The top echelons of the Justice Department constitute one of the most segregated work forces in the country. It provides us with a good illustration of what could result if the Meese-Reynolds brand of affirmative action becomes the law of the land" (Wash Post, 11/26/86, A19).

CONGRESS PASSES AGE DISCRIMINATION IN EMPLOYMENT ACT

Before adjourning Congress passed legislation making it illegal for most

employers to require employees to retire at a set age. President Reagan signed it into law on October 31, 1986. The previous law had established a retirement age of 70 except for federal employees, as to whom there was no upper age limit. Employers with fewer than 20 employees are exempted. The new law also provides a seven year exemption for law enforcement officers, firefighters and university professors. During this period the Department of Labor and the Equal Employment Opportunity Commission are to assess the impact the law would have on colleges and universities, and to "evaluate and propose physical and mental fitness tests for police and firefighters" (Congressional Quarterly, October 25, 1986).

The legislation was opposed by the National Association of Manufacturers and the U.S. Chamber of Commerce who claimed that the legislation would cost jobs, delay promotions, and limit efforts to bring more minorities and women into the work force (Congressional Quarterly, Oct. 25, 1986).

It is estimated that some 20,000 workers who would have retired will remain on the job because of the bill.

SCHOOL DISTRICT RESPONDS TO THREAT TO TERMINATE FEDERAL FUNDS

When the Office for Civil Rights of the Department of Education threatened to terminate federal funds to the Moline, Ill. school district, the school board, reversing its position, agreed to provide information requested by OCR staff investigating a Section 504 (disability discrimination) complaint against the district. This action came after OCR's Reviewing Authority reversed the decision of an Administrative Law Judge (ALJ) which found the data requests by OCR 'reasonably relevant' to the issue of compliance with Section 504 and the regulations but then sought to curtail these requests by limiting them to five questions and four interviews. The Reviewing Authority found:

> While the ALJ's equitable and well intentioned attempt to set a definite end to the investigatory process is a worthwhile goal, the opposite result could occur. If, for example, the Respondent simply chose to answer the five questions with summary or vague answers, attempts at enforcement would at worst lead to confusion or impasse and, at best, a return to the ALJ for clarification or direction. This procedure is not permissible under the regulations, nor is it desirable.

The Reviewing Authority ordered that "Federal financial assistance administered by the Department of Education... is to be terminated and refused to be granted to the Respondent School District. This termination and refusal to grant or continue Federal financial assistance shall remain in force until the Respondent School District corrects its noncompliance with Section 504 of the Rehabilitation Act of 1973 and satisfies the Responsible Official that it is in compliance" (See Administrative Proceeding in the U.S. Department of Education, In the Matter of Moline Unit School District #40, Moline, Illinois and Illinois State Board of Education, Springfield, Ill., Rulings on Exceptions and Final Decision of the Civil Rights Reviewing Authority, No. 84-504-7).

Background

When OCR determines that a violation of a civil rights law has occurred, it can seek to obtain compliance by asking an Administrative Law Judge to cutoff federal funds to the offending institution or it can refer the case to the Department of Justice to file suit against the institution. If OCR disagrees with the decision of an ALJ, it can appeal the decision to the Civil Rights Reviewing Authority. A final appeal can be made to the Secretary of Education.

Ms. Caldwell, a substitute teacher for the Moline, Ill. school district, who had taught in numerous programs including special education classes for handicapped children, filed a complaint with OCR on October 19 1982, claiming that her position had been terminated because she had filed previous complaints against the district pursuant to Section 504 (disability).

Between December 1982 and January 1984, OCR tried to gain information to conduct an investigation of Ms. Caldwell's complaint. The school district refused to provide all of the data requested. OCR determined that compliance with Section 504 could not be achieved voluntarily, and a hearing was held before an ALJ on January 16 and 17, 1985. The ALJ's decision, handed down on November 19, 1985, placed limitations on the data OCR could require the school district to provide. OCR determined that it could not adequately investigate the complaint with such limitations, and appealed the decision to the Civil Rights Reviewing Authority. As set forth above, the Reviewing Authority agreed with OCR and reversed the decision of the ALJ.

OCR is presently investigating the complaint and the school district is cooperating. If OCR determines that the complaint is valid, efforts will be made to resolve the dispute voluntarily. Should such efforts fail, the case will be presented to an ALJ.

SUPREME COURT HEARS AFFIRMATIVE ACTION CASES
by Trina Jones, Student Intern

On Wednesday, November 12, 1986 the Supreme Court heard oral arguments in two affirmative action cases which could set important guidelines on the application of affirmative action programs concerning promotions and those based on gender. In Johnson v. Transportation Agency, Santa Clara County, California, cert. granted, 54 U.S.L.W. 3861 (U.S. July 7, 1986) (No. 85-1129) (decision below reported at 748 F.2d 1308 (9th Cir. 1985)), the question before the Court is whether a public agency which implemented an affirmative action plan, adopted without a prior finding of discrimination, ran afoul of Title VII by promoting a qualified woman over a "more qualified" man . The second case, U.S. v. Paradise, cert. granted sub nom., U.S. v. Paradise, 54 U.S.L.W. 3961 (U.S. July 7, 1986) (No. 85-999) (decision below reported under name Paradise v. Prescott, 767 F.2d 1514, (11th Cir. 1985)), questions the constitutionality of a one-black-for-one-white promotion plan imposed upon a state agency by a District Court to remedy past racial discrimination. (For a thorough discussion of the cases, see the August 1986 CIVIL RIGHTS MONITOR.)

Johnson

Paul Johnson brought suit against the Santa Clara County, Calif. Transportation Agency for promoting a woman instead of him to the position of road crew dispatcher, under a plan voluntarily adopted by the county to increase the percentage of women and minority group members in its work force. Mr. Johnson maintained that he was "more qualified" for the position since he had scored higher than the woman, Diane D. Joyce, on the oral test.

In arguing before the Court, Constance E. Brooks, attorney for Mr. Johnson, asserted that the plan was impermissible since it failed to fall within the standards established by the Court in Weber, 443 U.S. 193 (1979) which found affirmative action plans permissible if they were designed to break down old patterns of racial segregation, do not unnecessarily trammel the interests of white employees or create an absolute bar to the advancement of white employees, and are established as a temporary measure.

Ms. Brooks also argued that a statistical imbalance is not sufficient to justify an affirmative action program. Rather, such plans should only be used to remedy proven acts of past discrimination. Ms. Brooks asserted that the agency never considered that the statistical imbalance might have been caused by factors other than discrimination. Arguing that the underrepresentation of women in such job categories reflected societal attitudes and a lack of interest among women in those jobs--not necessarily past discrimination, Ms. Brooks concluded that the affirmative action plan lacked a remedial purpose and in fact discriminated against Mr. Johnson on the basis of sex since he would have been promoted to the position of road dispatcher had it not been for his gender.

However, Steven Woodside, who was grilled incessantly by Justice Antonin Scalia during his defense of the Transportation Agency, asserted that one need only show statistically significant underrepresentation - not egregious discrimination - of women or minorities in a workplace when justifying an affirmative action program. Indeed, Mr. Woodside noted that the fact that there were no women in any of the agency's 238 skilled jobs established a "prima facie" case of discrimination. Mr. Woodside also pointed to a previous high court ruling which encouraged employers not to wait for lawsuits, but to hire and promote voluntarily minorities and women to reflect their availability in the labor market. Based upon these assessments, Mr. Woodside concluded, as did the appellate court, that the affirmative action plan fell within the guidelines established by Weber.

Paradise

Arguing against a court ordered one-black-for-one-white promotion plan imposed on the Alabama Department of Public Safety, Solicitor Charles Fried urged the Court to apply the Weber doctrine and direct federal judges to make sure that affirmative action plans are "strictly limited" in scope. Fried asserted that the plan was "wholly arbitrary, excessive, profoundly illegal" and violated the rights of innocent white state troopers who otherwise would have been promoted. Fried argued that because the plan accorded racial preference to non-victims, it was not narrowly tailored and therefore

unjustified. A more acceptable plan, according to the Solicitor, would be one which provided for the promotion of four blacks troopers for every eleven white troopers promoted to reflect the percentage of black troopers currently in entry level positions.

Attorney Richard Cohen, arguing for the black troopers, stated that the one for one promotion plan was justified because of the state's long history of discrimination and its reluctance to take steps to rectify its past. Mr. Cohen argued that the promotion plan was a "reasoned response" to the continued "footdragging" by the State police department. Cohen concluded by noting that the 1983 court-ordered remedy should be upheld since it would not operate unless there were qualified blacks to fill the position.

Decisions in the cases are expected by July 1987.

In a related matter, the Supreme Court on December 1 granted the Steelworkers' petition to review United Steelworkers v. Goodman, cert. granted, Dec. 1, 1986 (No. 85-2010) (decision below reported under the name Goodman v. Lukens Steel Co. at 777 F.2d 113 (3rd Cir. 1985)). The questions before the Court are:

(1) whether a labor union may be held liable for a violation of Title VII of the Civil Rights Act of 1964 solely because it failed to take affirmative steps to stop an employer's discrimination against black members of the bargaining unit, and

(2) if such a duty exists, whether a union can be held liable for breach of that duty based on a finding that in filing grievances against the employer's alleged discriminatory actions, the union made the arguments (such as seniority) that it thought best calculated to win the grievances, but those arguments did not include an explicit allegation of race discrimination.

While finding that the union had not discriminated, both lower courts held the union liable for failing "to include racial discrimination as a basis for grievances or other complaints against the company."

In its petition the union argues that it had "voluntarily undertaken a wide range of efforts to prevent employer discrimination" and that "the decisions below wrongly held [it] liable under Title VII to share in the consequences of the employer's wrongs because... in the courts' view, the union did not do enough to prevent or remedy those wrongs." The black employees argue that the union should be held liable for "deliberately choosing not to enforce non-discrimination clauses contained in its collective bargaining agreement, where the choice served to perpetuate a discriminatory environment."

The Court is not expected to hear the case until October 1987.

DEMOCRATS SUE TO END PROGRAM TO LIMIT MINORITY VOTING
by Trina Jones, Student Intern

On October 8, the Democratic Party filed a $10 million lawsuit in U.S.

District Court for New Jersey to halt a Republican "ballot security" program which Democrats contend was designed to "harass and intimidate" minority voters in an attempt to limit their participation in the November elections. On October 20, the GOP, while denying any wrongdoing, agreed to end the program. In the complaint, Democrats alleged that the program violated provisions of the Voting Rights Act of 1965 which prohibit intimidation of or attempts to intimidate voters, and prohibts any official from failing or refusing to permit any person who is qualified to vote. The Democrats also claim that the Republican plan breached a 1982 consent decree signed by the parties in which the RNC agreed to "refrain from undertaking any ballot security activities in polling places or election districts where the racial composition of such districts is a factor." Further, the complaint asserts that the plan was implemented in Louisiana, Indiana, and Missouri, and was planned for Michigan, Georgia, California, and Pennsylvania, aimed at over a million minority voters.

Background

In implementing the "ballot security" or "ballot integrity" program, the GOP hired a Chicago based company, Ballot Integrity Group, Inc. to send out some 350,000 letters marked "DO NOT FORWARD, RETURN TO SENDER" to registered voters in precincts which voted at least 80 percent for Mondale in the 1984 Presidential election. Polling data indicate that among the different racial and ethnic groups, only blacks voted for Mondale in that proportion. Returned letters, which were considered grounds for a voter residency challenge, were turned over to election officials, the FBI and the U.S. Attorney's Office in an effort to have the names purged. In addition, the names were kept for possible use by Republican poll judges in the November general elections.

Court Proceedings

While the RNC admits that letters were sent only to traditionally Democratic precincts, the Committee contended in court that the program was not racially motivated and did not target a specific gender, age or race. Accusations that a racial motive was involved in the plan's implementation were somewhat substantiated on Friday, October 24, when U.S. District Court Judge Dickinson R. Debevoise allowed release of a memorandum by Kris Wolfe, RNC Midwest political director. In the August 13 memorandum to Lanny Griffith, RNC's southern political director, Ms. Wolfe explicitly stated "I would guess that this program will eliminate at least 60-80,000 folks from the rolls... If it is a close race... which I am assuming it is, this could keep the black vote down considerably." Ms. Wolfe also revealed in testimony that she had discussed the "ballot security" program at length with officials involved in the Louisiana Senate campaign of Rep. Henson Moore (R) in his race against Rep. John Breaux (D). The "ballot security" program has also been alleged to be connected with other like campaigns, particularly those in Indiana's 8th and Michigan's 6th congressional districts. In close races, the minority vote can determine the outcome of the election.

Aftermath of suit

In the ensuing debate, Republicans have continued to maintain that the sole

purpose of the program was to remove from registration rolls non-existent or ineligible voters. RNC Chairman Frank K. Fahrenkopf in defense of the program has asserted that "any time a vacant and abandoned building or grave votes, the civil rights of all Americans are in danger." In response, Democrats insist that the Republicans have no interest in protecting civil rights. Rather, DNC Chairman Paul Kirk notes that the RNC has "spen[t] a million dollars to disenfranchise blacks and other minority voters. The GOP's attempt to portray this outrageous assault on voting rights as a public service project to eliminate ghost voters is another classic Republican disinformation campaign--an attempt to make people feel good while masking Republican dirty tricks."

Despite its defense of the ballot security program, the Republican National Committee on October 20, agreed to halt the program. According to Wade Henderson, Associate Director of the ACLU's Washington Office, the ACLU will ask the appropriate Congressional Committees to look at the program in the 100th Congress.

In light of a Republican promise to halt the program, no restraining order has been issued by the New Jersey Court. Depositions filed in the case have been suppressed by court order to prevent any embarrassment which may result from their disclosure. A hearing on the suit has been scheduled for February 1987.

SUPREME COURT AGREES TO HEAR JAPANESE AMERICAN REDRESS CASE

The Supreme Court on November 17, 1986 agreed to review the decision of the U.S. Circuit Court of Appeals for the District of Columbia in the Japanese American redress case, Hohri v. U.S. 782 F.2d 227 (D.C. Cir. 1986). The questions before the Court concern which federal appeals court has jurisdiction to hear the case; whether required procedures were followed in filing the case; and whether the case had been started after the statute of limitations had run out, thus barring consideration of the case on its merits. [A Japanese American Redress Bill has been introduced in Congress, see page 2.]

Background

On March 16, 1983 Japanese Americans who had been interned in U.S. military-controlled camps during World War II brought a class action suit against the U.S. Government seeking monetary damages and a declaratory judgment on twenty-two claims based upon a variety of constitutional violations, wrongful acts, and other grounds. The district court dismissed the case in its entirety. The court held that all of the claims except one were barred by the fact that the United States was entitled to claim sovereign immunity from suit. The exception was a claim under the Takings Clause of the Constitution ("nor shall private property be taken for public use without just compensation" (Amendment V)) which could be considered by a federal district court under a federal statute called the Tucker Act which waives sovereign immunity. But the court ruled that this claim had been filed too late, and therefore dismissed it too. Other grounds for dismissal were that claims were not filed within the time required by law or because of the plaintiffs' failure to exhaust their

administrative remedies as required, or because the court established that the U.S. had no fiduciary duty to the plaintiffs.

The U.S. Court of Appeals for the District of Columbia Circuit affirmed in part, and reversed and remanded in part. The Court found the statutory and contract claims barred on various grounds. But the appellate court agreed with the plaintiffs that the six year statute of limitations on the Takings Clause claims had not elapsed "because the government fraudulently concealed essential elements of their cause of action [and] the statute of limitations was tolled (i.e. did not run) until they actually discovered the facts that had been concealed." The court found that on this one constitutional claim the government's concealment of the fact that there was no military necessity for the internment program was sufficient to suspend the statute of limitations, and that it did not begin to run until there was an "authoritative statement by one of the political branches" acknowledging that "there was reason to doubt the basis of the military necessity rationale." Such a statement, the court reasoned, occurred when the Congress passed in 1980 an Act creating the Commission on Wartime Relocation and Internment of Civilians to review the evidence, and it was therefore then that the statute of limitations began to run. [The Commission on Wartime Relocation and Internment concluded that the exclusion and detention of Japanese Americans during World War II was based on racial prejudice, war hysteria and the lack of political leadership -- not military necessity.]

The Department of Justice in its brief requesting Supreme Court review asserts that jurisdiction on appeal of the Takings Cause Claim was the exclusive province of a special court called the U.S. Court of Appeals for the Federal Circuit, so that the D.C. Circuit should have ruled that it had no jurisdiction to consider the appeal to it.

On the question of timeliness of the suit, the Justice Department argues: "Our national misjudgement under pressures of war in the 1940's... does not suggest that a lawsuit may be brought in the 1980's to challenge those events. Like all who have suffered wrongs, respondents had the duty to pursue their claims diligently, and to bring them within the time provided by the statute of limitations." The Justice brief further states:

> What is perhaps most astonishing about the decision of the court of appeals is that, even if the tolling theory that the court has created had merit, a candid application of that theory still would not prevent the statute of limitations from having run. In 1976 (more than six years before the complaint in this case was filed), President Ford formally revoked the Executive Order under which the evacuation program had been carried out and officially proclaimed that 'we should have known then [that] not only was that evacuation wrong, but [that] Japanese-Americans were and are loyal Americans.' * * * *
>
> Plainly, if an authoritative statement by one of the political branches was needed before the statute of limitations could begin to run, President Ford's Proclamation 'fills the need far more naturally' than the 1980 Act. It is equally clear that '[t]he only difficulty' that kept the court of appeals from acknowledging this obvious fact is that 'the [Ford] statement

is inconveniently early.'

Oral argument is expected in the Spring with a decision by July 1987. If the Supreme Court accepts the government's position on the jurisdictional issue, it may not rule on the timeliness question.

JUSTICE DEPARTMENT REVERSES ITSELF ON VOTING RIGHTS

On January 6, 1987 the Department of Justice issued final regulations for the enforcement of Section 5 of the Voting Rights Act that authorize the rejection of proposed voting changes that would "result" in discrimination. The policy set forth in the final regulations is a reversal of the position expressed by Assistant Attorney General William Bradford Reynolds in a speech to the American Political Science Forum on August 29, 1986 in which he stated the Department would no longer object to some voting changes that have a discriminatory result (See CIVIL RIGHTS MONITOR, October 1986).

The Section 5 Standard

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. The position expressed by Reynolds in August meant that the Department, in reviewing Section 5 changes, would allow a voting change that has a discriminatory result on minority voters if it replaced a similarly discriminatory practice and the extent of the discrimination remained the same or decreased 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. This is the standard incorporated in the final regulations. Application of this standard will cause the Justice Department to object to a proposed voting change that provides minority voters with less opportunity then other members of the electorate to participate in the political process and to elect representatives of their choice. A proposed change will succeed or fail on its own, not through a comparison with the practice it would replace.

Serious Problems Remain

Civil rights advocates, many of whom had voiced strong opposition to the position expressed by Reynolds in his August 29 speech, were pleased with the standard adopted in the final preclearance regulation. However, they expressed strong dissatisfaction with other provisions of the regulations. The problems are briefly discussed below (For further discussion, see The Lawyers' Committee for Civil Rights Under the Law, Press Release: New Justice Department Voting Rights Act Regulations Fail to Provide Full Voting Rights Protection, January 6, 1987.)

1. Burden of Proof: The new regulation relieves covered jurisdictions of the burden of proving that a proposed change is not discriminatory, a

practice that had existed since 1965. Under the new regulation a change will be objected to only if there is "a clear violation of amended Section 2." The burden is thus on the Justice Department to prove discrimination.

2. Benchmark: The regulation provides that if "there exists no other lawful practice or procedure for use as a benchmark," in determining whether a Section 5 change has a retrogressive impact on minorities, (puts them in a worse position than they were in before the change) then the investigation will center on "whether the submitted change was designed or adopted for the purpose of discriminating..." This would presumably establish a standard of "intent to discriminate" in order to object to certain electoral changes.

3. Court-ordered changes: The regulation allows for Federal court authorization of voting law changes in emergency circumstances, such as impending elections, without Justice Department preclearance of the change. As expressed in the Lawyers' Committee Press Release, "The problem is that if elections occur only every four or two years, a jurisdiction may escape its Section 5 responsibilities by holding back on a new redistricting plan (or other change), and then get it implemented under court order in litigation without Section 5 review."

The Justice Department's adoption of a strong Section 5 standard occurred after a firestorm of opposition to the position expressed by the Assistant Attorney General in August. In addition to numerous civil rights activists, the Senate Majority Leader Robert Dole, a bipartisan majority of the Senate Judiciary Committee and the four primary House sponsors of the 1982 extension of the Voting Rights Act had sent letters to Attorney General Edwin Meese expressing concern over the suggested policy.

FOR YOUR INFORMATION

The Leadership Conference on Civil Rights will hold its 37th Annual Meeting and Dinner at the Capitol Hilton in Washington, D.C. on May 4 and 5, 1987. For additional information contact Lisa Haywood, Administrative Assistant, LCCR, 2027 Massachusetts Avenue, Washington, D.C. 20036, (202) 667-1780.

The 18th Annual National Conference of the A. Philip Randolph Institute is scheduled for June 4-7 at the San Francisco Hilton and Tower in San Francisco, California. For further information contact Mary Pearce, Administrative Director, A. Philip Randolph Institute, 260 Park Avenue South, New York, NY 10010 (212)533-8000.

JANUARY 1987

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