Civil Rights Monitor

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INSIDE

CIVIL RIGHTS ACT OF 1990 PASSES HOUSE AND SENATE

PRESIDENTIAL VETO STILL A POSSIBILITY

On August 3, 1990 the House by a vote of 272-154 passed the Civil Rights Act of 1990. A companion bill passed the Senate on July 19 by a vote of 65-34. Differences in the two bills will have to be worked out by a conference committee of the principal sponsors from both Houses when Congress returns from its August

recess in September. A Presidential veto of the bill remains a possibility.

The Civil Rights Act of 1990 amends Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, sex, national origin, or religion, and the 1866 Civil Rights Law (section 1981 of 42 U.S. Code) which prohibits intentional race discrimination in the making and enforcing of contracts. The bill addresses several Supreme Court decisions on 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. The decisions narrow the coverage of civil rights statutes, make it harder for women and minorities to prove discrimination and easier for employers to avoid responsibility for practices that discriminate, make it easier for those opposed to civil rights consent decrees to challenge them, and limit the award of attorney's fees. The bill also corrects an anomaly in Title VII, which prohibits gender, national origin, and religious discrimination in addition to racial discrimination, but which does not provide a damages remedy similar to that available under 1981 for intentional racial discrimination.

Senate and House Floor Action

Numerous changes were made to the bill in the Senate to address concerns raised by the Bush Administration, and a number of Senators, about the legislation particularly the claim that the bill would induce employers to adopt job quotas.

The bill considered on the House floor incorporated the changes approved by the Senate. In addition, two amendments were added to the bill on the House floor to address further the concerns of some members that the bill would lead to job quotas, and would result in huge monetary damage awards. Section 4 of the bill, which addresses the *Wards Cove* decision, was amended to address concerns that the bill would lead employers to institute hiring quotas simply to avoid a statistical imbalance in their workforces. The amendment provides that:

> "The mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.
>
> "Nothing in the amendments made by this Act shall be construed to require an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex, or national origin."

This amendment passed by a vote of 397-24, with 12 members not voting.

Section 8 of the bill was amended to provide for a limit on the amount of punitive damages a judge or jury could order in cases of intentional discrimination under Title VII. The limitation provides that defendants with fewer than 100 employees may not be ordered to pay *punitive* damages to an individual in an amount greater than:

> "$150,000; or an amount equal to the sum of compensatory damages awarded...and equitable monetary relief awarded...which ever is greater."

The damages amendment passed by a vote of 289-134, with 10 members not voting.

A major victory for the civil rights community was the House defeat of an amendment in the nature of a substitute offered by Minority Leader Bob Michel (R-IL) and representative John LaFalce (D-NY). The amendment was defeated 188-238. Supporters of the substitute tried to present it as a pro-civil rights proposal, a compromise, that the Administration would support. Sponsors and supporters of the Kennedy-Jeffords-Hawkins-Fish bill said the proposal would be a harmful step backward on civil rights. For example, the proposal would have adopted rather than overruled the key aspects of the *Wards Cove* decision, adopting the decision's weakened definition of business necessity and requiring victims of discrimination to isolate the harm caused by individual job practices even where it is impossible to do so.

The Bill's Provisions

Restoring the discriminatory impact test — reversing the *Wards Cove* decision (Title VII)

Sections 3 and 4 of the bill which address the issue of establishing the burden of proof in disparate impact cases overrule key aspects of the *Wards Cove* decision. *Wards Cove* radically changed principles governing proof of discrimination in Title VII disparate impact cases, standards the Court established more than

eighteen years ago in *Griggs v. Duke Power Co.*. In *Griggs* the Supreme Court interpreted Title VII to invalidate the employer's general intelligence tests and other criteria for employment that disproportionately excluded minorities because these selection devices were not shown to be job related and dictated by business necessity. *Griggs* thus established that an employer, in order to retain an employment practice that has been shown to have a disparate impact on women and minorities, must prove the practice is justified by business necessity.

The definition of business necessity in the bill contains two provisions. In the case of employment practices involving selection, such as hiring and promotion, the practices must "bear a significant relationship to successful performance of the job." In the case of practices not involving selection, the practices must "bear a significant relationship to a significant business objective of the employer." This language was added to the bill in response to a Bush Administration concern that employers be able to justify practices not related to selection (such as plant closings) with business reasons other than those relating to job performance.

Another sponsors' addition to the bill in response to Administration concerns provides that when an employee challenges a group of employment practices and the court finds that the employee can reasonably identify from the employer's records which specific practices contributed to the disparate impact, then the plaintiff must identify the specific practice contributing to the disparate impact and the employer need justify by business necessity only those practices.

Section 4 also makes clear that when an employer has demonstrated that a practice is justified by business necessity, the practice may still be found to be unlawful if the employee can show that a different practice or practices with less discriminatory impact would serve the employer's business objectives equally as well.

Prohibiting intentional discrimination — correcting the *Price Waterhouse* decision (Title VII)

Section 5 of the bill amends Title VII to overturn a ruling in the Supreme Court's decision in *Price Waterhouse v. Hopkins*. In a plurality opinion, the Court concluded that "when a plaintiff...proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability...by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account".

Section 5 makes clear that an unlawful employment practice has been established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a contributing factor for any employment practice, even though other factors also contributed to the decision." If the employer can show that nondiscriminatory reasons were sufficient to produce the adverse employment decision, the employer would not be required to hire or reinstate the employee. However, a court could award whatever other relief would be appropriate, e.g., an injunction against future discrimination, except that "damages may be awarded only for injury that is attributable to the unlawful employment practice." This ensures that damages will be provided only for injury that is traceable to the unlawful discriminatory component of the employment practice.

Preventing unlimited challenges to court-approved remedies — reversing the *Wilks* ruling

Section 6 of the bill corrects the effect of the *Wilks* decision (see Summer/Fall 1989 MONITOR) by establishing standards for providing interested nonparties with notice and an opportunity to be heard when a decree is proposed in an employment discrimination case, and then generally barring subsequent challenges by nonparties where these standards have been met. The legislation thus provides a means of achieving finality in a case, so that the parties and the court will not be required to relitigate continually the same challenges in separate actions, while at the same time protecting the due process rights of interested nonparties.

Several changes were made to this section after the bill was introduced to address concerns that this section would deny persons due process of law required by the U.S. Constitution. Added language makes it clear that practices will be protected from later collateral attack only where they implement and are within the scope of a fully approved litigated or consent order.

Language was also added to the section concerning challenges to an order by persons who had notice of the order to make it clear that the persons must have had "actual" notice and an opportunity "to present objections" and be heard before they can be precluded from attacking an order on this ground.

Providing a reasonable opportunity to challenge purposeful discrimination after *Lorance*

Section 7 deals with the problems created by the *Lorance* ruling which held that any challenge to a facially

neutral seniority system must be timely filed soon after the system is first put in place and that persons who wait until they are adversely affected by the system to file a suit may be too late. The section provides that when a collective bargaining agreement includes a seniority system or practice that is adopted with an intention to discriminate, the system or practice may be challenged when it is applied during the life of that collective bargaining agreement.

This section also extends the statute of limitations for Title VII cases from 180 days to two years, thus granting victims of discrimination a longer time to file charges.

Granting all victims of discrimination the right to recover damages for intentional employment discrimination

Section 8 addresses an existing deficiency in Title VII, which prohibits gender, national origin and religious discrimination in addition to racial discrimination, but which does not provide a damages remedy similar to that available under sec. 1981 for intentional racial discrimination. Section 1981 allows for compensatory and punitive damages while Title VII monetary awards are limited to make-whole relief, i.e., back pay, and where appropriate front pay.

This section authorizes in Title VII the award of compensatory damages for acts of intentional discrimination, and punitive damages for discrimination practiced with "malice, or with reckless or callous indifference." An amendment added on the House floor limits the award of punitive damages against employers of fewer than 100 employees to $150,000, or "to an amount equal to the sum of compensatory damages awarded...and equitable monetary relief...whichever is greater."

Allowing attorneys fee awards to Title VII plaintiffs for defending against intervenors' claims — reversing the *Zipes* ruling

The *Zipes* decision held that successful Title VII plaintiffs may not be awarded attorneys fees against persons who intervene in the suit unless the intervenors' action was "frivolous, unreasonable, or without foundation."

Section 9 would overturn that decision and allow a prevailing plaintiff in the original action to recover from the party against whom relief was granted (the original defendant) reasonable attorney's fees incurred in defending such judgment or order against the claims of intervenors. Section 9 also provides that the award of attorney's fees includes expert fees and other litigation expenses.

Allowing interest in Title VII actions against the Federal Government

Section 10 authorizes courts in Title VII cases against the Federal Government to award the prevailing party interest to compensate for any delay in the payment of monetary awards. Such interest is currently available in cases involving parties other than the Federal Government.

Restoring strong civil rights construction

Section 11 provides that federal laws should be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies, and that the granting of remedies in one law should not be construed to limit other remedies provided in other laws.

Restoring sec. 1981 — reversing the *Patterson* decision

The *Patterson* decision limited the reach of the 1866 Civil Rights law by ruling that the law's prohibition of racial discrimination in the making and enforcing of contracts covers hiring, but not problems or conditions such as racial harassment that may arise on the job.

Section 12 amends section 1981 by affirming Congress' intent that this statute cover all aspects of and all benefits, terms and conditions of a contractual relationship. In an employment case, this would make section 1981 applicable to racial/ethnic discrimination in hiring, promotions, treatment on the job, demotions, discharges, retaliation and every other aspect of employment. An employer who is prohibited from discriminating against blacks at the time of hiring would also be prohibited from harassing black employees after they start working.

No effect on lawful court ordered remedies, affirmative action, or conciliation agreements

Section 13 makes clear that nothing in this Act is to be read as affecting the lawfulness of court-ordered remedies, affirmative action, or conciliation agreements. Such a determination is to be made by the appropriate case law without reference to the amendments made by the Act.

Providing for severability

Section 14 makes clear that if any provision of the bill is held invalid, the other provisions of the bill will not be affected by that action.

Providing for retroactivity

Section 15 provides effective dates for each section of the legislation. Sections of the legislation which are intended to address the effect of specific Supreme Court decisions (*Patterson*, *Wards Cove*, *Martin v. Wilks*, and *Price Waterhouse*) will apply to all proceedings pending on or commenced after the date of the Supreme Court decisions. This section also provides transition rules for other sections of the legislation.

Coverage of the Congress

Both House and Senate bills extend to Congressional employees the rights and protections of Title VII. Each bill establishes administration and enforcement provisions consistent with the constitutional separation of powers in our tripartite federal government.

Statute of limitations for the Age Discrimination in Employment Act

Section 17 of the House bill extends the statute of limitations of the Age Discrimination in Employment Act from 180 days to two years. The Senate bill has no counterpart provision.

Alternative Means of Dispute Resolution

Section 18 of the House bill encourages, where lawful and appropriate, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, and arbitration, to resolve disputes arising under Title VII and sec. 1981.

SUPREME COURT TO RULE ON MAJOR SCHOOL DESEGREGATION ISSUE

The Supreme Court has agreed to review an Oklahoma City, Oklahoma school desegregation case that addresses the question of when court supervision of a formerly segregated school system may end, and whether districts may scrap their desegregation plans after supervision ends. The Supreme Court has previously said that racially dual [illegally segregated] systems must become "unitary" and must eliminate all vestiges of the previously segregated system. But the Court has never given content to these broad principles. The Supreme Court's decision could have an impact, according to the New York Times, on some 500 school desegregation cases currently under court supervision. Oral argument in the case is scheduled for Tuesday, October 2, 1990, *Board of Education of Oklahoma City Public Schools v. Robert L. Dowell*, Supreme Court, No. 89-1080.

The question before the Court is under what circumstances is a school district that has implemented a school desegregation plan for a number of years free to dismantle the plan and substitute a "neighborhood" system that results in resegregation?

Background

Prior to the *Brown v. Board of Education* decision, the Oklahoma City, Oklahoma school system operated segregated schools as mandated by the state constitution. In 1955 the school board adopted a neighborhood school assignment policy, but allowed parents of white students living within integrated neighborhood attendance areas to transfer their children to all white schools. In 1963 this transfer policy was ruled unconstitutional by a federal district court. The court also found the neighborhood school assignment policy inappropriate as it was superimposed over residential segregation.

> "The residential pattern of the white and Negro people in the Oklahoma City school district has been set by law for a period in excess of fifty years, and residential pattern has much to do with the segregation of the races...Thus the schools for Negroes have been centrally located in the Negro section of Oklahoma City, comprising generally the central east section of the City...The patrons of the School district had lived under a dual school system and the children's residential areas were fixed by custom, tradition, restrictive covenants, and laws."

In 1965, the District Court again found the district's attempts to desegregate its schools inadequate because of the reliance on a neighborhood school assignment policy. The Tenth Circuit Court of Appeals affirmed and the Supreme Court in 1967 declined to review the case. In 1972 the District Court would again rule that the school district had put in place an ineffective school desegregation plan, and would order the implementation of a plan drawn by the plaintiffs' experts. This plan employed the techniques of pairing, clustering and cross-town busing to integrate the schools.

In 1975, the school board filed a motion requesting dismissal of the lawsuit alleging that it "had eliminated all vestiges of state-imposed racial discrimination in its school system and was operating a unitary school system." In 1977 the district court terminated the case, stating that the court-ordered plan "had worked and that substantial compliance with the constitutional requirements had been achieved." The court did not dissolve the permanent injunction, and stated that it "does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the case has been pending before the Court."

The school system continued to operate under the court-ordered plan until the 1985-86 school year when the school board substituted a "neighborhood school assignment system" for grades K-4. Ten schools that were segregated in 1971 were resegregated when the Plan was abandoned, with 40 percent of the black students in these grades attending these 10 schools. Overall, 44.7 percent of black students in grades 1-4 now attend schools that are greater than 90 percent black. The district-wide elementary school enrollment is 36 percent black. Thirteen other elementary schools are now more than 80 percent white.

The plaintiffs challenged the school board's action in federal court, and the district court denied the challenge on the ground that "once a school system has become unitary, the task of a supervising federal court is concluded." The Tenth Circuit reversed, and instructed the district court to hold a hearing to determine whether "changed conditions require modification or [whether] the facts or law no longer require the enforcement of the [1972 injunctive] order."

On December 9, 1987 the district court "issued its opinion and order dissolving the 1972 decree and relinquishing any further jurisdiction". The court of appeals again reversed, finding that the school board "had not made a sufficient showing of changed circumstances that would justify the dissolution of the injunction." The Supreme Court granted review on March 26, 1990.

The Parties' Arguments

(1). The School Board:

The school board argues that once a school district that operated a dual segregated system has achieved a unitary school system, the vestiges of discrimination have been eliminated and the constitutional violation has been remedied. At that point, the board asserts, court supervision of the district should end. Further, the school board asserts, the district may at that point "adopt a neighborhood assignment plan even if it has a disproportionate racial impact, provided that the board's action is not intentionally discriminatory, and, therefore, is not a new constitutional violation."

> "Since unitariness signifies the elimination of unlawful discrimination and its effects from a school system, it by definition means that the previous constitutional violation has been corrected. The final declaration of unitary status achieved by the Oklahoma City School Board in 1977 carries this same meaning, because the attainment of that goal was only made possible by the district court's enforcement of, and the board's compliance with, the foregoing constitutional principles. Since unitariness means the effects of past discrimination have been eliminated, [the appeals court's] directive for the Oklahoma City School Board to remain under the governance of the injunction in

the absence of a showing of segregative purpose, because its neighborhood school plan 'restore[d] the effects of past discriminatory intent,'...is at odds with the very meaning this Court has given to the achievement of unitary status."

On the issue of residential segregation and neighborhood schools, the school board discusses the benefits of neighborhood schools and asserts that the school board did not originate the racial residential patterns, and cannot correct them.

> "The uncontroverted evidence showed that in Oklahoma City residential segregation cannot be eliminated by court order, board policy or otherwise...It is a reality in Oklahoma City as it is in most other large urban cities. Thus, whether a neighborhood plan is adopted today, or twenty-five years from now, it will result in the creation of some racially identifiable schools. To say that the Oklahoma City School Board must maintain racial balance in its elementary schools to control the effects of residential segregation, is to say that the board must continue to bus its young students until such time residential segregation is eliminated. The elimination of residential segregation is not possible and certainly not required by the Constitution."

(2). The Black School Children:

The brief for the respondents (the black school children) cites the Supreme Court decision in *U.S. v. Swift* to support the argument that a permanent injunction should not be revoked or modified unless new circumstances "have turned it into 'an instrument of wrong.'"

> "[O]nce a state or subdivision of a state has been found, as have Oklahoma and the Oklahoma School Board, to have violated the Fourteenth Amendment by deliberately segregating Afro-American children from white children in public schools, a permanent injunction promising a permanent correction of that constitutional violation is in order. The obligation of the board to conduct its affairs in such a way as to prevent resegregation and the power of the court to review the board's actions to assure that resegregation does not occur are coextensive with the permanent injunction."

The respondents also assert that reestablishing neighborhood schools based on segregated housing patterns has created a system that continues the vestiges of the prior segregated system.

> "The key question was whether the existing residential segregation that produced the ten all-Afro-American schools was linked to the residential segregation found by the district court to be caused by official actions, including the imposition of a neighborhood school plan on existing residential segregation in 1955...In 1967 and 1972 the district court held that neighborhood schools could not be used precisely because they exacerbated housing segregation by destroying integrated neighborhoods....In Oklahoma City there were sixty-five years of state imposed segregated schools and fifty years of state enforced residential segregation that was exacerbated by seventeen years of 'neighborhood' schools. It would be totally contrary to the spirit and intent of *Green* and *Swann* [Supreme Court school desegregation cases] to conclude that a school district can escape its affirmative obligations to eliminate all vestiges of discrimination by complying with a court decree that produces integration for one generation of students. To argue that the same ten schools that are now all-Afro-American as were in 1972 are not vestiges of segregation is to ignore *Swann's* recognition that the drawing of zone lines and the placement of schools are 'Potent weapons for creating or maintaining a state-segregated school system'...There is simply no evidence in this record that meets the school board's burden of demonstrating that the natural effects of its policies from statehood to 1972 have been dissipated."

SUPREME COURT RULES IN FAVOR OF FCC AFFIRMATIVE ACTION POLICIES

On June 27, 1990, the Supreme Court in a narrow 5-4 opinion upheld the constitutionality of two Federal Communications Commission's affirmative action policies that give preference to minorities and women in the awarding of broadcast licenses. The policies represented an effort to increase the number of minority broadcasters and thus provide "a diversity of expression over the airwaves."

The opinion addresses two cases. The first case, *Metro Broadcasting v. FCC*, No. 89-453, involved a challenge to the FCC policy of granting preferences to women and minority applicants for television and radio licenses. Minority status is considered a "plus factor," that is weighed along with other relevant factors, in FCC's evaluation of applications for licenses. The second case, *Astroline Communications Co. v. Shurberg Broadcasting*, No. 89-700, involved a policy that allows station owners who are threatened with the loss of their licenses for failure to comply with regulatory standards to make a "distress sale" to a minority controlled company at 75 percent or less of the market value of the license. (For further discussion of the cases, see CIVIL RIGHTS MONITOR, Spring 1990).

The Opinion

Justice Brennan wrote the opinion of the Court, in which Justices White, Marshall, Blackmun and Stevens joined. Justice Stevens also filed a concurring opinion. In upholding the FCC policies, the Court opinion states:

> "[W]e conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies. Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated,...the diversity of views and information on the airwaves serves important First Amendment values...The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits rebound to all members of the viewing and listening audience. As Congress found, 'the American public will benefit by having access to a wider diversity of information sources.'"

The Dissent

Justice O'Connor was joined in a dissenting opinion by Justices Rehnquist, Scalia and Kennedy. Justice Kennedy also filed a dissenting opinion in which Justice Scalia joined. Justice O'Connor concludes:

> "[T]he Government has not met its burden even under the Court's test that approves of racial classifications that are substantially related to an important governmental objective. Of course, the programs even more clearly fail the strict scrutiny that should be applied. The Court has determined, in essence, that Congress and all federal agencies are exempted, to some ill-defined but significant degree, from the Constitution's equal protection requirements. This break with our precedents greatly undermines equal protection guarantees, and permits distinctions among citizens based on race and ethnicity which the Constitution clearly forbids."

In a January 23, 1989 decision, the Court had held that a race-conscious Richmond, Va. ordinance calling for set-asides for minority contractors failed to meet the strict standard of scrutiny that the majority said was applicable, *Richmond v. Croson*. In the FCC case, the majority made it clear that Congress has more leeway than state and local governments in promulgating race-conscious policies.

HISPANICS IN LOS ANGELES WIN VOTING RIGHTS CASE

On June 4, 1990, U.S. District Judge David Kenyon ruled that a 1981 redistricting plan adopted by the Los Angeles County, California Board of Supervisors violated Section 2 of the Voting Rights Act and the equal protection clause of the Fourteenth Amendment: "The conclusion this Court reaches is that, on a fundamental level, the hispanic community has sadly been denied an equal opportunity to participate in the political process and to elect candidates of their choice to the Board of Supervisors for this burgeoning County."

At issue was the manner in which the county supervisors redrew the boundaries of the five districts after the 1980 census, at a time when the hispanic population's growth was "explosive and continuous". Judge Kenyon found that the "Supervisors' primary objective was to protect their incumbencies and that of their allies. This objective, however, was inescapably linked to the continued fragmentation of the Hispanic population core.".

Background

The population of Los Angeles County (8.7 million) is approximately 35 percent hispanic, but no hispanic candidate has ever been elected to the County Board of Supervisors. The Mexican American Legal Defense Fund, Department of Justice, and American Civil Liberties Union filed suit in August 1988. The plaintiffs allege that the 1981 redistricting plan fragmented the core of the hispanic community, and that the presence of only five supervisory districts had the effect of diluting the hispanic vote.

The case went to trial on January 2, 1990 after efforts to reach a settlement failed. Testimony presented at the trial demonstrated that since 1959 the Board had through redistricting kept the hispanic population split in an effort to "secure their positions against challengers who would appeal to hispanic voters." The 1981 redistricting plan maintained the boundary between the two districts with the largest populations of hispanics, thus continuing to split the core of the hispanic population in half. In doing so, the Board ignored three proposed redistricting plans that would have established a district with a bare hispanic majority.

The Court found that the supervisors acted with the intent to maintain the fragmentation of the hispanic vote in violation of Section 2 of the Voting Rights Act and the equal protection clause of the Fourteenth Amendment. On the question of the size, and thus number of districts, the court found that "while the size of the districts contributes significantly to the inability of Hispanics to elect a candidate of their choice, plaintiffs have failed to establish a valid legal claim based solely on the size of the supervisorial districts."

The court reasoned that since the issue of reapportionment is a legislative function it was appropriate for the court to give the supervisors time to come up with an alternative plan and recommended that in doing so the supervisors seriously consider the issue of expansion.

Hispanic leaders were jubilant in their response to the decision, calling it a landmark court decision. Antonia Hernandez, president and general counsel of MALDEF, said: "This is a historic moment in the history of the Hispanic Community."

Later Developments

On June 7, U.S. District Court Judge David Kenyon gave the County Supervisors 20 days to develop an alternative redistricting plan which the Supervisors presented to the court on June 27. Judge Kenyon held hearings on the alternative plan in late July and early August at which time MALDEF and the Department of Justice expressed their objections to the plan. On August 3, the court rejected the supervisors' plan, and on August 6 accepted the redistricting plan proposed by MALDEF. MALDEF's plan retains the five supervisory districts, but alters the boundaries of two districts to create a majority hispanic district. Judge Kenyon scheduled a November 6 primary election under the new plan.

Following the August 6 ruling, the Supervisors filed a motion with the Ninth Circuit Court of Appeals to stay the District Court's order. The supervisors wanted to hold a run-off election following an inconclusive primary held in early June in the challenged district. The appeals court granted the stay, and ordered that no election should be held pending further order of the court. The Ninth Circuit has scheduled a hearing on the merits of the case for October 5, 1990.

DEPARTMENT OF JUSTICE FILES VOTING RIGHTS CASE

On August 9, 1990, the Department of Justice filed suit to challenge the State of Georgia's voting requirement that all federal, state, and county primary and general elections must be won by a majority vote. The complaint filed in the U.S. District Court for the Northern District of Georgia asserts that the majority vote requirement violates the Voting Rights Act of 1965, and the Fourteenth and Fifteenth Amendments to the Constitution. The Department of Justice alleges that the majority vote requirement, adopted in 1964, "was adopted as a part of the state statutory scheme for the purpose of precluding black citizens of Georgia from participating effectively in the political process and electing candidates of their choice to office on an equal basis with white citizens." The DOJ complaint further asserts:

> "Use of the majority vote requirement in Georgia, with the state's long history of racial discrimination and the prevalence of racially polarized voting, has resulted in discrimination against black citizens by limiting their opportunities to nominate and elect candidates of their choice to public office. For example, in numerous election contests held throughout the State since 1965, candidates to whom black voters have given overwhelming support (usually black candidates) have received the highest vote total in the

first primary, but have failed to obtain a majority of the votes cast in that election. In the ensuing run-off election, the candidates supported by black voters have been defeated by the white bloc vote. Thus, the majority vote requirement in the context of racially polarized voting has had racially discriminatory results on black candidates in Georgia, since white citizens constitute a majority of the voters in most electoral contests."

Nine southern states presently have a statewide requirement that a candidate obtain a majority of votes cast in order to gain public office. The state of North Carolina recently changed its majority vote requirement to a substantial plurality (40 percent) requirement. The remaining 40 states have a simple plurality requirement. The DOJ reports that under the Georgia majority vote requirement, in the period 1965 to 1990, 35 black candidates in more than 20 counties have gained a plurality of the vote but did not win the office sought because they were forced into run-off elections in which they failed to obtain a majority of the votes cast.

MINORITY FARMERS RIGHTS ACT ADOPTED AS AN AMENDMENT TO THE SENATE FARM BILL

On July 26, 1990, the Senate by unanimous consent adopted an amendment introduced by Senator Wyche Fowler (D-GA) including the Minority Farmers Rights Act in the 1990 Farm Bill (S. 2830). This amendment marks the strongest action to date by Congress to stop the drastic decline of minority farmland. Since no similar action was taken in the House, the amendment's inclusion in the final farm bill will be decided by the House/Senate Conference Committee in September.

The amendment provides for an outreach and education program to minority farmers; a national registry of minority farmers in order to monitor minority land ownership; a comprehensive program for minority youth and beginning farmers; efforts to increase participation of minority farmers in government farm programs, including an investigation of current participation and recommendations for improvement; and studies of both the appeals process for minority farmers' complaints of discrimination and affirmative action procedures in USDA employment and contracting.

Senator Fowler and Representative Mike Espy (D-MS) introduced the Minority Farmers Rights Act this summer (S. 2881 and H.R. 5198). The farm bill as reported out of both House and Senate Agriculture Committees included the provision of the MFR Act that authorizes an outreach and education program to minority farmers through community based organizations and educational institutions, with priority given to historically black colleges and institutions.

Background

There were more than 900,000 black-operated farms in the U.S. at the height of black farming in 1920, comprising one seventh of all farm operations. Ninety-four percent of black farmers had disappeared by 1978. In the farm crisis decade of the 1980s, more than one-half of the remaining black farmers were wiped out, losing their land at over three times the rate of white farmers. Only 23,000 black farms remain in operation today. Native Americans and other minorities have land loss patterns similar to that of black farmers.

In 1982, the U.S. Commission on Civil Rights released its report, "The Decline of Black Farming in America." It predicted that without changes in policies of the U.S. Department of Agriculture, there would be no black farmers in existence by the year 2000. The Commission wrote:

> "In some cases, FmHA [Farmers Home Administration, the government's lender of last resort to small farmers] may have hindered the efforts of black small farm operators to remain a viable force in agriculture. Furthermore, as the Commission has found in the past, USDA and FmHA have failed to integrate civil rights goals into program objectives and to use enforcement mechanisms to ensure that black farmers are provided equal opportunities in farm credit programs."

The situation has further deteriorated since the Commission's report. At a July 25, 1990 hearing of the Government Information, Justice and Agriculture Subcommittee of the House Government Operations Committee, representatives of the Federation of Southern Cooperatives, Land Loss Prevention Project and other community based organizations working with black farmers in the South testified of consistent complaints of discriminatory action on the part of FmHA. Chairman Bob Wise (D-WV) expressed the intent of the Subcommittee to continue its investigation.

LEGISLATIVE UPDATES

Americans with Disabilities Act

On July 26, 1990 at a large Rose Garden Ceremony, President Bush signed into law the Americans with Disabilities Act. In so doing, the President signed into law the most comprehensive civil rights measure since the 1964 Civil Rights Act. The House passed the bill that the conference committee recommended on July 12 by a vote of 377-28, and the Senate on July 13 by a vote of 91-6.

ADA will provide to Americans with disabilities protection similar to that provided racial, ethnic and religious minorities through the Civil Rights Act. 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.

Racial Justice Act

On May 24, 1990, the Senate by a vote of 58-38 accepted an amendment by Senator Bob Graham (D-FL) to strike the Racial Justice Act from the Omnibus Crime Bill (S.1970). On July 23, 1990, the House Judiciary Committee approved the Omnibus Crime Bill, H.R. 5269, which includes the Racial Justice Act. When the full House considers the crime bill in September, an amendment to strike the RJA is expected.

Background

In the Senate the Racial Justice Act, S. 1696, was introduced on September 28, 1989 by Senator Edward Kennedy (D-MA). A hearing was held on October 2, 1990, and on October 17, 1989 the Senate Judiciary Committee by a vote of 7-6 approved the Racial Justice Act as an amendment to the Federal Death Penalty Act of 1989 (S. 32). S. 32 was subsequently reported out of Committee without a recommendation by a 7-6 vote. On November 21, 1989 Senator Joseph Biden (D-DE) introduced S. 1970, which incorporated the death penalty provision as well as the Racial Justice Act that had been reported by the Judiciary Committee.

In the House, the Racial Justice Act, H.R. 4618, was introduced by Representative John Conyers (D-MI) on April 25, 1990. The House Subcommittee on Civil and Constitutional Rights held a hearing on the bill on May 3, 1990, and approved the bill for full committee action on July 12, 1990. The bill was incorporated into the Omnibus Crime Legislation which the Judiciary Committee approved for consideration by the full House on July 23, 1990.

The Racial Justice Act addresses the well-demonstrated pattern of racial bias in the application of the death penalty. The bill would prohibit imposition of the death penalty if a state or federal criminal defendant could show, by using statistical evidence, racial disparities in the pattern of capital sentences based on the race of the defendant or the race of the victim. If the evidence showed a greater likelihood of death sentences where whites were the victims or disparities between black defendants and white defendants, no death sentence could be imposed on the defendant unless the State presented clear and convincing evidence that the apparent racial disparity is explained by non-racial factors.

(For further information, see the February 1989, *CIVIL RIGHTS MONITOR*).

Family and Medical Leave Act

The Family and Medical Leave Act passed the House on May 10 by a vote of 237-187, and the Senate on June 14 by voice vote. Despite strong bipartisan support for the bill, and major compromises that limited the bill's coverage, President Bush on June 29 vetoed the legislation. On July 25, the House fell 53 votes short of the two-thirds vote needed to override the President's veto, 232-195.

The bill would have allowed an employee to take up to 12 weeks of unpaid leave a year in total to care for a newborn or adopted child, or for a seriously ill child or parent. The 12 weeks could include similar leave in the event of the worker's own illness. The employee would have had to have worked for the employer at least 1,000 hours in the previous 12 months in order to qualify. The bill applied only to companies that employ 50 or more employees. Thus it would not have covered 90 percent of all employers and 56 percent of all employees.

Senator Christopher Dodd (D-CT) has reintroduced a Family and Medical Leave bill (S. 2973) that is similar to the bill he originally introduced. It would require businesses with 20 or more employees to offer 10 weeks of unpaid leave over two years to care for a newborn child or a seriously ill child or parent. It also provides for 13 weeks of leave per year for an employee suffering from a serious illness.

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