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AMERICANS WITH DISABILITIES ACT PASSES SENATE OVERWHELMINGLY

On September 7, 1989, the Senate by a vote of 76-8 approved the Americans with Disabilities Act (S. 933). The legislation has been characterized by its proponents as the most comprehensive civil rights measure since the 1964 Civil Rights Act, and will provide disabled Americans with protection similar to that provided racial, ethnic and religious minorities through the 1964 Civil Rights Act. Joseph L. Rauh, Jr., Counsel to the Leadership Conference on Civil Rights, in testimony before the Senate Labor and Human Resources Committee said:

"The ADA which extends civil rights protection to 43 million Americans with disabilities is, indeed, an historic measure. On the 25th anniversary of the 1964 Civil Rights Act, this legislation is long overdue. The ADA embodies the principles of non-discrimination and equal opportunity which our country embraced in 1964.

"Our society has viewed people with disabilities as inferior and has developed without consideration of their needs. Being disabled has meant far more than having a physical or mental impairment, it has meant being shut-in and shut-out. During the ADA hearings in the Senate, a black Viet Nam veteran testified about returning home in a wheelchair. He couldn't get to his apartment without his elderly grandmother carrying him. He couldn't go anywhere alone because of inaccessible streets and transportation. And he couldn't get a job because of stereotypes about his abilities, or more correctly presumptions of inabilities. He

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said that he learned that he was not welcome in the country he had fought for. This experience is unacceptable in a just society."

Senator Tom Harkin (D-IA), chief sponsor of the bill, said:

"This bill guarantees individuals with disabilities the right to be integrated into the economic and social mainstream of society. Enacting the ADA is the right thing to do for people with disabilities. It is also the right way to help strengthen our economy."

The National Federation of Independent Businesses has expressed strong opposition to the bill. An NFIB memorandum states: "The ADA bill imposes costly requirements on businesses and provides for unlimited damage awards even if the discrimination was unintentional. And the bill is so broadly worded that business owners will never know if they are in compliance with the law." The NFIB memorandum concludes: "The purpose of civil rights legislation is to provide fairness. Unfortunately, the ADA bill provides access to the disabled *at the expense* of others. While much can and should be done to assist the disabled, fairness for *all* Americans should be the guiding principle. Appropriate modifications in the bill can lead to this result."

The bill was voted out of the Senate Labor and Human Resources Committee on August 2, 1989 by a vote of 16-0. Just prior to the committee vote, the Bush Administration and the Democratic and Republican Senate sponsors, after weeks of intense negotiations, worked out a compromise with respect to key provisions of the bill. The White House issued a statement that "[t]he President endorses this legislation as the vehicle to fulfill the challenge he offered in his February 9 address to the nation: 'Disabled Americans must become full partners in America's opportunity society.'"

Action in the House

The ADA bill is before four committees and hearings were held in each committee. The Committees are Education and Labor, Judiciary, Commerce, Science and Transportation, and Environment and Public Works. Supporters of the bill expect the House to pass the bill in the near future. Senator Kennedy, a chief sponsor of the bill said of the House: "They expect to move very rapidly. It looks like very clear sailing."

Provisions of the Bill

This section borrows heavily from documents prepared by the staff of the Senate Subcommittee on the Handicapped, chaired by Senator Harkin.

The ADA prohibits discrimination against individuals with disabilities: in employment, programs or activities of a State or a local government, public accommodations, transportation, and telecommunications.

The ADA's definition of "disability" is comparable to the definition used for purposes of section 504 of the Rehabilitation Act of 1973 (which prohibits discrimination against persons with disabilities by recipients of federal financial assistance). Disability with respect to an individual means "a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment".

The definition includes persons with AIDS or HIV: it does not cover individuals who are addicted to illegal drugs or alcohol. ADA retains employment protection for applicants and employees who have overcome drug or alcohol problems, including those who are participating successfully in treatment programs and are refraining from illegal drug use or alcohol abuse.

An amendment offered by Senator William L. Armstrong (R-CO) and reluctantly accepted by cosponsors of the legislation, who thought it was unnecessary, excludes from the definition of disability "homosexuality, bisexuality, transvestism, pedophilia, transsexualism, exhibitionism, voyeurism, compulsive gambling, kleptomania or pyromania, gender identity disorders, current psychoactive substance use disorders, current psychoactive substance-induced organic mental disorders...which are not the result of medical treatment, or other sexual behavior disorders."

Employment

An employer, employment agency, labor organization, or joint labor-management committee may not dis-

criminate against any qualified individual with a disability in regard to any term, condition or privilege of *employment*. The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504, including the obligation to make reasonable accommodation unless to do so would result in an undue hardship on the operation of the business.

As the Senate Committee report provides "the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case." Thus, in one case it may involve making the facilities used by employees accessible and useable by individuals with disabilities. In other cases it may require job restructuring, part-time or modified work schedules or reassignment to a vacant position if a person with a disability can no longer perform the essential functions of the job s/he has held.

A qualified person with a disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Discrimination includes, for example: limiting, segregating or classifying a job applicant or employee in a way that adversely affects his or her opportunities or status; participating in contractual or other arrangements that have the effect of subjecting individuals with disabilities to discrimination; and using criteria or methods of administration that have a discriminatory effect or perpetuate discrimination by others subject to common administrative control.

Discrimination also includes the imposition or application of tests and other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test or other selection criterion is shown to be job-related for the position in question and is consistent with business necessity.

The ADA incorporates by reference the enforcement provisions of Title VII of the Civil Rights Act of 1964 which allow injunctive relief and back pay. For the first two years after the effective date of the Act, only employers with 25 or more employees are covered by the employment provision. Thereafter, employers with 15 or more employees will be covered.

Public Services/Public Transportation

No qualified individual with a disability may be discriminated against by a department, agency, special purpose district, or other instrumentality of a State or a local government. Thus, the prohibition of discrimination that today is limited to entities covered by sec. 504 (entities receiving federal funds) would apply to all services, programs and activities of state and local governments. For example, in providing school bus transportation to a child with a disability the school bus that serves his/her route should be accessible. This provision does not mean that all school buses need to be accessible.

With respect to public transportation, all *new* fixed route buses must be accessible unless a transit authority can demonstrate that *no* lifts are available anywhere from qualified manufacturers. A public transit authority must also provide paratransit for those individuals who cannot use mainline accessible transportation up to the point where the provision of such supplementary services would pose an undue financial burden on the transit authority. Paratransit usually has meant the use of small buses or vans, with the service provided on demand or door-to-door.

This section takes effect 18 months after the date of enactment, with the exception of the obligation to ensure that new buses are accessible, which takes effect 30 days after the date of enactment.

Public Accommodations

No individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any *place of public accommodation* on the basis of a disability. Public accommodations include: restaurants, hotels, doctor offices, banks, theaters, pharmacies, grocery stores, and shopping centers. Existing facilities must be made accessible if the changes are "readily achievable", i.e., can easily be accomplished without much difficulty or expense. If an entity can demonstrate that the removal of a barrier is not readily achievable, then the legislation would require that such goods, services, facilities, etc. be provided through alternative methods if such methods are readily achievable. Auxiliary aids and services must be provided unless it would cause an undue burden.

New construction and major renovations must be designed and constructed to be readily accessible to and usable by people with disabilities. Elevators need not be installed if the building has fewer than three stories or has less than 3,000 square feet per floor; if the building is a shopping center, shopping mall, offices for health care providers this exception does not apply, nor does it apply if the Attorney General decides that other categories of buildings require elevators.

This section also includes specific prohibitions of discrimination in public transportation services provided by private entities, including the failure to make new over-the-road buses accessible five years from the date of enactment.

The provisions in this section go into effect 18 months after the date of enactment. It incorporates enforcement provisions comparable to those in Title II of the Civil Rights Act of 1964 which authorize lawsuits by victims of discrimination, injunctive relief, and pattern and practice lawsuits by the Attorney General. The Attorney General may seek monetary damages on behalf of aggrieved parties and may seek civil penalties to a maximum of \$50,000 for a first offense and \$100,000 for subsequent offenses.

Telecommunication Relay Services

Telephone services offered to the general public must include *interstate and intrastate telecommunication relay services* so that such services provide individuals who use nonvoice terminal devices because of disabilities with opportunities for communication that are equivalent to those provided to individuals able to use voice telephone services.

Attorneys Fees

The bill specifies that "in any action or administrative proceeding commenced under the Act, the court, or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual".

For additional information on the bill, contact Pat Wright, Disability Rights Education and Defense Fund, (202) 328-5185 or Liz Savage, Epilepsy Foundation, (301) 459-3700.

COURT RULES THAT STATES ARE IMMUNE FROM SUIT UNDER THE EDUCATION OF THE HANDICAPPED ACT

The Supreme Court on June 15, 1989 ruled 5-4 in *Dellmuth, Acting Secretary of Education of Pennsylvania v. Muth* that States are immune from law suits filed under the Education of the Handicapped Act. The decision means that even if States violate the Education of the Handicapped Act they cannot be sued in federal court because, according to the majority, "Congress did not abrogate the States' constitutionally secured immunity from suit in federal court..." The majority ruled that in order to lift this immunity, Congress must make "its intention unmistakably clear in the language of the statute."

1. Background

The eleventh amendment to the Constitution provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Although the eleventh amendment applies in terms only to citizens of another State, it has been interpreted to apply also to citizens of the same State (like *Muth*).

The Education of the Handicapped Act provides funds to assist states and local agencies in educating handicapped children. Parents must be allowed to assist in the development of an Individual Education Plan (IEP) for their children and are entitled to a hearing by the state education agency in the event they find the IEP inadequate. If dissatisfied with the administrative decision, parents can sue in state or federal district court.

The Court's decision in this case is similar to its decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 359 (1985) in which the Court ruled 5-4 that the States' Eleventh Amendment immunity to suit in

federal court had not been lifted by Section 504 of the Rehabilitation Act which prohibits federal and federally-assisted programs from discriminating against otherwise qualified handicapped persons. The *Atascadero* decision surprised many in Congress and in the civil rights community who had interpreted the law as lifting the States' immunity. In response to *Atascadero*, Congress passed the Civil Rights Remedy Equalization Act as part of the Rehabilitation Reauthorization Act to make clear that States *can* be sued under the Rehabilitation Act.

2. The Facts

Russell Muth, the father of Alex, a child with a language learning disability and associated emotional problems, requested an "administrative hearing to challenge the District's IEP" for his son. In September of 1983, shortly after the hearing began, Alex was enrolled in a private school. The hearing examiner agreed with Muth that the IEP was inappropriate and made several recommendations. The father and the school district appealed to the State Secretary of Education. The Secretary remanded the case to the hearing examiner with instructions to revise the IEP. The school district revised the plan and the hearing examiner certified that the revised plan was appropriate. That decision was affirmed by the Secretary on October 24, 1984.

During the administrative process, Muth filed suit in district court against the school district and the State Secretary of Education, alleging that the district's IEP was inappropriate and that the State's administrative proceedings violated the procedural requirements of the EHA. He requested declaratory and injunctive relief and reimbursement for the private school tuition and attorney's fees.

The District Court "entered summary judgment for Muth on his procedural claims" concluding that "Muth was entitled to reimbursement for Alex's tuition that year because the procedural flaws had delayed the administrative process." The U.S. Court of Appeals for the Third Circuit affirmed.

The question before the Supreme Court was whether the EHA abrogates the States' Eleventh Amendment immunity from suit in the federal courts.

3. The Opinion

Justice Kennedy wrote the opinion of the Court, joined by Chief Justice Rehnquist and Justices White, O'Connor and Scalia. While recognizing that Congress has the right, under the sec. 5 enforcement authority of the 14th Amendment, to abrogate the States' Eleventh Amendment immunity, the Court majority said such authority must be tempered because it "upsets the fundamental constitutional balance between the Federal Government and the States." The majority proceeded to apply what it calls "a simple but stringent test":

"Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."

This is the same language the Court had used in *Atascadero*. The Court further stated that:

"legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met."

4. The Dissent

Justice Brennan dissented, joined by Justices Marshall, Blackmun and Stevens. Justices Blackmun and Stevens also wrote brief separate dissents. The Brennan dissent reasoned that Congress had abrogated state immunity in the enactment of the Education of the Handicapped Act and that the Court should apply the standard method for determining congressional intent, i.e., examine the legislative history, as well as the statute's words, and not the *novel rule* the majority has here devised.

"In light of the States' pervasive role under the EHA, and the clarity with which the statute imposes both procedural and substantive obligations on the States, I have no trouble in inferring from the text of the EHA that 'Congress intended that the state should be named as an opposing party, if not the sole party, to [a] proceeding' brought under sec. 14159(e)(2), whatever remedy is sought, and that Congress thereby abrogated Eleventh Amendment immunity from suit in federal court...Indeed, in those situations where a State has elected to

provide educational services to the handicapped directly, or where under the EHA it is required to provide direct services, the State would appear to be the only proper defendant in a federal action to enforce EHA rights."

The dissenters concluded that: "The text and legislative history of the EHA...make it unmistakably clear that Congress there intended to abrogate state immunity from suit." Civil Rights advocates in Congress plan to seek amendment of the Education of the Handicapped Act to make clear that States can be sued under the bill.

Related Cases

On June 15, 1989, the Court ruled 5-4 in *Will v. Michigan Department of State Police*, that a State or an official of the State while acting in his or her official capacity is not a 'person' within the meaning of sec. 1983 (sec. 1 of the 1871 Civil Rights Act) and thus cannot be sued in state court for violations of the U.S. Constitution. Sec. 1983 provides that any person who under color of state law deprives any individual "of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured..."

Ray Will filed suit in Michigan Circuit Court alleging "various violations of the United States and Michigan Constitutions as a claim under sec. 1983." Will claimed he had been denied a promotion by the Department of State Police "because his brother had been a student activist and the subject of a 'red squad' file maintained by...[the Department of State Police]."

The state court trial judge concluded that Will had established a violation of the U.S. Constitution and ruled that the Dept. of State Police was a person within the meaning of sec. 1983. The Michigan Court of Appeals vacated the judgment, holding that "a State is not a person under sec. 1983, but remanded the case for determination of the possible immunity of the Director of State Police from liability for damages". The Michigan Supreme Court "granted discretionary review...[and] agreed that the State itself is not a person under sec. 1983, but went on to hold that a State official acting in his or her official capacity also is not such a person." The U.S. Supreme Court granted certiorari and affirmed:

"We hold that neither a State nor its officials acting in their official capacities are 'persons' under sec. 1983."

"Given that a principal purpose behind the enactment of sec. 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through sec. 1983."

The Court was relying on previous holdings that States could not be sued as *persons* in *federal* courts.

Justice Brennan in dissent wrote: "In my view, a careful and detailed analysis of sec. 1983 leads to the conclusion that States are 'persons' within the meaning of that statute." He continued:

"As to the more general historical background of sec. 1, we too easily forget, I think, the circumstances existing in this country when the early civil rights statutes were passed. 'Viewed against the events and passions of the time,'...I have little doubt that sec. 1 of the Civil Rights Act of 1871 included States as 'persons.'...[Congress] was fighting to save the Union, and in doing so, it transformed our federal system. It is difficult, therefore, to believe that this same Congress did not intend to include States among those who might be liable under sec. 1983 for the very deprivations that were threatening this Nation at that time."

On June 19, the Court ruled in *Missouri v. Jenkins* that the Eleventh Amendment "has no application to an award of attorney's fees," and thus "an award against a State of a fee that includes...an enhancement for delay is not...barred by the Eleventh Amendment." The Court further approved the lower courts' "compensation of lawyers, paralegals and law clerks at market rates."

This case involved school desegregation litigation that began in 1977. The Kansas City, Missouri School District, the School Board, and children of two School Board members filed suit against the State and other defendants alleging that "the State, surrounding school districts, and various federal agencies had caused and perpetuated a system of racial segregation in the schools of the Kansas City metropolitan area." After

proceedings lasting many years the District Court found the State of Missouri and the Kansas City school district liable but dismissed the case against the suburban districts and the federal agencies.

The plaintiffs' attorneys, Kansas City lawyer Arthur Benson and the NAACP Legal Defense Fund, sought attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. The District Court awarded Benson approximately \$1.7 million and LDF \$2.3 million. In awarding the fees, the Court took into consideration "the market rate for attorneys of Benson's qualifications", as well as "the preclusion of other employment, the undesirability of the case, and the delay in payment for Benson's services." In calculating the rates for Benson's associates as well as for paralegals employed by Benson and the LDF, the court also took into consideration the delay in the case and used the current market rates. The Court of Appeals affirmed.

The State appealed, asserting that "a State cannot, consistent with the principle of sovereign immunity...embodied in the Eleventh Amendment, be compelled to pay an attorney's fee enhanced to compensate for delay in payment." The State also argued that sec. 1988 "does not authorize billing paralegals' hours at market rates, and that doing so produces a 'windfall' for the attorney." The Supreme Court affirmed the judgement of the appellate court.

"...The Eleventh Amendment has no application to an award of attorney's fees, ancillary to a grant of prospective relief, against a State. [This means that the case comes under an exemption to the Eleventh Amendment dating back to a 1908 case that covers *prospective* relief, i.e. the cost of coming into compliance with constitutional obligations, rather than retroactive relief, i.e. damages for past wrongs, *Ex parte Young*, 209 U.S. 123 (1908).] It follows that the same is true for the calculation of the amount of the fee. An adjustment for delay in payment is, we hold, an appropriate factor in the determination of what constitutes a reasonable attorney's fee under sec. 1988. An award against a State of a fee that includes such an enhancement for delay is not, therefore, barred by the Eleventh Amendment."

On the question of paralegal billings, the Court reasoned:

"Where...the prevailing practice is to bill paralegal work at market rates, treating civil rights lawyers' fee requests in the same way is not only permitted by sec. 1988, but also makes economic sense. By encouraging the use of lower-cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours 'encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes.'"

Reaction to the Decisions

Asked by *MONITOR* staff to comment on the impact of the decisions, Elliot Mincberg, partner with Hogan and Hartson, provided the following statement:

"The most immediate impact of the decision in *Dellmuth* is that unless the EHA is amended, parents of handicapped students cannot sue state government agencies for violating their children's rights to an appropriate education under the Act. In addition, by ruling that the text of a statute must make it 'unmistakably clear' that Congress has abrogated the states' Eleventh Amendment immunity, without regard to the statute's legislative history, the Court has adopted a stringent new immunity test which Congress did not know about when it passed EHA and other statutes. As a result, *Dellmuth* may mean that individuals cannot sue state agencies under other civil rights statutes like EHA without a statutory amendment, even where Congress intended to permit individuals to do so.

"The decision in *Will* effectively insulates state agencies and officials acting in their official capacity from being sued for damages for constitutional and civil rights violations under most circumstances...The fact that states and state officials are not 'persons' under sec. 1983 means that they cannot be sued for damages for violating this important civil rights statute.

"The ruling in *Jenkins* makes clear that where a state agency or official can be sued for violations of civil and constitutional rights, it can be required to pay attorneys' fees and related costs just like any other defendant. As in other cases, a state agency or official held liable for a civil rights violation can be required to pay 'reasonable' attorneys' fees and costs, which can include extra compensation for delay in payment of fees in a lengthy case

as well as compensation for paralegals and for law clerks at the market rate. The Eleventh Amendment, which protects a State from being required to pay damages in federal court lawsuits, does not apply to attorneys' fee awards."

E. Richard Larson, legal director of the Mexican American Legal Defense and Educational Fund, said the Supreme Court's decisions in *Dellmuth* and *Will* "not only create more work for Congress but also evidence considerable disrespect for the work of Congress." Larson further said:

"In *Dellmuth*, not only did the Court reject a search of the legislative history for evidence of a waiver, but the Court also rejected a contextual analysis of the statute for proof of Congress' waiver of Eleventh Amendment immunity. Worse, the Court applied its new rule of interpretation not prospectively but retroactively. As in the aftermath of *Atascadero*, when Congress was compelled by the Court to revisit the Rehabilitation Act, Congress now will have to revisit yet again the Education of the Handicapped Act. Congress also may have to revisit many other civil rights statutes as well.

"Addressing an entirely different issue in *Will*, the Court relied on its restrictive Eleventh Amendment jurisprudence to read state agencies and officials virtually out of sec. 1983. The Court's facile analysis was particularly surprising because the Eleventh Amendment of course does not apply at all to state court lawsuits such as *Will*. Such minor details, however, apparently do not matter to this result-oriented activist Court."

LEGISLATION TO BE INTRODUCED TO ADDRESS SUPREME COURT DECISIONS ON EQUAL EMPLOYMENT OPPORTUNITY LAW

As was reported in the June 1989 *CIVIL RIGHTS MONITOR*, in the last month of its 1988-89 term the Supreme Court issued several decisions related to employment discrimination that add up to a major shift from equal employment opportunity law established over the past twenty-five years to protect the rights of minorities and women. Civil rights advocates in the Congress and civil rights leaders have indicated they will seek passage of legislation to overturn the Court's decisions. Rep. Augustus Hawkins (D-CA), Chair of the House Education and Labor Committee, said:

"Women and minorities are losing ground with each Supreme Court ruling. Without warrant or necessity, the court has turned back the clock. In the absence of White House leadership, it is clear that Congressional action is the best response to these decisions."

Civil rights advocates expressed the view that Congress would act to overturn the decisions.

During the last eight years, six decisions of the Supreme Court on civil rights issues have been overturned by the Congress:

- In 1982 in extending the Voting Rights Act of 1965, Congress overturned the *Mobile v. Bolden* case which held that the Voting Rights Act required proof of intent to discriminate. The Voting Rights Amendments Act of 1982 established that election practices that have a negative impact on minority voters may also be prohibited by the Act regardless of intent.
- In 1986 the Handicapped Protection Act overturned the Supreme Court's decision in *Smith v. Robinson* which had ruled that the Education for All Handicapped Children Act (P.L. 94-142) did not authorize payment of legal fees. The HPA provided for the payment of legal fees of parties who successfully sue under P.L. 94-142.
- In 1986 the Civil Rights Remedy Equalization Act overturned the Supreme Court's decision in *Atascadero State Hospital v. Scanlon* which held that the States' Eleventh Amendment immunity to suit in federal court had not been lifted by Section 504 of the Rehabilitation Act of 1973. The CRRE Act established that under Section 504, Congress intended state agencies that violate the law to be held liable for damages in federal court.
- In 1986 the Air Carrier Access Act overturned the Court's decision in *Department of Transportation v. Paralyzed Veterans of America* which held that Section 504 was not applicable to commercial air carriers because they were not *direct* recipients of federal funds. The Act amended Section 404(a) of the Federal Aviation Act of 1958 to require the Secretary

of Transportation within 120 days to issue regulations ensuring "nondiscriminatory treatment of qualified handicapped persons consistent with the safe transportation of all passengers."

- In 1988 Congress overrode a presidential veto of the Civil Rights Restoration Act and overturned the 1984 Supreme Court decisions in *Grove City College v. Bell* and *Consolidated Rail Corporation v. Darrone* which held respectively that the Title IX prohibitions against sex discrimination and the Section 504 prohibitions against handicap discrimination did not cover all programs of an institution receiving federal assistance but only those to which the assistance was directed. The CRRA restored the broad coverage of Title IX, and Section 504, as well as Title VI of the Civil Rights Act of 1964, and the Age Discrimination Act, the four major civil rights laws that prohibit the federal funding of discrimination against women, persons with disabilities, minorities, and older Americans.

Comprehensive legislation to reverse the Supreme Court's decisions on equal employment opportunity law is expected to be introduced soon.

WHY LUCAS WAS DEFEATED

On August 1, 1989 the Senate Judiciary Committee by a vote of 7-7 refused to approve a motion to report favorably to the full Senate the nomination of William Lucas to be Assistant Attorney General for Civil Rights. The Committee also failed by the same vote to approve a motion to report the nomination without a recommendation, killing the nomination in committee. The vote on the nomination had been held over from July 26 because Senator Heflin (D-AL) had indicated he needed more time to consider the nomination. As the committee convened on August 1, Senator Heflin's vote was the only vote in question. Citing Lucas' lack of experience and qualifications and questioning his managerial accomplishments, the Senator said he would vote against the nomination.

"In the normal course of events, you'd expect appointments to the antitrust, criminal law, lands, civil rights and other divisions to be filled by lawyers who have established reputations in each of these specialized fields. Mr. Lucas admits his lack of legal experience, but says his background of managerial accomplishments and his dedication justify his confirmation. His history in the Wayne County jail case in which he was held in contempt of court causes me concern about his management abilities..."

Senator Strom Thurmond (R-SC) who strongly supported the nomination said:

"It seems to me we ought to give this black man a chance. He's a minority, yes; minorities are entitled to a chance. Years ago they didn't have a chance; I know down South they didn't, and up North either. I say let's confirm this man and show the world that we are fair... Turn him down simply because he's black? That's the word that will go out to other countries. That's the word that will go out to this country."

Senator Simpson said the rejection of Lucas was "racism in reverse."

"To say, 'Give Bill Lucas a chance,' as several have said, that 'I would vote for him in some other position,' or 'Give him a chance and I would help him in anything else in the Administration,' that's kind of like back-of-the-bus stuff in the 1960's. It's discrimination; it's racism in reverse."

Other senators spoke of Lucas' lack of qualifications and commitment to civil rights. Senator Howard Metzenbaum (D-OH) said:

"The President has selected a man to be Assistant Attorney General who candidly admits that he is 'new to the law.' Would we accept a key economic adviser who is new to economics or a science adviser who is new to science."

Senator Paul Simon (D-IL) said he had been looking for "a real, gut commitment to lead the charge on civil rights. And there was just no evidence of that gut commitment being there."

On August 11, Attorney General Dick Thornburgh announced that he had hired Mr. Lucas as Director of the Office of Liaison Services in the Department of Justice, a position that does not require Senate confir-

mation. Mr. Lucas will serve as liaison with local law enforcement agencies, civil rights and community groups, and state and local governments.

As the *MONITOR* went to press, the post of Assistant Attorney General for Civil Rights had still not been filled. Attorney General Thornburgh has indicated that the delay in filling the position was due to the rejection of Lucas. "Once burned, twice shy. We saw someone I felt was an appropriate candidate roughed up pretty badly in the Judiciary Committee. Frankly that has scared off some people who might otherwise be interested. We are anxious to get someone nominated and confirmed. It's just on the basis of recent experience it's going to be a little bit challenging" (James Rowley, *The Associated Press*).

PRESIDENT NOMINATES CLARENCE THOMAS TO COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

On October 30, President Bush nominated Clarence Thomas, Chair of the Equal Employment Opportunity Commission, for the seat on the U.S. Court of Appeals for the District of Columbia that was vacated by Judge Robert Bork's resignation.

In a July 17 letter to the President, fourteen members of the House including twelve chairs of committees or subcommittees with oversight responsibilities for the EEOC, had expressed concern about the possible nomination.

"[We] believe Mr. Thomas has developed policy directives and enforcement strategies which have undermined the effectiveness of the Age Discrimination in Employment Act (ADEA) and Title VII.

Both Democratic and Republican administrations have vigorously enforced the ADEA since enactment in 1967. However, during Mr. Thomas' administration, the Commission has adopted policies involving pension accrual, supervised waivers, apprenticeship exclusions and early retirement incentive plans inimical to ADEA's purpose -- to encourage the employment of qualified, older workers. In addition, EEOC failed to process thousands of older workers' complaints in a timely manner which prevented them from pursuing their claims in court. This led to congressional legislation extending the statute of limitations for these workers."

In June, the Leadership Council of Aging Organizations, in a letter to President Bush expressed concerns about the possible nomination of Thomas.

"Since 1985, Mr. Thomas has shifted EEOC enforcement policy away from cases challenging a pattern and practice of discrimination on the basis of age, race, or sex and instead has limited enforcement to individual claims. This approach wastes valuable federal enforcement resources on narrow claims while ignoring systemic discrimination among large corporations and whole industries."

Mishandling of Thousands of Age Discrimination Cases

In testimony before the Senate Special Committee on Aging in 1988, Thomas admitted that EEOC had failed to resolve as many as 7,546 age discrimination complaints filed with the agency or to file court cases before the two-year statute of limitations expired. In response to the agency's mishandling of the cases, the Congress restored the right to sue until September 29, 1989 for cases extending as far back as January 1, 1984 (the Age Discrimination Claims Assistance Act). EEOC notified the 7,546 complainants of their right to sue in federal court. Thomas blamed the mishandling of the complaints on bad management in some of EEOC's district offices and on a limited budget.

On May 1, 1989 Thomas increased his estimate of the number of cases involved to 13,000.

Other Problems at EEOC

There have been other charges of lax enforcement of laws by EEOC during Thomas' tenure. A General Accounting Office report issued in October of 1988 found that EEOC and state agencies did not fully investigate discrimination charges. According to the GAO report::

"GAO reviewed investigations of charges closed with no-cause determinations (no evidence

of discrimination found) by six EEOC district offices and five state agencies under contract with EEOC to investigate charges from January through March 1987 and found that:

41 to 82 percent of the charges closed by the district offices were not fully investigated and 40 to 87 percent of charges closed by the state agencies were not fully investigated.

Of the charges closed with no-cause determinations by the 11 EEOC district offices and state agencies from January to March 1987:

critical evidence was not verified in 40 to 87 percent of charge investigations,

relevant witnesses were not interviewed in at least 20 percent of charge investigations in 7 of the 11 offices, and

charging parties were not compared with similarly situated employees in at least 20 percent of charge investigations in 5 of the 11 offices.

In 1985, Rep. Augustus Hawkins (D-CA), Chair of the House Education and Labor Committee, charged EEOC with deliberately refusing to enforce the nation's civil rights laws. Rep. Hawkins' charge was based on the findings of an investigation of EEOC by staff of the House Committee on Education and Labor. The staff conducted a series of onsite reviews of selected district offices of EEOC to assess the extent to which EEOC's enforcement of Title VII is consistent with congressional intent. The findings of the staff include:

"EEOC's Acting General Counsel orally directed regional attorneys not to recommend the use of goals and timetables in consent decrees, not to intervene in cases in which goals and timetables are proposed as a remedy, and not to seek enforcement of goals and timetables in existing consent decrees as well as in future ones.

"Class action cases or charges which do not identify *actual victims* are now reported to be unacceptable to the Commission. Remedies for discrimination are apparently limited to *identified victims*. Previously, EEOC sought relief such as the establishment of goals and timetables to correct an employer's discriminatory employment practices, and to bring more women and minorities into the workforce.

"EEOC is placing greater emphasis on the rapid closure of cases at the expense of quality investigations. Moreover, attempts may have been made to 'pad' the number of charges processed in order to make the case statistics and some district offices 'look good.'...In the Birmingham District Office, EEOC staff alleged that there was a wholesale closure of cases at the end of fiscal year 1985, in order to 'pad' the workload statistics and to show that that district office had processed an impressive number of charges that year."

The Landmark Legal Foundation, Center for Civil Rights, a conservative legal advocacy group, submitted a report to the American Bar Association that concludes that Thomas is highly qualified to serve on the federal bench. The report states:

"Based on the record, Mr. Thomas is clearly exceptionally well-qualified to serve as an appellate judge. He brings to the position well-rounded experience gained as an attorney in the private sector, as well as a distinguished record of service with the legislative and executive branches of the government... EEOC under Mr. Thomas has been transformed from a moribund and stagnant agency into a vital and responsive one. The record establishes that under Mr. Thomas' chairmanship the Commission has compiled by far the most successful enforcement record -- more relief secured for more victims of discrimination -- than under any chairman in the history of the EEOC."

In releasing the report, Clint Bolick, Director of the Center for Civil Rights, said: "There is no question whatsoever that Clarence Thomas is exceptionally well qualified to serve on the Court of Appeals."

SAVINGS AND LOAN BAILOUT BILL CONTAINS IMPORTANT LOW INCOME HOUSING AND ANTI-REDLINING PROVISIONS

On August 9, 1989 President Bush signed into law the Savings and Loan Bailout Bill which provides billions of dollars to save the savings and loan industry. The bill contains provisions to assist low-income renter households, and low and moderate income persons seeking to buy a home for the first time. The bill also amends the Home Mortgage Disclosure Act to require lenders to disclose the race, sex, and income level of loan applicants and recipients in an effort to combat discrimination in mortgage lending, and amends the Community Reinvestment Act to require federal regulators to disclose their evaluations and ratings of institutions covered under the Act.

Asset Disposition

The bill provides for the establishment of a new agency, the Resolution Trust Corporation, to manage and dispose of the assets of insolvent thrifts. In disposing of single family residential properties (selling for less than \$67,500), the RTC must give state and local governments, non-profit housing agencies, and families with incomes of less than 115 percent of the median income in the area a "90 day right to purchase" before offering the property to for-profit buyers.

In addition, "State and local governments and non-profit housing agencies will also be given a 45-day right to purchase certain low-cost multifamily residential properties, provided that a sufficient number of units are maintained for low income persons at very low rents for the life of the property" (*Congressional Quarterly*, August 12, 1989).

This provision states that "RTC may offer these properties [to non-profit buyers] with below-market rate financing and at prices below what might otherwise be possible to help these buyers maintain some of the units for low and very low income use, at restricted rents, for the remaining useful life of the property" (Low Income Housing Information Service, Special Memorandum, Summary of the Financial Institution Reform, Recovery and Enforcement Act, HR 1278 (LIHIS, Special Memorandum)).

Low Income Mortgages

The bill requires the twelve regional Federal Home Loan Banks to set aside a portion of their earnings to subsidize low-income mortgages. The total amount will be 5 percent of the earnings or at least \$50 million each year for years 1990-1993, 6 percent or at least \$75 million in 1994, and 10 percent or at least \$100 million for each subsequent year. Each FHLB is to establish a "cash advance program with subsidized interest rates that would be available to member institutions making loans for 'long-term affordable low and moderate income housing' at subsidized rates" (LIHIS, Special Memorandum). The funds can only be used for:

- loans to finance home purchase or rehabilitation by families with incomes below 80 percent of AMI [the area median income]; and
- financing the purchase, rehabilitation and development of rental housing in which at least 20 percent of the units must be rented to households with incomes below 50 percent of the AMI for the remaining useful life of the property or the mortgage term. With regard to this last requirement, the Conference Report states: 'The conferees expect that the Board will encourage the use of the longest practicable mortgage term in order to aid in making the housing affordable by very low income families' (LIHIS, Special Memorandum).

Anti-Redlining Provisions *Home Mortgage Disclosure Act*

The bill amends the Home Mortgage Disclosure Act to require mortgage lenders to report information on the number and dollar amount of mortgage applications by gender, race, income, and census tract. The Low Income Housing Information Service states: "This new information will make it possible to track not only where lenders make loans, but where they are failing to do so despite applications and whether or not patterns of discrimination emerge from a comparison of applications approved and applications rejected."

Community Reinvestment Act of 1977

The Community Reinvestment Act was amended to require federal regulators to disclose their evaluations and ratings of institutions covered under the Act. The CRA provides that "deposit-gathering institutions have an affirmative obligation to solicit borrowers and depositors in all segments of their communities." Among the factors federal regulators are required to consider in evaluating banks, and savings and loans are:

- their efforts to determine the credit needs of the community
- their efforts to make the community aware of credit services
- practices intended to discourage applications for credit
- geographic distribution of credit extensions, applications and denials
- evidence of discriminatory or illegal credit practices
- participation in local community development projects

For readers wanting additional information on the Savings and Loan Bailout Bill, see the Low Income Housing Information Service, *Special Memorandum: Summary of the Financial Institution Reform, Recovery and Enforcement Act, HR1278*. The memo is available from the LIHIS, 1012 14th St., NW, Wash., DC 20005, for \$5.00. Interested readers may also want to contact Barry Zigas at the Low Income Housing Information Service, (202)662-1530, or Allen Fishbein at the Center for Community Change, (202)342-0567.

FOR YOUR INFORMATION

The Citizens' Commission on Civil Rights has announced the publication of a new 652 page book which calls for bold action to restore the effectiveness of federal civil rights enforcement agencies. In *ONE NATION, INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990'S*, the nation's leading civil rights authorities provide an overview of where America stands today in the major areas of civil rights and a comprehensive set of recommendations including new legislation, enforcement policies, litigation goals and other actions federal agencies must take to ensure effective implementation of federal civil rights laws.

The book is available from the Citizens Commission on Civil Rights, 2000 M Street, NW, Room 400, Washington, D.C. 20036, (202) 659-5565. The cost is \$15.00.

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