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INSIDE....

CONGRESS OVERRIDES THE PRESIDENT'S VETO OF THE CIVIL RIGHTS RESTORATION ACT

On March 22, 1988, the Senate by a vote of 74-23, and the House by a vote of 292-133 overrode President Reagan's veto of the Civil Rights Restoration Act. The Act restores the four civil rights statutes that relate to federal financial assistance to their broad coverage prior to the Grove City College v. Bell, 465 U.S. 555 (1984) decision. In the Grove City decision, the Supreme Court ruled that the prohibition in Title IX of the Education Amendments of 1972 against federal funding of sex discrimination extended only to the specific program or activity receiving the funds, and not to the entire recipient institution or entity. Since all the civil rights statutes relating to federal funds use the same language to describe coverage, the decision had the effect of also narrowing the scope of laws prohibiting federally-subsidized discrimination based on race, disability and age.

The Civil Rights Restoration Act amends each of the affected statutes by adding a section defining the phrase "program or activity" to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives federal financial assistance.

Background

The Act passed the Senate on January 28, by a vote of 75-14. During two days of debate on the Civil Rights Restoration Act in the Senate, several

amendments were offered which would have changed substantive law. All but one of the amendments were defeated. The defeated amendments include:

> An amendment offered by Senator Orrin Hatch (R-UT) that would have applied each statute's discrimination prohibition only to the portion of a religious institution that received federal assistance, not the entire institution. The amendment was rejected 36-56.
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> An amendment offered by Senator Strom Thurmond (R-SC) that would have limited the anti-discrimination requirements to a particular school receiving federal aid not the entire school system of which the school is a part. The amendment was defeated 16-70.
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> An amendment offered by Senator Orrin Hatch that would have broadened Title IX's exemption for religiously controlled institutions to include entities not controlled by but "closely identified" with the tenets of a religious organization. The amendment was defeated 39-56.
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> An amendment offered by Senator Hatch that would have provided institution-wide coverage under the statutes only for educational institutions. The amendment was defeated 19-75.
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> An amendment offered by Senator Gordon Humphrey (R-NH) that would have exempted certain small providers, such as grocery stores and pharmacies, from Section 504's requirement that the facilities be accessible to the handicapped.

Senator John Danforth (R-MO) offered an amendment which in effect will repeal long-standing Title IX regulations, first promulgated by then-Secretary of HEW Caspar Weinberger. The regulations provide that a recipient of federal funds "shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy" offered by the institution. The amendment adopted by a vote of 56-39, provides:

> "Nothing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion."

The amendment means that educational institutions will no longer be required to pay for abortions even when they provide comprehensive coverage for other medical needs.

The House passed the Senate-passed bill on March 2, by a vote of 315-98. On March 16, President Reagan vetoed the bill, and sent Congress a substitute bill, The Civil Rights Protection Act of 1988. The President's bill expanded Title IX's exemption for religiously controlled entities to include entities "closely identified with the tenets of a religious organization..." and would also have limited coverage of businesses, state and local governments, and grocery stores.

The need for passage of the Civil Rights Restoration Act

A recent decision by Judge John H. Pratt of the U.S. District Court for the District of Columbia in the Adams v. Bennett and Women's Equity Action League v. Bennett, (Nos. 3095-70 & 74-1720 (Dec. 11, 1987)) cases underscores the need for the Civil Rights Restoration Act.

The Adams suit was filed by the NAACP Legal Defense Fund (LDF) in 1970 against the Department of Health, Education and Welfare (now the Department of Education) to compel the Department to enforce Title VI in the southern and border states and require desegregation of public schools on all levels. In 1974, a similar case was filed to compel enforcement of Title IX beginning with the promulgation of regulations (WEAL). Despite a number of detailed court orders and agreements between the parties requiring better Government enforcement of both of the laws, serious compliance problems remained. In particular, several state systems of higher education remained in violation of Title VI, as did schools at every level throughout the country under the three statutes. There clearly was a need for judicial supervision of Department of Education enforcement efforts if state compliance were to be obtained.

The trial court, however, ruled that under Supreme Court decisions issued after the Adams case was first decided the plaintiffs (dozens of individuals and organizations) did not have "standing" -- the right to sue -- to force a reluctant federal government to carry out its obligations under the statutes affected by the Grove City decision and other similar federal laws. The LDF has appealed the decision (see related article that follows).

Thus, the ability of civil rights groups and victims of discrimination to obtain court orders requiring federal agencies to do their job under Title VI and other statutes has been impaired. Effective action will come only through Congress making clear the broad reach of the laws (as it has now done) and monitoring the performance of the federal agencies charged with enforcement.

SECRETARY OF EDUCATION BENNETT CLAIMS STATES HAVE MADE SUBSTANTIAL PROGRESS IN DESEGREGATING HIGHER EDUCATION

On February 10, 1988 Secretary of Education William Bennett held a press conference to announce that the Department of Education had "completed its [long-awaited] review of efforts by ten states to desegregate their systems of public higher education" and had determined "that [the] ten states have made substantial progress in desegregating their systems of higher education in accordance with binding desegregation plans previously signed with the Department's Office for Civil Rights (OCR)." The Secretary announced that four of the states -- Arkansas, North Carolina, South Carolina and West Virginia -- were in compliance with Title VI of the Civil Rights Act of 1964, and no further desegregation measures will be required by OCR. The other six states -- Delaware, Florida, Georgia, Missouri, Oklahoma, and Virginia -- were "found in partial violation of Title VI for failure to implement one or more specified desegregation measures to which they had previously agreed." The states have 90 days to submit assurances that they will implement the measures by December 31, 1988.

In his statement the Secretary stressed the steps that states had taken, and not the results of their actions:

> "The hundreds -- in some cases thousands -- of specific actions taken by each state to satisfy the requirements of these plans do not mean that they have met each numerical goal or timetable the plans employ. But I should emphasize, as the Office for Civil Rights has always emphasized, that these goals and timetables are not quotas."

Legree S. Daniels, Assistant Secretary for Civil Rights, who also spoke at the press conference, said:

> "Although each of the ten states complied with the majority of their commitments, six states will be required to implement some measures that remain incomplete. ...[T]he Office for Civil Rights will endeavor to ensure that these commitments are fulfilled by December 31, 1988. We do not anticipate that any state will be unable to implement the remaining important measures by next December. If necessary, however, the Office for Civil Rights will move to terminate federal education funds to any program or activity receiving those funds if they do not implement the remaining measures by that time."

The Department of Education's determination that four of the states are in compliance with Title VI means that the states will not have to take any further actions to desegregate their higher education systems such as enhancement of traditionally black colleges and affirmative recruitment of minority students.

Background

OCR in the Department of Education has responsibility for enforcement of federal statutes that prohibit discrimination in all education programs and activities that receive federal funds. In 1969-1970, OCR found that a number of border and southern states were continuing to operate segregated dual higher education systems in violation of Title VI. Although the states failed to desegregate their higher education systems, OCR did not take any administrative action against the states.

In 1970 the NAACP Legal Defense and Educational Fund (LDF) filed suit to compel the Department to require the states to desegregate their schools at all levels, Adams v. Richardson. Over the next 17 years, beginning with a decision in 1973 (356 F. Supp. 92 (D.D.C.)), the court found the states in noncompliance with Title VI and directed OCR to begin enforcement proceedings against recalcitrant states. On the higher education level, states were required to desegregate their colleges and universities, and to step up efforts to increase minority student enrollment. OCR continued to drag its feet and Elliott Lichtman, who represents the LDF in the litigation, testified in April 1987 that the reasons the suit was brought in 1970 unfortunately still characterize OCR's enforcement efforts today. OCR continues to refuse "to decide compliance issues or ha[s] delayed those decisions for protracted periods of time..." and has refused "to commence enforcement proceedings against state systems of higher education despite the clearest evidence of Title VI noncompliance by the states." This persists despite numerous judicial decrees requiring OCR to enforce Title VI in the higher education area and establishing specific timeframes and procedures for the enforcement of Title VI, as well as OCR's own findings that the states have not eliminated the

vestiges of segregation after three cycles of plans from the states committing themselves to desegregation of the systems. (Lichtman testimony before the House Committee on Government Operations' Subcommittee on Human Resources and Intergovernmental Relations, April 1987).

In 1983, the Department of Education filed a motion to dismiss the Adams case, arguing that the plaintiffs did not have standing to sue. On December 11, 1987, the court accepted the Department's argument and dismissed the case. The plaintiffs have filed a Motion for Stay of the Order of Dismissal, and a Notice of Appeal. The plaintiffs' Motion for Stay of the Order of Dismissal states:

> "The grant of this motion will preserve, pending appeal, the status quo created by this Court's orders since 1973... [L]oss of the remedial mechanisms so long in place will cause irreparable harm to plaintiffs' constitutional and Title VI rights... [C]ontinuance of the orders will cause no harm to the defendants... [T]he public interest, as declared by Congress, lies on the side of implementation of Title VI... and... plaintiffs are sufficiently likely to prevail on the merits to warrant maintenance of the status quo."

Response from the Civil Rights Community

In a statement issued following the Secretary's press conference, the NAACP Legal Defense Fund said:

> "The Department of Education today effectively excused ten Southern States from their affirmative obligation to dismantle the vestiges of racially segregated colleges and universities under Title VI of the Civil Rights Act of 1964. The Department released four states outright, and as to the remaining six left them with very limited responsibilities only to "implement" certain measures before December 31, 1988, at which time they too will be released. This deplorable action was taken despite the fact that in very few instances has there been more than minimal progress toward meeting the goals that were originally set by the states themselves. A review of the same data the Department relied upon in reaching its findings today, by the House Committee on Government Operations concluded 'that the original violations of law have not been corrected, and the factors that [the Department] found to constitute illegal vestiges of segregated systems of higher education remain.'
>
> "In determining that these ten states had fully or substantially complied with Title VI's obligations, the department looked to see if a review of specific measures in a state's desegregation plan has been implemented, not whether those measures achieved any results. For example, for the most part the states are not required to take further actions with respect to minority recruitment and retention despite the fact that Blacks currently enter and graduate from higher education systems in these states in lesser proportions than they did a decade ago. Disparities between Blacks and Whites in rates of college entry have worsened, not narrowed, since the 1970's. The black percent of white parity in college-going declined from Fall 1978 to Fall 1985 in
>
> Arkansas from 78 to 73%
> Florida from 68 to 57%

Georgia from 51 to 38%
Oklahoma from 88 to 70%
Virginia from 78 to 60%

...Overall, the record of state performance under the plans is not one of substantial compliance or progress. The Department's announcement today is very bad news for the college aspirations of present and future Black youngsters."

It is worth noting that the Department of Education's relaxation of requirements comes at a time when minority enrollment in higher education is dropping. The proportion of black high school graduates in the age group 18-24 enrolled in college declined from 28 percent in 1981 to 26.1 percent in 1985. The corresponding figures for Hispanics were 29.8 and 26.9. During this period, the proportions of 18-24 year olds who had graduated from high school continued to increase -- to 75.6 percent for blacks and 62.9 percent for Hispanics (New York Times, Nov. 18, 1987).

THE SUPREME COURT SANCTIONS UNEQUAL JUSTICE
by Diann Rust-Tierney, ACLU Legislative Counsel

On April 22, 1987, the Supreme Court ruled in a 5-4 decision written by Justice Lewis Powell, (McCleskey v. Kemp, 1075 S.Ct. 1756), that Georgia's death sentence was constitutional despite evidence that the death sentence was exercised in a discriminatory manner. In the case, Warren McCleskey, a black man who was convicted and sentenced to die for the murder of a white police officer, challenged his Georgia death sentence based on evidence which demonstrated that race was probably the most important factor in the decision to sentence him to death. McCleskey based his claim on a study by University of Iowa Law Professor David Baldus. After examining nearly 2,000 homicide cases occurring in Georgia between 1973 and 1979, Baldus discovered that the Georgia capital sentencing scheme operated on a dual standard of justice: a dual standard that turned on the race of the defendant and his or her victim. Baldus found that when Georgia exercised its most awesome power, the power to kill as punishment for a crime, it was more likely to exercise that power when the victim of the crime was white and particularly when the defendant is black. He found that blacks who kill whites are sentenced to death at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks. Prosecutors in Georgia sought the death penalty for 70 percent of black defendants with white victims, but only 15 percent of black defendants with black victims and only 19 percent of white defendants with black victims.

During the same period of time, only 9.2 percent of Georgia's homicides involved black defendants and white victims. Over sixty percent of Georgia homicides involved black victims. When the Mccleskey case was decided in April 1987 Georgia had executed 7 people since its statute had been approved by the Court in 1976. Six of the seven people who were killed were black. All of those killed were killed as punishment for the murders of white victims.

In addition to the statistical evidence presented to the Court, McCleskey's lawyers demonstrated that the distribution of death sentences mirrored the pattern of capital sentencing that Georgia statutes once provided for explicitly by law. Georgia's Civil War criminal code had a separate section

for "Slaves and Free Persons of Color" which provided for an automatic death sentence for murder committed by blacks. Anyone else convicted of the same offense might receive life imprisonment. That code also provided that rape of a free white female by a black was punishable by a mandatory death sentence. The same crime when committed by anyone else was punishable by a prison term of not less than 2 nor more than 20 years. The rape of a black woman was punishable by "fine or imprisonment at the discretion of the court."

The Court ruled, despite this evidence, that Warren McCleskey's death sentence was not unconstitutional. The Court acknowledged that such evidence, in another context, would raise an inference of race discrimination that would have entitled McCleskey to relief. However, the Court reasoned that because "McCleskey challenges decisions at the heart of the State's criminal justice system," it was justified in imposing a higher standard of proof. The Court went on to say "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we would soon be faced with similar claims as to other types of penalties." The Supreme Court thus created a new and impossibly difficult standard of proof which protects what it viewed to be the more important principle: preserving the character of Georgia's criminal justice system. The Court weighed the individual's right to be free from race discrimination in the most extreme case -- when the discrimination would cost him his life -- against Georgia's interest in preserving the status quo and the status quo won.

Justice Brennen in dissent wrote:

> "... Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our own peril, for we remain imprisoned by the past as long as we deny its influence in the present.
>
> "It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustices are not so easily confined. 'The destinies of the two races in this country are indissolubly linked together,' id., at 560, (Harlan, J., dissenting), and the way in which we choose those who will die reveals the depth of moral commitment among the living."

The Supreme Court Strikes a Blow for Race Discrimination

Not since before the Supreme Court decision in Brown v. Board of Education has the Court, when confronted with overwhelming evidence of race discrimination, engaged in such a balancing test and decided that competing societal interests required a standard of proof so difficult that the right to be free from discrimination is virtually eliminated. Not since before Brown has the Court held that some measure of race discrimination is tolerable.

The Supreme Court's refusal to address the evidence of race discrimination in McCleskey is all the more disturbing because the problem is not limited to Georgia. According to University of Florida Professor Michael L. Radelet, there have been no major studies on death sentencing in the last fifteen years

that have failed to find a significant pattern of race discrimination. A 1980 study of death sentences in Florida, Georgia, Texas and Ohio found that black defendants convicted of killing whites were more likely to be sentenced to death than were defendants of any other race. A 1984 study of sentencing patterns in eight states: Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia found consistent evidence of discrimination based on the race of the victim. A recent study by University of North Carolina Law Professor Barry Nakell and Kenneth Hardy, Director of the Social Science Statistical Laboratory, Institute for Research in Social Science for the University of North Carolina reveals similar patterns of race discrimination.

In many respects it is not surprising that the death penalty continues to be meted out in a racially discriminatory manner. As was true for other institutions in our society, the long term effects of de jure discrimination linger in attitudes and practices which produce discriminatory results long after the legal justification for race-based distinctions has been removed. Why is it that the death penalty seems to remain virtually untouched by the civil rights movement? One reason is that unlike the federal government's conduct concerning other institutions that operated on racial considerations, it has done nothing to address the way in which states impose death sentences. The political branches of the federal government and now the Supreme Court have been content to permit the states to decide upon various procedures that are designed to curb arbitrariness and discrimination. The evidence presented in the McCleskey case and the empirical data of the last fifteen years demonstrate that the states have failed miserably at the task. The failure by states to curb discrimination in deciding who will be killed as punishment leaves not only individual injustices but a gaping hole which threatens to swallow the basic principle of equality before the law.

Congress Must Remedy Pervasive Race Discrimination

In response to this threat, the Congress of the United States must act as it has in the past to make equality before the law a reality for every American -- every criminal defendant and every victim. After the Supreme Court decided McCleskey v. Kemp, the Executive Committee of the Leadership Conference on Civil Rights voted to make legislation to remedy race discrimination in death sentences a priority. LCCR expects to join with others to urge the Congress to pass legislation that would prohibit states from imposing or implementing death sentences if it is shown that the decision to sentence a defendant to death was influenced by race. Until Congress acts, race, not evidence, not facts - will continue to control who is and isn't sentenced to die in this country. The undeniable message is that white lives are worth more than black lives. For all the progress that the civil rights movement has begun to make a reality, if this is true we will not have come very far.

SIEGAN'S NOMINATION TO THE COURT OF APPEALS OPPOSED BY THE CIVIL RIGHTS AND PUBLIC INTEREST COMMUNITY

San Diego Law Professor Bernard Siegan, nominated by the President on February 2, 1987, to fill a vacancy on the 9th Circuit Court of Appeals is strongly opposed by civil rights and public interest groups because of his extraordinary views on constitutional doctrines relating to civil rights, separation of church and state, freedom of speech, and economic regulation.

For example, the nominee has espoused the view that the 14th Amendment's Equal Protection Clause does not prohibit states from discriminating against minorities and women in education, jury service, voting and office holding. Professor Siegan has also stated that the Brown v. Board of Education decision was decided on the wrong grounds, and that the courts have no constitutional authority to force recalcitrant school districts to desegregate.

The following discussion of Professor Siegan's judicial philosophy as it relates to civil rights borrows heavily from a report by People for the American Way Action Fund, and a report prepared by 26 organizations and available from the Judicial Selection Project, Alliance for Justice.

Civil rights issues

Professor Siegan brings to all constitutional questions a philosophy that views the Constitution as a static document to be interpreted by the literal intent of the Founding Fathers. His philosophy allows no room for interpretation of the Constitution to accommodate modern day issues, as he views the document as frozen in time. Opponents of this view see the Constitution as a living document written in broad terms which were "deliberately left undefined so that future generations could apply new knowledge and experience in interpreting constitutional questions" (People for the American Way Report).

In his writings, Siegan makes a distinction between natural or civil rights -- the protection of life, liberty, and property -- which he contends the Constitution authorizes the courts to protect, and political rights -- education, voting, jury service and holding office -- which he contends can be judicially protected only if Congress enacts laws. Thus, Siegan holds that the Equal Protection Clause of the 14th Amendment does not prohibit states from discriminating against minorities and women in education, jury service, voting, and office holding as these are political rights and thus not directly protected by the Constitution.

Siegan has also suggested that decisions of the Supreme Court barring gender discrimination are morally objectionable. In his book, The Supreme Court's Constitution: An Inquiry Into Judicial Review and Its Impact on Society, he wrote:

> "A definitional equality in gender is being protected at a price --possibly a very significant one. Making this outcome even harder to justify is the dubious authority of the Court in the matter. As has frequently occurred in other areas, the Court's projected moral position is compromised by the harm it imposes on those who trace their rights to original understanding. [The Court's ruling in the gender area]... results in both benefits and costs and when properly effected is morally as well as legally objectionable."

Professor Siegan claims that the landmark school desegregation case, Brown v. Board of Education, 349 U.S. 294 (1954), was wrongly decided under the 14th Amendment. The Brown decision rejected "separate but equal" schools as a violation of the 14th Amendment's Equal Protection Clause. As noted above, Siegan has claimed the Equal Protection Clause protects only "natural" rights (life, liberty, property) and does not apply to state administrative matters, such as schools and other public facilities.

Siegan believes that Brown I could have been decided under the right to travel since black children have the constitutional right to travel to schools attended by white children. Under this theory, those children not choosing to travel to a previously white school would have continued to be assigned to segregated schools. In Brown II and the school desegregation cases that followed, implementing the Brown I ruling, Siegan contends, the Court has overstepped its constitutional authority. He sees the Court's proper role as a "naysayer" -- able only to reject invalid laws and unable to issue affirmative mandates for school desegregation. He has referred to the desegregation cases as "the most flagrant example" of the Court's usurping powers belonging to other governmental bodies.

The People for the American Way Action Fund Report states that Siegan's view of Brown is incompatible with 30 years of civil rights law and peaceful social change.

> "Not only does Siegan misread Brown and misinterpret the 14th Amendment, but he also challenges the courts' equitable powers under Article III of the Constitution. His theoretical framework would result in the rejection of virtually all of the school integration cases decided by the Supreme Court since Brown. The unifying theme in his writing is his rejection of any role for the courts to remedy unlawful segregation."

Harvard Law Professor Laurence Tribe in a letter to Senate Judicary Committee Chair Joseph Biden wrote of Siegan's view of Brown:

> "Perhaps the most telling illustration of Mr. Siegan's radical revisionism is his conclusion that, because 'the fourteenth amendment accepted segregation in contemporary public educational facilities,' the Supreme Court's landmark ruling in Brown v. Board of Education cannot be supported as a decision enforcing the equal protection of the laws. Reluctant to repudiate Brown outright, Mr. Siegan advances the tortured argument that the right of black children vindicated by that ruling was 'a component of the right to travel, a right long secured by the federal courts.' The Supreme Court's Constitution, pg. 106. The notion that it is a black child's freedom to 'travel' onto the schoolgrounds that segregation laws infringed is so bizarre and strained -- so incompatible with meaningful enforcement of the right to integrated education and so at odds with ordinary ways of thinking about constitutional law -- as to bring into question both Mr. Siegan's competence as a constitutional lawyer and his sincerity as a scholar. At the very least, anyone who must strain so hard to find justification for the Supreme Court's ruling in Brown must be regarded as far outside any plausible definition of the jurisprudential mainstream."

Status of the nomination

The Senate Judiciary Committee held hearings on the nomination on November 5, 1987 and February 25, 1988. It has been reported that Attorney General Edwin Meese has told Mr. Siegan "his nomination is doomed." Siegan is reportedly taking a few days to consider whether to ask that his nomination be withdrawn (Wash. Post, 3/25/88, A3). Because of Siegan's extreme views, opponents of the nomination are guardedly optimistic that once Siegan's record is thoroughly reviewed he will be rejected. His views have been characterized by

some as to the "right of Bork." Robert Bork himself has characterized Siegan's views on economic regulation as a theory that would "work a massive shift away from democracy and toward judicial rule." Robert Bork, ("The Constitution, Original Intent, and Economic Rights," 23 San Diego Law Review 823 (1986)).

During the February 25 hearing, Senator Patrick Leahy (D-VT) who chaired the hearing, raised questions about the nominee's lack of trial experience in the federal courts. In response to questions, Professor Siegan stated that he has never appeared before a Court of Appeals and has not appeared before a district court in the last 35 years.

Senator Orrin Hatch (R-UT) in his questioning of the nominee sought to establish that Professor Siegan's criticisms of Supreme Court decisions were the writings of an academic, who should be provocative, and that as a judge Siegan would adhere to even those Supreme Court rulings with which he disagreed. In response to Senator Hatch's questions and similar questions by Senator Howell Heflin (D-AL), Professor Siegan asserted that if he is confirmed his objective in all cases that come before him will be "to figure out existing law as determined by the Supreme Court and apply it." Senator Heflin questioned the nominee on what principles he would apply in cases where precedent has not been established. Siegan insisted that in almost all cases one can determine the "winds... the way the Court would go." Senator Heflin observed that Siegan's answers left an uncertainty about the "general principles" he would apply in deciding cases involving issues "that have not been decided by the Supreme Court."

On this issue, the Judicial Selection Project says: "Careful scrutiny is essential because, while appeals court judges are bound by Supreme Court precedent, cases are not carbon copies of each other." Therefore, an appeals court judge when presented with a case for which precedent does not provide a clear answer can reasonably be expected to be affected by his/her view of what the law ought to be. "And it cannot be assumed that the Supreme Court will correct the decision if it is in error, for the Supreme Court hears but a small fraction of all the cases it is asked to review. Thus, the courts of appeals are in fact the courts of last resort for most cases, including of course many involving individual rights and liberties."

Readers interested in additional information on the nomination should request copies of reports on the Bernard Siegan nomination from:

People for the American Way
2000 M Street, NW
Suite 400
Washington, D.C. 20036

Judicial Selection Project
Alliance for Justice
600 New Jersey Avenue, NW
Washington, D.C. 20001

SENATE JUDICIARY COMMITTEE HOLDS HEARING ON THE PERFORMANCE OF THE REAGAN ADMINISTRATION IN NOMINATING WOMEN AND MINORITIES TO THE FEDERAL BENCH

On February 2, 1988, Senator Edward Kennedy (D-MA) chaired a hearing by the Senate Judiciary Committee to review the Reagan Administration's performance in nominating women and minorities to the federal bench. In opening the hearings, Senator Kennedy said:

> "The most distinctive feature of our constitutional system is our independent federal judiciary, on which we rely to protect our most fundamental rights and liberties. In America, the federal judiciary is the forum of last resort for those who have been treated unfairly. It is one of the most important strands in the fabric that holds America together.
>
> It is therefore vitally important that all groups in our society have confidence in the fairness, and the openness, of the federal judiciary. That confidence cannot exist if the federal courts are perceived to be the exclusive bastion of any single group in our society.
>
> ... The Reagan Administration has appointed far fewer women and minorities to the federal bench than did the previous Administration.
>
> Of the Administration's 367 nominations, only six (or 1.6 percent) have gone to Black nominess; by contrast, 14.3 percent of President Carter's federal court nominees were Black. Similarly, only 8.4 percent of President Reagan's judicial nominees were women, while 15.5 percent of President Carter's nominations were women. This pattern is reflected across the board, for all racial minorities, and at all levels of the federal judiciary."

Senator Kennedy's statement was echoed by a number of witnesses representing national and local women's and minority bar associations. Witnesses stated that while the number of qualified women and minority lawyers has been increasing, this Administration's record of appointing women and minorities has been declining.

> "Between 1981 and 1986, the Administration's judicial nominees were 9.2 percent female, 1.7 percent black, and 4.4 percent Hispanic. Between 1987 and 1988, the percentages declined to 5.4, 1.4, and 1.4 respectively."

Witnesses also decried the Administration's failure to continue the policy (started by the Carter Administration) of giving the Federation of Women Lawyers and the National Bar Association (a predominantly black association) the list of candidates under serious consideration for the federal bench. Thomas A. Duckenfield, Vice President of the National Bar Association, testified before the Committee said:

> "Throughout the Reagan Administration, the National Bar Association has requested of the Department of Justice that the National Bar Association be included as an active participant in the selection and investigation process of judicial nominees... Such practice had been our experience in the years preceding the Reagan Administration. In fact, the National Bar Association would receive the names of potential nominees along with the American Bar Association and would have the opportunity to offer its views and insight. We were able to provide much needed insight and information bearing on the fitness of potential nominees for the federal judiciary."

Mr. Duckenfield said during questioning that Attorney General Edwin Meese had made it clear in a meeting with NBA officials that the policy of sharing the names of potential nominees with the NBA would not be the policy of his office.

Estelle H. Rogers, National Director, Federation of Women Lawyers' Judicial

Screening Panel, stated that the Carter Administration's consultation with her association and the National Bar Association had "sent a signal that the selection of federal judges was no longer just an extension of the old boys' network." She further testified:

> "The Justice Department of Attorney General William French Smith sent a very different signal. No longer would the administration share the names of its candidates with FWL or the National Bar Association. No longer would 'commitment to equal justice' be a requirement for those seeking appointment to the federal judiciary. No longer would Senators be encouraged to recommend women or minorities. This, despite President Reagan's 1980 campaign to '...seek out women to appoint to...Federal courts in an effort to bring about a better balance on the Federal bench;' and the later pledge of Edwin Meese: '[I]f I am confirmed by the Senate as Attorney General, I will make the greatest search to try and find as many qualified people from all minority groups...for judgeships.'"

Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, Department of Justice, testified on behalf of the Administration. He said President Reagan "is determined to appoint to the federal courts only those individuals who are committed to the rule of law and to the enforcement of the Constitution and statutes as those were adopted by 'we the people' and their elected representatives... only those who have the intellectual capacity to deal with difficult legal issues of a complex society, who have the legal training and experience necessary to take on the important duties of the bench, and who are of the highest personal integrity."

During questioning about the Administration's poor record of nominating women and minorities, Mr. Markman stated that the Administration rejects the affirmative action policy of the Carter Administration. He stated that the Reagan Administration rejects proportionality, and the willingness (he claimed) of the Carter Administration to appoint a woman, black or Hispanic who was less qualified than a white. In the judicial selection process, he asserted, this Administration is committed to an "open door, fair share, color blind [policy], but not an equal results policy." He insisted the Administration would like to find more qualified women and minorities, but said it was not easy as the pool of qualified women and minorities is small. In describing the pool of qualified blacks, Mr. Markman stated that you must first consider the fact that only 3 percent of all attorneys are black, of those half are too young for consideration, and most black attorneys are not employed in positions from which judges are traditionally selected. To illustrate this last point, Mr. Markman said that blacks are heavily concentrated in government and public interest positions, and comprise less than one percent of the partners in major law firms, a category from which judges are traditionally selected. Further, he stated that it is a fact of political life that 90 percent of all judicial appointments come from the same party as the President, and the vast majority of black attorneys are closely identified with the Democratic party.

Asked by MONITOR staff to comment on Mr. Markman's testimony, Conrad K. Harper and Stuart J. Land, Co-Chairmen of the Lawyers' Committee for Civil Rights Under Law, and partners in Simpson Thacher & Bartlett and Arnold & Porter respectively, issued the following statement:

"Mr. Markman's testimony is seriously misleading. It is clear that this

Administration has not hesitated to go outside of what Mr. Markman calls the 'traditional' areas from which judges are selected. Many nominees have come from government positions, law schools, and in one case, a nominee to an appellate court had spent a significant portion of his professional life as a newspaper editor.

"Moreover, we should look at the stellar performance of minority and women judges currently on the federal bench. It is certainly true that many, if not most, were nominated to the bench from positions other than as partners with major law firms.

"There is no shortage of minority or women lawyers who would make outstanding judges. What the country needs is performance in judicial nominations and appointments which accords with these facts and not statements contrary to them such as those made by Mr. Markman in his testimony."

Hearing witnesses also spoke of the availability of qualified women and minorities, and of their own willingness to work with the Administration. Wiley A. Branton, former Dean of Howard University Law School, and a partner in the firm of Sidley and Austin, testified before the Committee:

"There are 51 judges on the Superior Court of the District of Columbia, all of whom must meet the same basic requirements for appointment as that required of United States district judges. In my opinion, approximately 70% of the active judges presently sitting on the Superior Court are worthy of serious consideration for appointment to the United States District Court for the District of Columbia. Many of them are good candidates for the United States Court of Appeals for the District of Columbia. Among this group are 18 black male judges, 3 black female judges and 8 white female judges, any of whom would be good candidates for appointment to the federal bench. On the District of Columbia Court of Appeals, there are 4 black judges, including 2 females, who are worthy of consideration for appointment to the federal bench."

Iverson O. Mitchell, III in his testimony for the Washington Bar Association (an affiliate of the National Bar Association), said:

"If the administration is so willing, the Washington Bar Association would be more than happy to confer with Assistant Attorney General Markman to help identify individuals for consideration for the next court vacancy. We have our own standing committee for judicial nominations which can provide the administration with names of qualified candidates."

In addressing the issue of qualified women for the judiciary, Martha Saenz-Schroeder, President of the Women's Bar Association of the District of Columbia, reported the results of a survey of her organization's membership conducted in the fall of 1985:

80 percent of those responding worked full-time;

The median age was between 30 and 37;

47 percent had been in practice from 6 to 10 years;

40 percent worked for the government, 31 percent for law firms, 9 percent were in sole practice, and 5 percent worked for corporations.

Saenz-Schroeder said:

"By now, women lawyers have been in the profession in sufficient numbers and long enough to have acquired the credentials necessary for serious consideration to all judicial appointments, including the Supreme Court."

United States District Court for the District of Columbia

The Hearing also focused on the President's nominations to the United States District Court and Court of Appeals for the District of Columbia, all of which have been of white males. This, despite the fact that of the 45,000 attorneys in Washington, 10,000 are women (22 percent) and 3,000 (7 percent) are Black or Hispanic.

In addition to the testimony of Wiley Branton, discussed above, Robert E. Jordan III, President of the District of Columbia Bar, said:

"[W]e are both concerned and distressed that all eight appointees to the United States Court of Appeals for the District of Columbia and all six nominees to the United States District Court for the District of Columbia, have been white males. This is not to suggest that there is not a large enough number of white males to provide extremely well-qualified appointments for every available vacancy. However, we number among the members of our Bar a very large number of women and minorities, including blacks, Hispanics, and others. It does not appear to us that adequate attention is being paid to the enormously talented lawyers available among women and minorities in evaluating potential nominees for judicial positions in the federal courts of the District of Columbia.

We believe that the Administration is overlooking, in large part, this substantial body of legal talent, while at the same time creating an image of the federal judiciary as being, entirely apart from the talents of those who are in fact appointed, unrepresentative of the population of both the Nation and the District of Columbia."

CONFLICT OF INTEREST QUESTIONS RAISED ABOUT FUNDING OF HUD FAIR HOUSING CAMPAIGN

From 1983 to 1985, approximately $1 million was spent to promote public awareness of fair housing laws that prohibit discrimination through a project sponsored by the Department of Housing and Urban Development (HUD). The project which critics say amounted to little more than a public relations campaign for Secretary of HUD Samuel Pierce, was held in eight cities, Baltimore, Dallas, New York, Oakland, Columbus, Philadelphia, New Orleans and Los Angeles. To pay for the events, HUD officials solicited monies from housing developers, real estate agents, and contractors "who do business with HUD and who in some cases had projects awaiting HUD approval" (Los Angeles Times, Dec. 27, 1987). This has raised questions of a possible conflict of interest as the persons asked to contribute might have thought their donation, or lack thereof, would affect their business relationships with HUD.

Walter Zelman, Executive Director of Common Cause in Los Angeles, was quoted in the Los Angeles Times article:

> "There's clearly a potential conflict when policy makers in an agency request private money to achieve a goal and the money comes from people who want something from these policy makers... At a minimum, you ought to have public disclosure [of the money collected]... And it's arguable whether there ought to be something considerably stronger like a ban."

One developer who manages hundreds of HUD subsidized rental units had his contribution of $100.00 returned with a letter that stated:

> "$100 is on the ridiculous side... It does not pay for the time and energy we have used to create an opportunity for you to be identified with this project... With your involvement in housing and benefits from doing business with HUD you should want to make a better impression..."

The Los Angeles Times reported that the biggest expense for the campaign was advertising space on buses and billboards across the country. Other expenses included printing of posters, newspaper advertisements, and the costs for press conferences and parties which in some cities included helium balloons costing thousands of dollars.

Secretary Pierce's Testimony Sought

Secretary Pierce declined to appear before the House Committee on Banking, Finance and Urban Affairs' Subcommittee on Housing and Community Development to answer questions about the fair housing campaign. In a letter to the subcommittee chair Henry B. Gonzalex (D-Tex.), Secretary Pierce wrote that he considered the hearings unnecessary because the Department has initiated an investigation, and he thought the hearings "would degenerate into a partisan attack ultimately harmful to the cause of fair housing."

The subcommittee has extended a second invitation to the Secretary to testify. Chair Gonzalez wrote:

> "At the opening of yesterday's hearing, several Members of the Subcommittee expressed in very strong terms their frustration over your declining to appear before the Subcommittee. In fact, you have not appeared before the Subcommittee for almost three years. The frustration was so serious that the Members discussed the possibility of a subpoena if you continued to decline the invitation to testify. I urge you to reconsider."

Secretary Pierce in responding to the second invitation said he would be "pleased to testify on ... matters not discussed by HUD officials representing me in the Subcommittee hearings mentioned above." Subcommittee staff have indicated that members of the subcommittee are not going to allow the Secretary to place conditions on his testimony. When the MONITOR went to press, a hearing date had not been scheduled.

Testimony on the Extent of Residential Discrimination

The Housing and Community Development Subcommittee did hold hearings on the extent of housing discrimination. Professor Douglas S. Massey, University of Chicago, reported the results of research he conducted on patterns of racial residential segregation in 60 metropolitan areas which include the 50 largest urban areas and 10 areas with large concentrations of Hispanics. The findings of this research include:

> Blacks remain the most residentially segregated minority group in America.
>
> Black segregation is greatest in large metropolitan areas containing many black residents, especially in the northeast and midwest. For example, in Chicago, which contains the second largest black population in the United States, and the third largest Hispanic and Asian populations, the black segregation score was 88, meaning that 88 percent of blacks would have to change their place of residence to achieve a racial distribution in every neighborhood in the metropolitan area equal to the urban area as a whole. The Hispanic score was 64, and the Asian score was 44.
>
> Black suburbanization lags far behind that of other minority groups and is generally quite limited, particularly in the northeast and midwest. In the metropolitan areas studied, the average percentage of blacks living in suburbs was 28 percent, compared to 48 percent for Hispanics and 58 percent for Asians.
>
> Blacks are unable to achieve integration within central cities; they are less able than other groups to attain suburban residence; and once in [the] suburbs, they are still highly segregated.
>
> Changes in the level of black education, income, or occupational status are not, in general, strongly related to the level of black segregation; even after controlling for socioeconomic status, black segregation remains high.
>
> As black socioeconomic status rose, the level of black suburbanization remained essentially unchanged. Increasing socioeconomic status among Hispanics and Asians, however, is strongly associated with lower segregation and higher suburbanization.
>
> The best evidence suggests that black segregation results from two processes of discrimination -- one active, the other passive. First, whites attempt to prevent black entry into white neighborhoods through a variety of tactics; and once black entry into a neighborhood is achieved, whites avoid that area as undesirable.
>
> Because residential segregation continues to limit the freedom of black families to live wherever they might want, race remains a fundamental cleavage in American society, denying aspiring black families access to the full range of opportunities in our society.

Charles Kamasaki, Director of Policy Analysis, National Council of La Raza, provided testimony on segregation and housing discrimination in the Hispanic community. He stated that discrimination contributes to the poor housing conditions many Hispanics experience, and reported research findings on

housing discrimination against Hispanics in selected urban areas. For example, a study in Dallas, found that 42 percent of dark-skinned Mexican Americans and 16 percent of light-skinned Mexican Americans were given false information on the availability of rental units. The chance of dark-skinned Mexican Americans experiencing at least one instance of discrimination in a typical housing search was 96 percent, and the probability of light-skinned Mexican Americans experiencing similar discrimination was about 65 percent.

Mr. Kamasaki spoke in support of the pending Fair Housing Amendments Act which would provide HUD with a stronger enforcement mechanism to resolve housing discrimination complaints. He, said, however, the bill pending in Congress does not go far enough as it does not "address the need for action to increase the likelihood that Hispanics encountering housing discrimination will file complaints." Mr. Kamasaki said that "despite evidence of pervasive housing discrimination against Hispanics, HUD data reveal that Hispanics tend to file very few complaints."

To address this concern, Kamasaki said that La Raza is committed to work with the Appropriations Committee to obtain funding for the Fair Housing Initiatives Program (FHIP). The FHIP program, as authorized, provides funding for (1) innovative enforcement and compliance activities, (2) education and outreach programs to inform the public of their rights and obligations under federal, state, and local fair housing laws, and (3) administrative and judicial enforcement of fair housing laws by supporting testing and other investigative efforts.

Kamasaki also stated that La Raza believes FHIP should include an explicit Hispanic focus, and recommends:

> "(1) support for systemic testing including Hispanic, White, and Black teams, in various locations, to provide more empirical data on the scope and degree of discrimination against Hispanics;
>
> (2) funding to Hispanic groups interested in fair housing activities, to support outreach and public education, receiving and recording of complaints, conducting of tests, and referral of documented complaints to HUD; and
>
> (3) availability through HUD of all necessary bilingual materials and personnel in order to inform the Latino community about their equal housing opportunities and about complaint procedures."