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SUPREME COURT DECISION IN RICHMOND V. J.A. CROSON CASE

On January 23, 1989 the Supreme Court in a 6-3 decision declared the Richmond, Virginia's set-aside program unconstitutional and brought into question similar state and local programs across the country. The majority opinion, written by Justice Sandra Day O'Connor, held that state and local laws enacted to address discrimination against minorities must be judged by the same constitutional standard as laws enacted to favor whites over minorities. This standard, known as the "strict scrutiny" test and based on the equal protection clause of the 14th Amendment, requires that official actions of a race conscious nature be narrowly tailored to address a compelling state interest. An NAACP Legal Defense Fund analysis describes the decision as the first by the Supreme Court in which "a majority has applied the strict scrutiny standard for determining the constitutionality of affirmative action."

Historically, the strict scrutiny standard has been a very difficult standard to meet when applied to public acts of discrimination against minorities. Only one governmental action has ever passed the test. In Korematsu v. U.S. (323 U.S. 215 (1944)), the Court upheld as constitutional the Federal Government's internment of Japanese-Americans during World War II. This decision is viewed today as "shameful" by many Americans.

In Croson, the Court did not rule, as the Reagan Administration urged it to do for eight years, that all race-conscious

affirmative action is unconstitutional. The Court's ruling was based on the particular facts in the Richmond case. Affirmative action remedies grounded on a solid evidentiary base and tailored narrowly to the problem were reaffirmed by the Court:

"Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise... Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria....In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

"Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."

Nor did the majority opinion embrace the arguments of Justice Scalia who wrote in a concurrence that race conscious action by government is permissible only to undo the effects of its own discrimination. Justice O'Connor in a section of the opinion not joined by Justices Scalia or Kennedy wrote that affirmative action may be justified if government was a "passive participant" in private discrimination.

Background

In April 1983, the city of Richmond adopted a minority set-aside program that required contractors awarded city construction jobs to subcontract at least 30 percent of the work to minority businesses. The city would waive the subcontracting requirement if qualified minority businesses were unavailable or unwilling to participate.

A minority business was defined as a business "at least fifty-one (51) percent of which is owned and controlled...by minority group members." Minority group members included citizens who are Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut (the same listing contained in the Federal Government's set-a-side programs).

The city council adopted the program after holding a hearing at which witnesses testified that "during the preceding five years,

only two-thirds of 1 percent of the dollar value of construction contracts awarded by Richmond was awarded to MBEs." The population of Richmond is approximately 50 percent minority. The city manager and a city council member testified that, "on the basis of their experience...there was widespread discrimination in the construction industry in general and in Richmond in particular...."

Other witnesses questioned whether there were enough minority businesses in Richmond to meet the 30 percent requirement, and officials of contractors' organizations "indicated that they did not discriminate...and were in fact actively seeking out minority members."

In October 1983, the J.A. Croson Company sought a waiver of the minority subcontracting requirement on the grounds that only one minority business had been responsive to its subcontracting offer and the company was unqualified. The city denied the waiver request. After receiving a subcontract bid from a minority contractor, Croson sought to increase the dollar amount of its bid as the minority contractor's cost for fixtures, bonding and insurance increased the cost of the project by approximately \$8,000. The city denied this request and elected to rebid the project.

Croson filed suit in the Federal District Court for the Eastern District of Virginia, "arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case." The district court upheld the Richmond set-aside program. A divided panel of the Fourth Circuit Court of Appeals affirmed the decision. Croson appealed to the Supreme Court and the Court vacated the opinion of the Court of Appeals and remanded the case for further consideration in light of the intervening decision in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

A divided panel of the Court of Appeals then ruled that the Richmond set-aside program violated both prongs of the strict scrutiny test under the Equal Protection Clause of the 14th Amendment (justified by a compelling governmental interest and narrowly tailored to accomplish a remedial purpose). Richmond appealed and the Supreme Court affirmed the decision of the Court of Appeals.

The Decision

The Court distinguishes between this decision and its decision in Fullilove v. Klutznick, 448 U.S. 448 (1980), in which the Court had upheld a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors. The Court emphasized that Congress has broader power to adopt such programs than do State and local governments. The opinion states that Congress has a "special constitutional mandate" to enforce the protections of the 14th amendment, whereas section 1 of the 14th amendment is an "explicit constraint on state power

and the States must undertake any remedial efforts in accordance with that promise....Correctly viewed sec. 5 [of the 14th amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the 14th amendment."

Justice O'Connor writes in the Richmond opinion that the Court's decision in Fullilove "made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures."

"The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body."

The Court concludes:

"Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for use of a racial classification would essentially entitle the States to exercise the full power of Congress under sec. 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under sec 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.

Having made this distinction, the Court then evaluates the Richmond set-aside program under the strict scrutiny standard of the 14th amendment, and finds it wanting. The opinion states that the set-aside program should be judged by this test because "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." The Court finds that because the city of Richmond did not establish a record of discrimination in the Richmond construction industry, the city "failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race." Further, because of the lack of an evidentiary basis the Court states that "it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination...." In attempting to assess the program in relation to this prong of the strict scrutiny test, the Court finds:

"There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based

quota.... If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for firms would, a fortiori, lead to greater minority participation.

"[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.... Where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake that particular task.

"Unlike the program upheld in Fullilove, the Richmond Plan's waiver system focuses solely on the availability of MBEs; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

"Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination."

Dissent

Justice Thurgood Marshall, with whom Justices Brennan and Blackmun joined, dissented from the decision. Justice Marshall argues that "nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups." Justice Marshall continues:

"Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures.... This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism....

"Racial classifications 'drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism' warrant the strictest judicial scrutiny because of the very irrelevance of these rationales.. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race-based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in

this Nation has pervaded our Nation's history and continues to scar our society. As I stated in Fullilove: "Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization,... such programs should not be subjected to conventional 'strict scrutiny' - scrutiny that is strict in theory, but fatal in fact.

"In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity."

Possible Approaches to Meeting the Constitutional Requirements

Barry Goldstein, of the NAACP Legal Defense Fund, in a memorandum analyzing the decision, offers possible approaches for states and local governments to meet the constitutional requirements for the establishment and design of a set-aside program.

Evidence

-Evidence of prior discrimination is necessary as the predicate for a set-aside plan. The evidence must establish a "strong basis [for the] conclusion that remedial action was necessary," or "a prima facie case of a constitutional or statutory violation".... The standard does not require a finding comparable to a judicial determination of a constitutional violation. Evidence sufficient to establish a prima facie case suffices to justify affirmative action.

-Local governments must show specific evidence of discrimination in their "own bailiwicks."

-The evidence does not have to relate to a discriminatory governmental practice; it is sufficient that the government is a 'passive participant.'

-In order to establish discrimination, "the city would have to link [the low number of minorities] to the number of local MBEs eligible for membership" in a contractors association.

Narrowly tailored plan

-A local government should add no group to a set-aside plan unless there is a prima facie case that members of the group have been the victims of discrimination in the contracting industry. The Court criticized "[t]he random inclusion of racial groups," such as "Spanish-speaking, Oriental, Indian, Eskimo or Aleut," in the Richmond Plan.

-A set-aside plan must have a "logical stopping point." A statistical analysis identifying the "shortfall" between the expected number of a city's minority contractors based upon the availability of minority contractors and the actual number may serve to establish the "logical" and constitutionally permitted "stopping point."

-The requirement of narrowly tailoring "has acquired a secondary meaning.... The term may be used to require consideration of whether lawful alternatives and less restrictive means could have been used." There is no requirement that a significantly more expensive or less effective alternative must be used.

-A set-aside plan should provide for individualized consideration and flexibility. The contours of this requirement are not clear. A waiver provision must be broader than the one provided in the Richmond Plan. The plan must to some extent permit the taking into account of individual circumstances other than the race of the owners of businesses.

Reaction to the Decision

Civil rights advocates expressed disappointment about the Court's decision but hastened to add that the Court did not bar affirmative action.

"[T]he Supreme Court did not outlaw affirmative action. While the decision is a set-back for civil rights (especially the adoption of an across the board 'strict scrutiny test') and the majority's naivete regarding the nature and extent of discrimination in this country is disturbing, the Court did once again reaffirm the constitutionality of affirmative action remedies. Indeed, the Court held that even quotas (as distinguished from goals, ratios and other numerical remedies) are permissible if a solid evidentiary base has been established and the remedy is tailored narrowly to the problem." (Statement of Ralph G. Neas, Executive Director, Leadership Conference on Civil Rights).

Similarly, the AFL-CIO Executive Council issued a statement on affirmative action that reads in part:

"The City of Richmond decision recognizes that a city or

state "has the authority to eradicate the effects of private discrimination within its own legislative 'jurisdiction'" so long as the city or state "identifies that discrimination with the particularity required by the Fourteenth Amendment." We therefore call upon state and local governments to marshal the evidence and make the findings sufficient to satisfy even the current Supreme Court standard.

"Equally important, the Supreme Court's decision in City of Richmond emphasizes that "Congress...has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment" and that Congress may adopt remedies for "situations which Congress determines threaten principles of equality." We therefore call upon the Congress to exercise that responsibility.

"Finally, nothing in the City of Richmond decision in any way calls into question the lawfulness of private affirmative action programs such as those collectively bargained by unions and employers to overcome historic discrimination and employment barriers which have held minorities and women from achieving their rightful place. We affirm our support for such programs, and urge unions and employers to redouble their efforts to eradicate the vestiges of employment discrimination in this society.

Conservatives, on the other hand, were quick to declare victory. As reported in the New York Times, Charles Fried, Solicitor General during the Reagan Administration, said he considered the decision "great news" and further indicated that the decision "made his four years in the job worth it even if he had accomplished nothing else." Similarly, former assistant attorney general Charles Cooper said: "this is a big victory for the Reagan Administration and the Justice Department... [similar set-aside programs] are gone, because they were based on similarly flimsy evidence."

President Bush, asked at a press conference on January 27 if he was concerned about the Supreme Court decision and about set-aside programs, responded that the decision did not "kill all set-asides and it didn't kill off affirmative action. I want to see a reinvigorated Office of Minority Business and Commerce, I want to see our S.B.A. program go forward vigorously. And so I would say that decision spoke to one set of facts - in Richmond, I believe it was - and...I will not read into that a mandate, to me, to stop trying on equal employment and on affirmative action generally" (N.Y. Times, Jan. 28, 1989).

On March 6, 1989 the Supreme Court applied its ruling in Croson in disposing of two pending cases. In H. K. Porter v. Metropolitan Dade County, the Court vacated the decision of the Eleventh Circuit Court of Appeals upholding Dade County, Florida's set-aside program, and ordered the appeals court to reexamine the program pursuant to its decision in Croson. The

Dade County program has a 5 percent minority set-aside requirement for construction contracts.

In a similar case, the Court affirmed without comment a decision by the Sixth Circuit Court of Appeals that declared a Michigan set-aside program unconstitutional, Milliken v. Michigan Road Builders. The Michigan set-aside program which was adopted in 1981 established a 7 percent set-aside of state contracting expenditure for minority owned businesses and an additional 5 percent for female businesses.

The Court also denied review on February 27 of a case (Higgins v. Vallejo, Calif.) in which the Court of Appeals held that a city's decision to promote a qualified black male over a white who scored higher on an examination did not violate the equal protection clause.

On March 2, 1989 the Georgia State Supreme Court ruled that Atlanta's set-aside program failed to meet the standards set by the Supreme Court in the Croson case. In striking down the Atlanta plan, which has been referred to as the grandfather of affirmative action programs, the court applied the strict scrutiny standard and found that city officials had failed to produce "convincing evidence of discrimination and to narrowly tailor the program to remedy such discrimination." The Atlanta program had a goal of 35 percent participation by Blacks, Hispanics, Asians and women on all city-financed projects.

SECOND CIRCUIT RULES THAT CIVIL RIGHTS RESTORATION ACT APPLIES TO CASES PENDING AT THE TIME OF ENACTMENT

On January 24, 1989 the U.S. Court of Appeals for the Second Circuit (the day after oral argument was heard) affirmed the judgment of the U.S. District Court for the Eastern District of New York that the Civil Rights Restoration Act of 1987 applied to cases pending at the time of enactment.

Background

In 1985, a Mr. Leake who has one arm was released from his employment at the Long Island Jewish Medical Center. In 1987 he filed suit in federal district court alleging that the Medical Center had terminated his employment because of his physical handicap in violation of sec. 504 of the Rehabilitation Act of 1973. At the time of the filing, the Grove City College v. Bell and Consolidated Rail Corporation v. Darrone decisions were applicable. In Grove City the Court held that the Title IX prohibitions against discrimination (sex) applied only to the specific programs receiving federal financial assistance and not to the entire institution. The same interpretation was applied to section 504 (handicapped discrimination) in Darrone which was decided on the same day. The Medical Center moved for summary judgment on grounds that the plaintiff had not been employed in a program or activity that received federal funds. The Civil Rights

Restoration Act then became law. The lower court denied the Medical Center's motion on the ground that the CRRA's broader coverage should apply. The Medical Center appealed and the question before the court was whether Congress intended the Civil Rights Restoration Act to apply to cases pending at the time of its enactment.

In March 1988, the Congress enacted the Civil Rights Restoration Act to overturn the Grove City and Darrone decisions and to require that all programs and activities of an institution that receives federal funds be covered by the anti-discrimination provisions of the four civil rights laws that relate to federal financial assistance (Title VI of the Civil Rights Act of 1964 (race), Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Aged Discrimination Act of 1975).

The National Women's Law Center, in an amici curiae brief filed on behalf of civil rights, advocacy, labor, religious, and educational organizations, argued that it was the clear intent of Congress that the CRRA apply to cases pending at the time of enactment:

"A fair reading of the Restoration Act, its compelling legislative history, and the governing law leads necessarily to the conclusion that it is properly applied to cases pending on the date of its enactment. While the question of the applicability of changes in the law to pending litigation is one with which the courts have long struggled, the principal line of authority... is clearly established:

A court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

The brief discusses the legislative history in detail, providing many quotes from the legislative debate that reflect the "understanding of the Members that the legislation was designed to correct the Supreme Court's erroneous decision and restore Congress' original intent regarding the coverage of the four civil rights statutes."

Further, the brief states that an assessment of "injury regarding the potential injustice which would be caused by the application of the Restoration Act to this case must also include a consideration of the injustice which would be done to Mr. Leake and to other similarly situated victims of discrimination, by the contrary conclusion." The brief continued:

The employment discrimination faced by Americans with disabilities is staggering. Approximately two-thirds of all such adults are unemployed and that figure rises to 84 percent for black disabled Americans. Yet the great majority of these persons want to work.

The determination of whether to apply the Restoration Act to cases pending on the date of its enactment will not only profoundly affect Mr. Leake in this case and other Americans with disabilities who suffer from such devastating discrimination. It will similarly affect victims of discrimination on the basis of race, national origin, sex and age who had the misfortune to have claims arising from such discrimination pending in the period after Grove City College and before the passage of the Restoration Act."

UNIVERSITY OF ALABAMA FOUND IN VIOLATION OF SEC. 504

On December 30, 1988 the U.S. District Court for the Northern District of Alabama, Southern Division permanently enjoined university officials from denying auxiliary aids to handicapped students on the basis of their financial ability, and from failing to grant auxiliary aids to handicapped special students and those handicapped students enrolled in Special Studies. University officials were ordered to make reasonable accommodation for handicapped students enrolled in the business education laboratory courses; to install a chair lift for handicapped persons in the swimming pool; and to provide reimbursement for the auxiliary aids a student purchased.

The Department of Justice had filed suit against the University of Alabama alleging that the University had violated Sec. 504 of the Rehabilitation Act of 1973 which prohibits discrimination against handicapped persons in federally financed programs.

The court's findings of fact include:

On June 20, 1978, the parents of Marie Lowman, a deaf student, wrote to UAB requesting a free sign language interpreter. UAB responded negatively. On July 24, 1978, Ms. Lowman (Marie's mother) wrote to Dr. Faircloth in the Office of Student Affairs reminding her of Section 504's requirements and seeking resolution of the request for an interpreter for Marie. The request was denied because UAB considered Marie's family financially able to pay for the costs of Marie's interpreter. Ms. Lowman paid for her interpreter throughout the time she attended UAB. Ms. Lowman was unable to enter the medical technician program because she could not locate an interpreter who could translate technical and scientific classes for her, and UAB provided no assistance in locating such interpreter.

The business education laboratory is located in Bell 218, a classroom on an upper level of the Bell-Ullman building which UAB identified in 1978 as inaccessible to mobility impaired persons. The Bell-Ullman building is considered too old to accommodate an elevator and may not figure in UAB's long term utilization plans, but there are no present plans to discontinue using the Bell-Ullman building.

Vicki Orr is a mobility impaired student who is confined to a wheelchair as a consequence of polio which she contracted when she was two years old. In August, 1983, Ms. Orr submitted a letter to Dr. Hill, then President of UAB, requesting help in making her business education laboratory classes accessible. Dr. Armstrong [department chair] indicated that the business education labs would move at some future time but not in time for Ms. Orr's scheduled class. He said he would 'testify in Vick's behalf if it ever came to a lawsuit.'

The decision was made to segregate Ms. Orr for instruction in each of her three required business education laboratory classes.

HUD ISSUES FAIR HOUSING FINAL RULE

On February 10, 1989 the Department of Housing and Urban Development issued a final rule for the Fair Housing Initiatives Program. The rule contains restrictions on the use of testing to which the LCCR had objected in comments on the proposed rule. Testing is the procedure by which persons pose as prospective renters or buyers to determine whether landlords/agents discriminate in providing information on the availability of housing. In an August 8, 1988 letter accompanying the comments, Ralph G. Neas, Executive Director of the LCCR, wrote:

"The Leadership Conference strongly supports the use of testing in uncovering and enforcing violations of Title VIII of the Civil Rights Act of 1968 and applicable state and local Fair Housing laws. The use of testing has been recognized by the Congress, the Courts and the Department of Housing and Urban Development as an essential tool in the battle against housing discrimination. However, the proposed regulations would unnecessarily and unduly restrict the efficacy of FHIP funded testing."

Background

The Fair Housing Initiatives Program authorized in the 100th Congress provides funding to public and private organizations to strengthen implementation of the Fair Housing Act. Three categories of funding are provided under the program: (1) administrative enforcement initiative (2) education and outreach initiative, and (3) private enforcement initiative.

Under the education and outreach component, funds are provided "for educational projects which advise the general public and housing industry groups about fair housing rights and responsibilities and outreach projects which promote specialized support and coordinated methods to provide for fair housing." The administrative enforcement initiative provides funding to state and local fair housing enforcement agencies...to broaden the

range of enforcement and compliance activities which they conduct." The private enforcement component provides funds to private entities "for projects designed to enhance efforts to enforce the provisions of the Fair Housing Act and substantially equivalent State and local fair housing laws."

Comments on the proposed regulations

In commenting on the proposed regulations, issued on July 7, 1988, the LCCR's Housing Task Force expressed opposition to the "guidelines in their entirety on policy, procedural and practical grounds." The comments, developed by Charles Kamasaki, National Council of La Raza, provided detailed analysis of the restrictions on testing applicable to the private enforcement initiative.

Procedural concerns were expressed about negotiations HUD officials held with the National Association of Realtors in developing the testing restrictions contained in the rule. The negotiations did not include other interested parties --state and local enforcement agencies, private fair housing groups, and national civil rights organizations. Former HUD General Counsel John Knapp said in testimony before the Senate Subcommittee on Housing and Urban Affairs that the reason for the negotiations was "to alleviate the unfounded fears obviously held by so many of the organization's members" and that HUD "concluded that the exclusion of some legitimate activities seemed a small price to pay [to allay] the destructive level of opposition and resentment [expressed by NAR]."

The LCCR comments asserted that the negotiations between HUD and NAR:

"First...arguably represent violations of the Administrative Procedures Act. Second, they certainly raise the appearance of impropriety, since an entity that represents both the subjects of testing (realtors) and potential FHIP grantees (Community Housing Resource Boards) was included in private negotiations on regulations before the program was enacted. Finally, they raise serious questions about the integrity of the comment process, since those entities, including the member organizations of the Leadership Conference on Civil Rights, who recommend alteration or removal of parts of the guidelines already have been informed of HUD's intention to incorporate the guidelines in the regulations.

"Further, the Department has testified that the NAR's concerns with the FHIP program are "unfounded," and based on "ignorance and misunderstanding." It is unconscionable that the Department would subvert the regulatory process, exclude from eligibility for funding wholly legitimate testing procedures, and decide beforehand to ignore the recommendations of groups with demonstrated expertise in the field to accommodate what it admits to be unfounded concerns."

HUD's explanation of the final rule notes these objections and blandly observes:

"HUD believes that the objections raised by the three civil rights/fair housing organizations are without substance. HUD has conducted several studies which involved extensive fair housing testing on a nationwide basis and had sufficient experience in the area for development of proposed guidelines which would meet the statutory standard described above. HUD has now had the benefit of public comment with respect to the guidelines contained in its proposed rule and the views of all commenters have received consideration in the preparation of the final version of the testing Guidelines."

Testing

LCCR's comments also expressed specific concerns about FHIP-funded testing requirements concerning bona fide allegations, paired testers, testing of the individual agent, and contact between testers. The final rule made no changes in the bona fide allegation and paired testers requirements and no substantive changes to those on testing of the individual agent. The final rule does address LCCR's concern about the limitation on contact between testers.

1. Bona Fide Allegation

The proposed rule limited FHIP-funded testing to testing conducted in response to a bona fide allegation. Bona fide allegation is defined as "an assertion of a discriminatory housing practice unlawful under Federal fair housing law." The definition specifically excluded an allegation by testers and provided that the allegation "must state specifically and in detail the facts and circumstances which are believed to constitute the discriminatory housing practice, including, but not limited to, the date, time, and place of the alleged discrimination, and the names of each person or firm allegedly engaged in the discriminatory housing practice." FHIP funded testing could be conducted only after a homeseeker filed a complaint with the fair housing organization.

In its comments, LCCR had objected to this restriction because it would limit testing to a tiny fraction of persons and entities engaged in discriminatory acts: (1) HUD estimates that there are many more incidents of housing discrimination than the number of formal complaints; (2) eliminate a major potential source of information about entities engaged in discriminatory acts, i.e., testers; and (3) it would virtually eliminate the ability of FHIP grantees to carry out systemic testing which is designed to measure the scope and degree of discrimination in certain markets.

In the preamble to the final rule, HUD notes these objections,

and concludes:

"Since the Private Enforcement Initiative is a demonstration program of limited duration and with limited financial resources, HUD believes that it should use a specifically structured testing program. FHIP was presented to Congress as a program to support the enforcement of the fair housing laws and not as a research effort to document whether discrimination exists. HUD therefore believes that it is reasonable to narrow the use of the limited resources available for this initiative to cases in which there is an indication of a violation of the fair housing laws. Accordingly, the bona fide allegation requirement has been retained in the final rule."

HUD did modify the definition of bona fide allegation to allow an approximation of the date, time or place of an allegation, and to provide that "while the allegation must be documented, it need not be reduced to writing prior to the conduct of a test."

2. Paired Testers

The proposed rule provided that all testing must use "paired testers," and that testers must visit the same individual agent or owner against whom the bona fide allegation had been made. LCCR in its comments stated:

"The requirement for paired testers would eliminate the ability of FHIP grantees to send a single tester -- usually White -- to a firm or agent against whom a complaint has been lodged. If the White tester is offered a unit that was not made available to a member of a protected class, there is an immediate presumption of discrimination. This valuable and efficient enforcement practice would be denied to FHIP-funded groups.

"The requirement that testers visit the same agent or individual owner would require testers to ask to see the individual by name, even if that agent were unavailable and other agents were available. This requirement would be a "red flag" alerting the agent and his/her colleagues that a test is occurring. This problem would be exacerbated by the bona fide allegation requirement, since the agent is likely to know that s/he already had been alleged to have engaged in a discriminatory act. This requirement would virtually eliminate the efficacy of FHIP-funded tests, and would skew the data obtained through FHIP by giving advance warning to those being tested."

In the preamble to the final rule HUD states that it "has considered the arguments both for and against these two limitations and has decided to make no change in the regulations with respect to either of them" and continues:

"However, in the event that a participant in FHIP makes a

good faith effort, in conducting a test, to comply with these requirements but finds it impossible to meet one or both of them, HUD can nevertheless permit the use of FHIP funds to pay for the testing activity. Reimbursement in these circumstances may be appropriate so that participants are not discouraged from conducting FHIP testing activities in response to all bona fide allegations..."

3. Contact or Communication

The proposed rule prohibited "any contact or communication between pairs of testers until all information has been recorded and the testers debriefed by the testing coordinator." LCCR asserted in its comments that this prohibition was overly broad as it would appear to require the physical separation of testers, perhaps to the extent of requiring separate physical facilities for groups of testers. LCCR said that the prohibition on communication would appear to prevent, for example, one tester from telling another the address or phone number of a firm to be tested, or what an individual agent to be tested looks like, or what the agent's office hours are. LCCR recommended that the prohibition on contact be removed entirely and that the communications prohibition be limited to communications that would directly and adversely affect the probative value or credibility of the evidence adduced through the test.

In the final rule HUD indicates that it agrees with these comments and therefore has revised the rule. The final rule prohibits:

"any communication between pairs of testers relating to the conduct of the test or to testing experiences or results until all information has been recorded and the testers debriefed by the testing coordinator."

The final rule is effective May 9, 1989. Interested readers should share their views with Charles Kamasaki, National Council of La Raza, 810 1st Street, NW, Washington, D.C. 20001 or Kerry Scanlon, Lawyers Committee, Suite 450, 1400 I Street, NW, Washington, D.C. 20005.

APPROPRIATION FOR JAPANESE AMERICAN REDRESS SET AT \$20 MILLION

Former President Ronald Reagan's fiscal year budget for 1990 calls for an appropriation of only \$20 million under the Civil Liberties Public Education Act. The bill, signed into law on August 10, 1988, authorizes restitution payments of \$20,000 each to Japanese Americans alive at the date of enactment who were held in American detention camps during World War II. Heirs are eligible to receive redress monies if the internee dies prior to payment. An appropriation of \$20 million would provide restitution for approximately 1,000 of the estimated 60,000 surviving detainees.

The total amount authorized under the bill is \$1.25 billion, of which not more than \$500 million is to be appropriated in any one year over the next ten years. Supporters of the bill had pressed for a full appropriation level of \$500 million as many of the detainees are elderly and further delays may result in many not living to receive the compensation. James Turner, Acting Assistant Attorney General for Civil Rights, in testimony before the House Subcommittee on Civil and Constitutional Rights stated that the Department of Justice requested an appropriation of \$500 million under the Act. The request was reduced to \$20 million by the Office of Management and Budget under the Reagan Administration.

President Bush in June 1988 expressed support for the bill. At that time, his office released a statement which read in part:

"Unfortunately, one of [the costs of World War II] was the violation of the civil rights of loyal, hard-working Japanese-Americans.

* * * *

"The Vice President strongly believes that it is only fair that our country provide apologies and reparations to those Japanese-Americans who were interned during World War II... we should always try to remember our basic purpose -- to defend freedom and civil rights for all."

However, since taking office, the President has been silent on the appropriation request.

Rita Takahashi, Acting Executive Director of the Japanese American Citizens League-Legislative Education Committee, in testimony before the House Judiciary Subcommittee on Civil and Constitutional Rights, stated that monies must be appropriated expeditiously for the following reason:

"Congress and the President intended that redress payments should, first and foremost, be given to actual victims of Government discrimination. Although heirs are to receive redress monies if the eligible person passes away prior to payment, clearly the law was meant for the actual victims.

"The Department of Justice's Office of Redress Administration (ORA) estimates that two hundred (200) eligible persons are passing away each month. This means that thus far 1,400 persons have already passed away since the bill was signed into law."

Takahashi in her testimony also urged that the awarding of payments not be delayed until all eligible persons had been identified:

"Congress intended that timely redress payments would be made, beginning with the oldest identified individuals

first. Section 105(7)(b) stipulates that:

The Attorney General shall endeavor to make payments under this section to eligible individuals in the order of date of birth (with the oldest individual on the date of the enactment of this Act (or if applicable, that individual's survivors under paragraph (6)) receiving full payment first), until all eligible individuals have received payment in full. (emphasis added)

"The law does not require the Attorney General to first identify all eligible persons and then begin payments. Rather, the Attorney General is to attempt to make payments to the oldest eligible persons first. This means that payments can be made to the oldest persons who have been identified at the time monies are appropriated. In no way should the payment process be delayed because each and every eligible person had not been identified. Congress had no intention of setting up such barriers to redress implementation."

Readers wanting additional information should contact Rita Takahashi at the Japanese American Citizens League, 1730 Rhode Island Ave., Suite 204, Washington, D.C. 20036-3148, (202)296-8082.

CITIZENS' COMMISSION ON CIVIL RIGHTS ISSUES REPORT ON THE STATE OF CIVIL RIGHTS ENFORCEMENT AND AN AGENDA FOR THE 1990's

On January 17, 1989 the Citizens' Commission on Civil Rights (CCCCR) held a press conference in Washington, D.C. to release a pre-publication summary of a major report -- One Nation Indivisible: The Civil Rights Agenda for the 1990s -- that CCCR will publish in May 1989. In releasing the summary, which provides an overview of where America stands today in civil rights and a comprehensive set of recommendations on where we as a nation must go, the Commission called on President George Bush to establish a task force of Cabinet Secretaries to address growing racial tensions and to deal with the causes and results of eight years of civil rights neglect. Arthur Flemming, Chair of the bipartisan Commission said, "The President should ask that an action plan from this task force be on his desk in 60 days." The summary states:

"[President Bush] must make it clear that assuring equality of opportunity for all persons is among the highest priorities of his Administration, and that the commitment will be implemented both through enforcement of all laws and a condemnation of bigotry. Strong enforcement of civil rights laws and court decisions and support for the enactment of other legislation are essential to provide access to equal opportunity. Sustained and visible condemnation of expressions of prejudice or bigotry,

whatever the source, along with efforts to heal racial and other divisions will help realize the goal of 'one nation, indivisible.'"

The summary includes many examples of persistent discrimination and lack of enforcement of the nation's civil rights laws during the Reagan Administration, such as:

"In 1985, the Department of Housing and Urban Development estimated that 2 million instances of housing discrimination occur each year. Since 1981, in the area of fair housing, an average of only 10 new cases have been filed per year.

"In 1982, Secretary of Education Terrel Bell cautioned that schools were not meeting or assessing the needs of Hispanic and other students whose proficiency in English was limited. Today in many school districts across the nation, the dropout and failure rates for Hispanic students approach 50 percent and segregation in schools is spreading rapidly.

"In 1987, the median income of black families was \$18,098 -a drop of almost \$1,000 from the median for black families in 1978.

"In 1985, the American Public Transit Association reported that 76 percent of the nation's 49,000 buses were not accessible to wheel chair users.

"In 1981, the Office of Civil Rights of the Department of Health and Human Services issued 85 letters of findings of violations of civil rights laws. By 1985, the numbers of such findings had dropped to three."

"Since 1981, in the area of voting rights, the Department of Justice has filed only 31 cases to challenge discriminatory voting practices and only 15 cases to enforce the pre-clearance requirements of the Voting Rights Act. This means that each of the 27 attorneys in the voting section of the Justice Department's Civil Rights Division has handled an average of 1.7 substantive cases since 1981."

The summary provides detailed recommendations in the areas of presidential leadership, policies and remedies, vigorous enforcement and monitoring of that enforcement, presidential appointments, and easing racial and ethnic tensions:

"The President should support remedies developed and implemented by six predecessors...by Congress, and the courts to eradicate discrimination and provide equal opportunity for all citizens.

"Agencies should support the use of goals and timetables and other proven affirmative action remedies in appropriate cases.

"The Federal Government should require school districts to use the full range of constitutional remedies for unlawful school segregation.

"Agencies should settle cases only where they obtain remedial plans which obligate entities to take specific steps which will correct violations.

"Where settlements that fully redress discrimination cannot be obtained, agencies should take vigorous enforcement action including litigation and administrative sanctions such as the withdrawal of federal funds and debarment of contractors.

"In appointments to the federal bench, high priority should be given by the Administration to selecting nominees who will make the Judiciary more broadly representative of the American people and who have a demonstrated commitment to equal justice under law.

"Unless the U.S. Commission on Civil Rights is reconstituted as a bipartisan independent monitoring agency, it should be abolished."

The summary says that "[i]n most areas, Congress has already enacted laws barring discrimination and has given to the executive departments and other agencies the necessary enforcement tools....However, in other areas critical gaps remain in the laws to eradicate discrimination that need to be filled by new legislation." In this area the CCCR recommends:

"Extend current civil rights law to protect disabled people against discrimination in the private sector.

"Permit citizens to register for federal elections by mail and remove deadlines for registering in person.

"In responding legislatively to the crisis in the savings and loan industry and in other federally regulated financial institutions Congress should include provisions to strengthen proscriptions against redlining and to stimulate community reinvestment.

"Correct substantial undercounting of minorities during the 1990 decennial census.

"The Administration should recommend and Congress should give priority consideration to legislation which gives more people access to the equal opportunities guaranteed by civil rights laws."

Readers interested in the summary should request a copy from the Citizens' Commission, 2000 M Street, N.W., Suite 400, Wash., D.C. 20036. The cost is \$5 per copy. The complete report will be

available in May 1989 at the cost of \$15.00.

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