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FAIR HOUSING BILL PASSES CONGRESS

On August 8, 1988 the House of Representatives by a voice vote approved the Senate-passed Fair Housing Amendments Act (Amendments) and thus ended a twenty-year struggle to strengthen the Fair Housing Act of 1968. The bill had passed the Senate on August 2 by a 94-3 vote. A slightly different version of the bill had passed the House on June 29 by a 376-23 vote. President Reagan is expected to sign the bill into law in early September. Moments before the bill passed in the Senate, Senator Edward Kennedy (D-MA), chief sponsor in the Senate along with Senator Arlen Specter (R-PA), said:

> "[T]his moment has been many years in coming, and what a beautiful moment it is. The 20-year logjam on fair housing is finally breaking, and the promise of fair housing is about to become a reality."

Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights said:

> "This is the most dramatic and significant improvement in civil rights law in the last 20 years."

The principal sponsors in the House were Representatives Hamilton Fish (R-NY) and Don Edwards (D-CA).

Major Provisions of the Bill

1. Enforcement Mechanisms

The Amendments make major changes in the enforcement mechanisms of the law. Under the 1968 Fair Housing Law, the only effective means of enforcement was through the courts which was a long and costly process. If HUD found evidence of discrimination, it could only use informal methods of conference, conciliation, and persuasion to bring about compliance. If those efforts failed, HUD could not issue cease and desist orders and it could not initiate litigation against those it determined were discriminating. A limited category of cases could be litigated by the Department of Justice on referral from HUD, namely those in which a person or group was engaged in a pattern or practice of housing discrimination. In any other discrimination case, only the victim could sue, at that person's expense.

Under the Amendments, HUD will continue to attempt to resolve discrimination complaints through conciliation. However, if this is insufficient, HUD will have the authority to issue a discrimination "charge" where its investigation supports a reasonable cause finding. If the investigation is not completed within 100 days, the Secretary must notify the complainant and the respondent "in writing of the reasons for not doing so." The person who complained to HUD, the person charged with discrimination, or an aggrieved person on whose behalf the complaint was filed may elect to have the matter decided in a civil action in U.S. district court. The Secretary shall then authorize such action and the Attorney General is required to commence and maintain the civil action. If the court finds that a discriminatory housing practice has occurred it may award the plaintiff actual and punitive damages.

If the election to go to court is not made, the Secretary is to pursue the case before an Administrative Law Judge (ALJ) within HUD. The ALJ is to begin the hearing "no later than 120 days following the issuance of the charge..." Within 60 days after the end of the hearing, the ALJ is to issue findings of fact and conclusions of law and where there is a finding of discrimination, the ALJ shall issue an order for appropriate relief. If the ALJ is unable to meet these timeframes, the Secretary, the aggrieved person, and the respondent must be notified of the reasons for the delay. Relief may include compensatory damages, injunctive and other equitable relief, and civil penalties against a respondent ranging from a maximum of $10,000 for a first-time violation, to a maximum of $50,000 for a repeat violation. The Secretary may review the ALJ's decision so long as such review is completed within 30 days. An appeal from the final agency order may be taken to the federal circuit court of appeals.

The private right to sue remains. An aggrieved person can bring a civil action in federal or state court whether or not a complaint has been filed with HUD. But a conciliation agreement or the

beginning of a trial in either forum terminates the right to proceed in the other forum.

2. Protected Classes

The 1968 Fair Housing Act prohibited discrimination in the sale or rental of housing to any person because of race, color, religion, sex or national origin.

The Amendments add two new protected classes: handicapped persons and families with children.

In addition to prohibiting a refusal to rent or sell housing to a handicapped person, the bill prohibits discrimination in the terms and conditions of the transaction. The amendments provide that the buyer or renter must be allowed to make necessary modifications to the unit "if such modifications may be necessary to afford such person full enjoyment of the premises." In addition, 30 months after the enactment of the bill all new multifamily dwellings of four units or more must be designed and constructed so as to be accessible to and useable by handicapped persons. If the dwellings have four or more units and an elevator, all units must meet the requirements. In such dwellings without elevators the ground-floor units must be accessible and usable. The requirements of this provision include:

> The public use and common use portions of such dwellings must be readily accessible to and usable by handicapped persons.
>
> All the doors designed to allow passage into and within all premises within such dwellings must be sufficiently wide to allow passage by handicapped persons in wheel chairs.
>
> Reinforcements are required in bathrooms walls to allow for later installation of grab bars.
>
> Kitchens and bathrooms must be constructed to allow an individual in a wheelchair to maneuver about the space.

The bill also makes it illegal to refuse to rent or sell housing to families with children as well as to "any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years." Exemptions are provided for housing for older persons, which is defined as:

> Housing provided under any State or Federal program that the Secretary of HUD determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or
>
> Housing intended for, and solely occupied by, persons 62 years of age or older; or
>
> Housing intended and operated for occupancy by at least one

person 55 years of age or older per unit. Under this exemption, the Secretary of HUD is to develop regulations which require at least the following three factors:

> Significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons.
>
> At least 80 percent of the units are occupied by at least one person 55 years of age or older.
>
> The publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

Under this section, a transition period is provided "to ensure that the interests of current residents of housing that excludes children will not be unduly disturbed by passage of the bill" (August 1, 1988 Dear Colleague letter and attached memorandum of Senators Edward Kennedy and Arlen Specter). Thus, housing developments which do not meet the age requirement at the time of enactment of the bill will not lose the exemption provided that the age requirement is applied to persons moving in after enactment of the law.

ATLANTA JOURNAL-CONSTITUTION STUDY FINDS DISCRIMINATION IN MORTGAGE LENDING

In a series of articles published in May 1988, the Atlanta Journal-Constitution carried the findings of an examination by its reporters of mortgage lending practices in the Atlanta area over a six-year period. The study concluded that:

> Race -- not home value or household income -- consistently determines the lending patterns of metro Atlanta's largest financial institutions...
>
> Among stable neighborhoods of the same income, white neighborhoods always received the most bank loans per 1,000 single-family homes. Integrated neighborhoods always received fewer. Black neighborhoods -- including the mayor's neighborhood -- always received the fewest.
>
> With the banks and savings and loans largely absent, home finance in metro Atlanta's black areas has become the province of unregulated mortgage companies and finance companies, which lenders say commonly charge higher interest rates than banks and savings and loans.

The investigation consisted of a five-month review of compliance

with the Community Reinvestment Act of 1977, a federal law which provides that "deposit-gathering institutions have an affirmative obligation to solicit borrowers and depositors in all segments of their communities" (Journal-Constitution, May 1, 1988). Journal-Constitution staff examined lenders' reports on home-purchase and home-improvement loans by every bank and savings and loan association in the Atlanta metropolitan area from 1981 through 1986 (109,000 loans total). The focus was on 64 middle-income neighborhoods, 39 white, 14 black and 11 integrated. The study also included an examination of 1986 real estate records for 16 of the neighborhoods. This component of the study showed that "Banks and savings and loans financed four times as many of the home purchasers in middle-income white neighborhoods as in middle-income black neighborhoods."

Other findings include:

> Banks and savings and loans return an estimated 9 cents of each dollar deposited by blacks in home loans to black neighborhoods. They return 15 cents of each dollar deposited by whites in home loans to white neighborhoods.
>
> The offices where Atlanta's largest banking institutions take home loan applications are almost all located in predominantly white areas. Most savings and loans have no offices in black areas.
>
> Several banks have closed branches in areas that shifted from white to black. Some banks are open fewer hours in black areas than in white areas.
>
> Lenders are not required to disclose information on loan applicants by race. However, two of the largest lenders volunteered that information, which showed they rejected black applicants about four times as often as whites.
>
> A black-owned bank in Atlanta, which makes home loans almost exclusively in black neighborhoods, has had the lowest default rate on real estate loans of any bank its size in the country.

Marvin Arrington, president of the Atlanta City Council, responded to the study: "It's institutional racism. While we are patting each other on the back about being a great city and a city too busy to hate, they're still redlining." The Journal-Constitution reported that "Senior banking executives noted that home mortgage lending is not their primary business. Lenders also said any disparities most likely are caused by factors beyond their control, including poor quality housing and lack of home sales in black neighborhoods, fewer applications from blacks, and limitations in the federal lending data. They pointed out that lending patterns are influenced by real estate agents, appraisers and federal loan programs."

A Reprint Booklet of the series entitled "The Color of Money" is

available from the Marketing Department of The Atlanta Journal Constitution, 72 Marietta Street, N.W., P.O. Box 4689, Atlanta, Georgia, 30302, (404)526-5690.

SUPREME COURT RULES THAT DISPARATE IMPACT STANDARDS APPLY TO SUBJECTIVE PROMOTION SYSTEM

On June 29, 1988 in an 8-0 decision (Justice Kennedy not participating) the Supreme Court ruled "that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases," Watson v. Fort Worth Bank and Trust, 56 USLW 4922 (1988). The Court wrote:

> "We are persuaded that our decisions in Griggs and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices.
>
> "We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."

Background

1. Disparate treatment vs. Disparate impact

The following discussion borrows heavily from Affirmative Action in the 1980s: Dismantling the Process of Discrimination, A Statement of the United States Commission on Civil Rights.

Civil rights law has developed two different legal standards for determining when illegal discrimination in employment has occurred. Constitutional guarantees of equal protection of the law, contained in the 5th and 14th amendments, are violated only by intentional, purposeful actions that harm persons because of their race, national origin or sex. However, Title VII of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967 and Executive Order 11246 on Affirmative Action also forbid actions, regardless of their intent, that have a discriminatory effect on protected classes and that cannot be justified as necessary to the conduct of the business.

Under both the "intent" and the "effects" standards, statistical data may be used in determining whether illegal discrimination has occurred, but such data serve different purposes. In intent cases, the question asked after discovering statistical disparities is whether there is evidence of intent. In effects cases, it is whether the practices that resulted in the disparities can be justified.

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court interpreted Title VII of the 1964 Civil Rights Act to invalidate general intelligence tests and other criteria for employment that disproportionately excluded minorities because these selection devices were not shown to be job related and dictated by "business necessity." Although the lower courts had found that the company's tests were not deliberately discriminatory, the Supreme Court concluded:

> "[G]ood intent or [the] absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

Not all employment selection mechanisms that have an "adverse impact" or "disparate effect" are unlawful, only those that cannot be shown to be job related and necessary to the conduct of the business. Griggs established that the employer must demonstrate that practices which adversely affect the opportunities of minorities and women do, in fact, fairly measure or predict actual performance on the job.

Prior to the Watson case, the Supreme Court had not addressed the question whether disparate impact analysis may be applied to cases in which subjective criteria rather than objective are used to make employment decisions. The courts of appeals were divided on the issue.

2. The facts in the case

As summarized in the Court's decision, the facts in this case are as follows:

> Clara Watson, a black woman, had been employed by the Fort Worth Bank and Trust since August 1973. She was hired as a proof operator. In January 1976 she was promoted to teller in the Bank's drive-in facility.
>
> In February 1980 she applied for a position as supervisor of the tellers in the main lobby. The position was filled by a white male. She then applied for a position as supervisor of the drive in bank. A white female was selected for the position.
>
> After serving for a year as a commercial teller in the Bank's main lobby, and informally as assistant to the supervisor of tellers, the supervisor was promoted and Ms. Watson applied for the position. The position was filled by the supervisor of the drive-in bank, a white female. Watson applied for the vacant drive-in bank supervisor position but a white male was selected.
>
> The bank employs approximately 80 employees and does not have precise, formal criteria for evaluating applications

> for the positions Watson sought. The bank relies on the subjective judgement of supervisors. All the supervisors who evaluated Watson for the jobs were white.

The district court treated Watson's claims "under the evidentiary standards that apply in a discriminatory treatment case," thus requiring her to prove that the bank had a discriminatory intent or motive. The district court concluded that:

> "...Watson had established a prima facie case of employment discrimination, but that the bank had met its rebuttal burden by presenting legitimate and nondiscriminatory reasons for each of the challenged promotion decisions. The court also concluded that Watson had failed to show that these reasons were pretexts for racial discrimination."

Watson appealed to the Fifth Circuit, and the Court of Appeals panel held that "a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model."

The Supreme Court vacated the lower court's decision and remanded the case "for further proceedings consistent with this opinion."

Justices disagree about evidentiary standards

While agreeing that disparate impact analysis may be applied to subjective employment criteria, the Justices split on the evidentiary requirements that should apply in these cases.

Justice O'Connor, joined by Chief Justice Rehnquist, and Justices White and Scalia stated, "today's extension of disparate impact analysis calls for a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bounds." Their opinion suggests standards that may make these subjective criteria cases more difficult to prove than those involving objective criteria. The opinion says:

> "First, we note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force...[T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.
>
> "Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected class.
>
> "A second constraint on the application of disparate impact

> theory lies in the nature of the 'business necessity' or 'job relatedness' defense. Although we have said that an employer has 'the burden of showing that any given requirement must have a manifest relationship to the employment in question,' Griggs, 401 U.S., at 432, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant.
>
> "Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must 'show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.'"

Justice Blackmun, in an opinion joined by Justices Brennan and Marshall, asserted "that the plurality mischaracterizes the nature of the burdens this Court has allocated for proving and rebutting dispatate-impact claims."

The Blackmun opinion further said:

> "The plurality's discussion of the allocation of burdens of proof and production that apply in litigating a disparate-impact claim... is flatly contradicted by our cases. The plurality, of course, is correct that the initial burden of proof is borne by the plaintiff, who must establish, by some form of numerical showing, that a facially neutral hiring practice 'select[s] applicants... in a significantly discriminatory pattern'... [A] plaintiff who successfully establishes this prima facie case shifts the burden of proof, not production, to the defendant to establish that the employment practice in question is a business necessity...
>
> "The plurality's suggested allocation of burdens bears a closer resemblance to the allocation of burdens we established for disparate-treatment claims..., than it does to those the Court has established for disparate-impact claims."

Justice Stevens, concurring only in the judgment, wrote:

> "At this stage of the proceeding,... I believe it unwise to announce a 'fresh' interpretation of our prior cases applying disparate impact analysis to objective employment criteria... Cases in which a Title VII plaintiff challenges an employer's practice of delegating certain kinds of decisions to the subjective discretion of its executives will include too many variables to be adequately discussed in an opinion that does not focus on a particular factual context. I would therefore postpone any further discussion of the evidentiary standards set forth in our prior cases

> until after the District Court has made appropriate findings concerning this plaintiff's prima facie evidence of disparate impact and this defendant's explanation for its practice of giving supervisors discretion in making certain promotions."

Mike Middleton, law professor at the University of Missouri Law School and formerly Associate General Counsel of EEOC, believes that the Court's opinion may become extremely important because Justice O'Connor "redefines disparate impact theory in a way that is very close to disparate treatment. Her reasoning brings intent into the inquiry in disparate impact cases." Professor Middleton characterized Justice O'Connor discussion of the appropriate evidentiary standards in such cases as "scary." "It is not at all clear that she is limiting [such standards] to subjective factors. There may come a time in the not too distant future when the Court will apply these standards to objective selection procedures, thus reversing Griggs. The only saving grace is that this portion of the opinion was not joined by a majority of the Court."

Professor Middleton is completing work on a law review article on the Watson case.

JUSTICE DEPARTMENT SEEKS TO DISMISS SCHOOL DESEGREGATION CASES

The Justice Department is seeking to close the books on hundreds of cases that the Department itself brought in 1969 to desegregate schools in Georgia, Mississippi, and Alabama. Interestingly, the districts themselves had not asked the Justice Department to be released and many have since said that they are content to remain under court order.

In almost all cases, the school districts had achieved "unitary status" some time ago, i.e., they had desegregated their schools completely enough for the court to agree that they had eliminated their previously "racially dual" systems that violated the Constitution. Once having achieved unitary status, the districts no longer had to comply with detailed court-ordered plans that often required them to make year-by-year changes to keep their schools within a specific racial balance. But many of the districts remained under general injunctions requiring them to refrain from any discriminatory actions which would resegregate the schools. It is these injunctions that the Justice Department now seeks to dissolve.

The importance of the injunctions to civil rights lawyers representing black children is that without them, plaintiffs would face a greater burden of proof if forced to go back into court to challenge new segregative actions.

On February 3, 1988 in a letter to the Clerk of the U.S. District Court for the Middle District of Georgia, William Bradford Reynolds, Assistant Attorney General for Civil Rights, said that

the Justice Department had already contacted a number of districts in the state of Georgia "to determine whether they are interested in entering into stipulations to have their cases dismissed." The letter further stated that some of the districts had agreed to the dismissal and had signed joint stipulations. A Joint Stipulation of Dismissal signed by the United States and eight school districts was enclosed. In explaining the DOJ's actions the letter says:

> "In recent months this Division has conducted a review of the school desegregation cases to which it is a party. We have focused this review on those cases in which the defendant school districts were previously declared to be operating unitary school systems and in which the detailed desegregation orders have been dissolved by the court and a general injunction imposed. At that time, these cases were placed on the court's inactive docket.
>
> "These orders were entered, in most cases, over ten years ago and we do not believe it was ever the intent of either the court or the parties to keep these cases on its docket indefinitely. Once a school district has fully remedied the constitutional violations committed by the district, 'the district court ha[s] fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.' Pasadena Board of Education v. Spangler, 427 U.S. 424, 437 (1976). Accordingly, a court should relinquish jurisdiction and dismiss the case."

On February 16, 1988 Lowell Johnston, an attorney with the NAACP Legal Defense Fund, in a letter to Justice Department Attorney Pauline Miller said:

> "We believe that the course of action suggested by the United States is improper and fails to protect the rights of black citizens and school children on whose behalf the Attorney General originally brought this suit, and whose interests the Ridley intervenors represent in this matter. We do not believe that school desegregation cases differ fundamentally from other equity suits; rather, we believe that plaintiffs (or, in this case, plaintiff-intervenors) are entitled to appropriate permanent injunctive relief. The injunctive decrees currently in effect in these cases may serve as such permanent relief, or modifications may be required; but in no case (in our opinion) is the complete dismissal and vacation of all relief heretofore granted, as the United States suggests, appropriate."

Background

The following discussion borrows heavily from a March 9, 1988 Memorandum prepared by the Lawyers' Committee for Civil Rights Under Law.

In 1969, the United States filed a statewide case against all school districts in Georgia that were not otherwise parties in pending school desegregation cases, U.S. v. Georgia. The districts were required to submit school desegregation plans. The NAACP Legal Defense Fund intervened on behalf of black school children in Georgia. Intervention was initially denied by the district court but later permitted by the 5th Circuit Court of Appeals which held that the NAACP Legal Defense Fund should be allowed to intervene in order to challenge the statewide standards that would govern the development and implementation of the desegregation plans.

In 1973, the case was split into individual school cases and sent to the appropriate district courts for monitoring of the implementation of the desegregation plans. The Department of Justice continued to be responsible for the bulk of the labor associated with monitoring the cases. Following the issuance of permanent injunctions by the several courts to which these cases had been assigned, the cases were placed on DOJ's inactive docket. Many of the injunctive orders stated that because the school districts had been operating on a non-racial basis for three school years in compliance with Brown v. Board of Education, 347 U.S. 483 (1954), Green v. County School Board, 391 U.S. 430 (1968), and Swann v. Charlotte-Mecklenberg, 402 U.S. 1, (1971), they had become unitary.

Justice Department Efforts Encounter Problems

The Justice Department's February, 1988 efforts have run into some problems. Two of the school districts included in the stipulation are not under the jurisdiction of the District Court for the Middle District of Georgia. Pleadings on behalf of these districts should have been filed with the District Court for the Southern District of Georgia. Four other school districts have indicated that they want to withdraw from the stipulation:

> Macon County has filed a motion with the court stating that it has no objection to the continuation of the case and the order of the court.
>
> Mitchell County sent a letter to the Justice Department indicating that the school board has voted to withdraw from the joint stipulation of dismissal.
>
> Grady County sent a letter to the NAACP Legal Defense Fund stating that it would like to withdraw the joint stipulation of dismissal.
>
> Monroe County has asked the NAACP Legal Defense Fund to join it in drafting a stipulation designed to effectuate the county's withdrawal from the stipulation of dismissal.

Further, the NAACP Legal Defense Fund learned that in 1987, one of the school districts, Jasper County, Georgia, that the Justice Department sought to release was the subject of a current

discrimination complaint filed with the Office for Civil Rights in the Department of Education. The complaint was filed in April 1987 by James Wright, a black parent whose son had been assigned to "slow-learner" reading and mathematics classes. In July 1987, OCR determined that students in the school district "were assigned to racially identifiable classes in a discriminatory manner" in violation of Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race in federally funded programs" (Education Week, May 4, 1988).

Phyllis McClure of the NAACP Legal Defense Fund stated: "The Justice Department had apparently not checked with OCR or they would have found out what we found out" (Education Week, May 4, 1988, p.9).

Status

On May 18, 1988 a status conference was held before District Court Judge Wilbur Owens. The conference was attended by counsel for eight of the nine school districts, the Department of Justice, and the Ridley intervenors.

Legal Defense Fund attorneys indicated that they were prepared not to object to the dismissal of the cases so long as the permanent injunctions remained in effect:

> "...[T]he fact that there is permanent injunctive relief that binds these school systems not to take action which tends to segregate students or faculty or not to take action which tends to re-establish the dual system is a benefit for the clients that we represent that we do not lightly wish to give up..." (Transcript of the May 18, 1988 Conference in Macon, Georgia, Hon. Wilbur D. Owens Jr. U.S. District Judge, Presiding).

LDF attorneys also said that with the permanent injunction in place "it is the school board's burden of proof to demonstrate that the practices we might attack are not discriminatory."

DOJ attorneys took the position that "... upon a determination of unitary status, the case should and must be dismissed and... a new action would have to be filed and intentional discrimination would have to be shown... [O]nce the school system has complied fully and has achieved unitary status, it is entitled to a dismissal and ...there's no need for the injunction to remain in place."

Justice Department attorneys indicated that the DOJ would object to dismissing the cases and leaving the injunction in place. "I think the Court should make some determination that the systems are unitary or not unitary."

Judge Owens instructed the DOJ attorneys to submit a brief on its position. Judge Owens said:

> "I think we're going to put the onus upon the government to file a brief as to why this Court has a duty to make a finding as to unitary status as a condition precedent to dismissal, as contrasted with just dismissing and leaving the injunction in effect as it has been for all these years."

The DOJ submitted its brief on June 16, 1988 and the NAACP LDF responded on July 14. The DOJ argued in its brief that "after over a decade of inactive status for these cases, it is now time to decide whether this Court's continued jurisdiction remains appropriate. If unitary status has been achieved, the cases should be dismissed; if not, additional steps should be taken to ensure that desegregation is quickly, fully, and finally accomplished." On the issue whether the court may dismiss the actions without vacating the existing general injunctions, the DOJ argues that if the court determines that unitary status has been achieved, the case should be dismissed and that "only an injunction that requires that the school district not intentionally discriminate, and placing the burden of showing such intentional discrimination upon plaintiffs, should be issued." Although the DOJ brief states that this type of injunction "raises serious problems if entered when the case is being dismissed... [the] United States will not object to its entry in these cases."

The NAACP LDF brief said that "there can be no doubt of the Court's authority" to "dismiss these actions without vacating the existing general injunctions." The brief further stated:

> "Since the government has expressed such discomfort at the prospect of the continuation of the 1974 injunctions, however, we suggest that the Court simply dismiss the United States from these cases, modifying the 1974 injunctions only in their caption so that they bind only the private plaintiffs-intervenors and the defendant school districts, and thereafter dismiss the actions as suggested at the May 18, 1988 conference."

Additional briefs were filed by DOJ and the NAACP LDF on July 29, and August 8 respectively. The case is pending before Judge Wilbur Owens.

The Justice Department has sent letters to 23 superintendents of Alabama school districts in the Northern District requesting statistical information for the past three years, and suggesting the appropriateness of joint motions to dismiss. Similar letters have also been sent to 100 school districts in Mississippi.

UPDATE ON JUDICIAL NOMINATIONS

On July 14, 1988 the Senate Judiciary Committee by an 8-6 vote, along party lines, rejected the nomination of Bernard H. Siegan to the U.S. Court of Appeals for the Ninth Circuit. After the

vote to report the nomination out of Committee with a recommendation failed, the Committee voted on a motion to send the nomination to the floor without a recommendation. The vote was 7-7 with Sen. Dennis DeConcini (D-AZ) joining the Committee's six Republicans. A tie vote defeats the motion.

Siegan's nomination was 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, he 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. For further discussion of his views, readers are referred to the March 1988 CIVIL RIGHTS MONITOR.

Treen Nomination Withdrawn

On April 26, 1988 former Louisiana Governor David C. Treen asked the President to withdraw from consideration his nomination to the U.S. Court of Appeals for the Fifth Circuit. Senator Strom Thurmond (R-SC) in a statement before a Judiciary Committee Executive Session in May stated that former Governor Treen has asked that his nomination be withdrawn because the nomination "had been pending before the Judiciary Committee for over nine months and he had never been given the opportunity to appear before the Committee and respond to the allegations which had been made against him." Senator Thurmond went on to quote from Mr. Treen's April 26, 1988 statement:

> "The Senate Judiciary Committee, which has had my nomination for nine months, has yet to schedule a hearing. I can no longer afford the disruption to my law practice and business endeavors caused by this unwarranted delay...
>
> "More recently, failure to schedule a hearing has been ascribed to certain charges from a source which the Judiciary Committee labeled 'confidential'. None of these charges has any merit; but they do provide another convenient excuse for delay. I have no doubt that additional excuses will be found to further delay a confirmation hearing. I simply cannot afford to suspend my private endeavors any longer.'"

Senator Patrick Leahy (D-VT) in a June 13, 1988 letter to Senator Thurmond stated that the Treen nomination exemplified the Justice Department's dragging its feet and evading "responding to this Committee's requests in a troubling proportion of cases."

> "I am constrained from giving full details by the need to maintain the confidentiality of this Committee's requests to

the Justice Department. I think it would be totally unfair to Governor Treen to repeat the serious allegations of impropriety which the Committee received. These allegations have been neither proved nor disproved; indeed, from all appearances the Department refused to investigate them, so they remain simply allegations. However, I can state that, contrary to your statement, these allegations were neither 'vague' nor 'questionable'; they were quite specific, and between February 17, when they were first transmitted to the Department, and the time the Committee became aware of the nominee's request for withdrawal of the nomination, I advised the Department of the names of four individuals who should be interviewed with respect to the allegations. As far as I know, none of these individuals was ever interviewed; at least, the Committee has never received any report of such interviews, although one letter from the Justice Department indicates that the FBI would be directed to conduct an interview of one of these individuals."

The Leadership Conference on Civil Rights and other civil rights organizations had expressed strong opposition to the Treen Nomination. A memorandum prepared by the NAACP Legal Defense Fund concluded that Governor Treen had been "consistently hostile or insensitive to civil rights issues." The memorandum includes the following information on the nominee.

In 1959, David Treen joined the States Rights Party of Louisiana. He served as the chairman of the party's central committee and ran as a presidential elector candidate in 1960. The main platform of the States Rights Party was preservation of racial segregation in the state and resistance to any federal effort to curtail segregation.

A survey of Congressman Treen's record compiled by the Louisiana Legislative Black Caucus showed that 'he almost always voted against positions supported by the black community.' In particular, he voted against the extension of the Voting Rights Act in 1975, and later, as Governor, was one of the only Southern Governors to oppose the extension and amendment of the Act in 1982.

As Governor in the 1980's, unavoidably faced with reapportioning eight congressional districts, he adamantly opposed creating even a single majority-black district (in a state that is roughly 30% black). He deliberately refused to create a compact, equal population district that respected parish boundaries, observed precinct lines, recognized cohesive communities of interest, and represented the will of both houses of the state legislature, simply because such a district would also be majority black in population. He lobbied instead for an illegal, secretive, and racially exclusive process to create eight majority white districts by tortuously fragmenting black neighborhoods into a multi-dimensional cartoon figure. His 'influence' theory of districting (blacks are always better off attempting to

influence elections in majority white districts rather than electing representatives of their choice in a majority black district) can only be described as 'noxious' in the context of Louisiana politics, with its sordid history of disenfranchisement and pervasive white bloc voting. Moreover, his 'influence' theory applied only to blacks. When articulating the interests of rural parts of the state, or of other cities, such as Baton Rouge, he always spoke in favor of having solid majority districts.

ABA PASSES RESOLUTION ON USE OF DISCRIMINATORY PRIVATE CLUBS

At its annual convention this month the American Bar Association adopted a statement of policy on the use of discriminatory private business clubs and directed the President of the Association to transmit the statement to all of its members. The statement reads in part:

> "Some private business clubs do not allow women or minorities to become club members or to use the clubs' facilities. That presents a serious professional problem to women and minority lawyers who wish to belong to the clubs or use them for business or professional purposes. The clubs provide convenient places to meet and conduct professional business with clients and other lawyers. In some areas it appears to be important to have the opportunity to belong to private business clubs in order to be a full member of the profession, to advance in the profession and to fully and adequately represent clients.
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> The American Bar Association urges law firms not to hold firm functions at business clubs that discriminate, and we urge lawyers who belong to those clubs to work to reform their policies. Should a club be unwilling to reform its policies, we urge law firms not to pay membership fees in the club for lawyers who belong to it, nor to reimburse expenses for use of the club. We encourage lawyers not to use the club for professional or business purposes, or to consider resigning.

On June 20, 1988 the Supreme Court in a unanimous decision upheld a New York City law that provides that certain private clubs are not "distinctly private" and thus are covered by the city's 1965 Human Rights Law, as amended, which prohibits discrimination on the basis of race, creed, color, national origin, sex, handicap or sexual orientation in public accommodations. The law defines public accomodations as facilities that have more than 400 members, provide regular meal service, and receive income for use of the facilities by nonmembers "for furtherance of trade or business."

The decision rejected the argument that such clubs have a right

to exclude women under the First Amendment freedom of association clause, New York State Club Ass'n v. New York City, 56 U.S.L.W. 4653.

For your information...

* The Citizens' Commission on Civil Rights has released a report, Barriers to Registration and Voting: An Agenda for Reform. The Commission's report is based on investigative hearings held in the Northeast (New York City), the South (Atlanta, Georgia), and the Southwest (Phoenix, Arizona), which documented numerous examples of discriminatory voting practices. Among the testimony of the 77 witnesses was the following:

> In South Dakota, Indians from the Pine Ridge Reservation had to travel off the reservation approximately 125 to 200 miles round trip in order to register. In Arizona, New Mexico and Utah, state laws prohibit tribal and state elections from being held in the same building.
>
> Black deputy registrars in Dallas County, Alabama were fired if they registered too many blacks.
>
> At sites in Massachusetts, Florida and California, "Hispanic-looking" registrants were subjected to more stringent identification requirements than were others.
>
> Registration sites and limited hours in numerous locations were reported a problem for working women, in states which do not offer mail-in registration.

Copies of the 171 page report are available from the National Center for Policy Alternatives, 2000 Florida Avenue, N.W., Washington, D.C. 20009. The cost is $11.95 per copy, plus 10% ($2.00 minimum) for postage and handling.

* Herman Schwartz, Professor of Law at American University and one of the leading legal scholars in recent judicial confirmation battles, has written a book on the Reagan Administration's judicial nominations entitled Packing the Courts: The Conservative Campaign to Rewrite the Constitution. Publishers' Weekly described the book this way:

> "Schwartz, Professor of Law at American University, charges that Reagan's nomination of Robert Bork to the Supreme Court was part of his campaign to pack federal courts with judges who would reverse our constitutional gains in civil rights and individual liberties. In reviewing the selection process of judges and politics surrounding confirmation hearings under this administration, of both failed and successful nominees including Daniel Manion, William Rehnquist, Antonin Scalia, Douglas Ginsburg and Anthony Kennedy, the author, while noting that most presidents seek to achieve a

politically compatible judiciary, accused Reagan of extreme efforts to assure ideological purity affecting such issues as abortion and school prayer. Although it is too soon to estimate the impact of this administration's approximately 350 appointees, it is clear from a sampling of their decisions that those in the upper courts at least are meeting the president's expectations, according to Schwartz. Unless a Democrat becomes president in 1988, he concludes, our heritage of liberty and justice will be in jeopardy" (Publishers Weekly, June 3, 1988).

Tom Wicker of the New York Times said of the book: "A splendid account of the Reagan administration's attempt to pack the federal courts, and give them a right-wing cast far into the 21st century, by one of the wisest and best-informed observers of the judicial scene... a remarkable book that illuminates history, politics, and the law."

The book is published by Scribners and is available in bookstores.

* The Center on Budget and Policy Priorities has released a report, National Overview, Holes in the Safety Nets: Poverty Programs and Policies in the States, which examines the national patterns of safety net gaps and protections that emerge from a state by state analysis of AFDC, Medicaid, Supplemental Security Income, general assistance, unemployment, insurance, tax policy, food stamps and WIC, energy and housing assistance.

Among the findings are:

In 20 states, the Medicaid income eligibility threshold for a three person family is below half of the poverty line. In only one state is it set at or above the poverty line.

In nine states, the maximum Aid to Families with Dependent Children (AFDC) cash benefit is less than one-third of the poverty line.

Only eight states have state programs of general cash assistance to single people and childless couples who are neither elderly nor disabled. In 11 states, there is no state or local general assistance program.

In 26 states, fewer than one of every three jobless workers received unemployment insurance in an average month in 1986.

At least 28 states impose state income taxes on low income working families living below the poverty line, and 11 states impose taxes on families whose gross incomes fall below half of the poverty line.

The National Overview is part of a multi-volume study which also includes 51 individual state, and the District of Columbia,

reports. The reports are available from the Center on Budget and Policy Priorities, 236 Massachusetts Avenue, N.E., Suite 305, Wash., DC 20002. The cost for the National Overview is $8.00, individual state reports are $3.50 each.

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