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THE 101ST CONGRESS AND CIVIL RIGHTS

The 101st Congress compiled a very good record on civil rights, passing a number of important legislative initiatives in two extraordinarily active sessions. The major success for civil rights advocates in Congress was enactment of the Americans with Disabilities Act, one of the two top legislative priorities for the civil rights coalition. The major disappointment was the Senate's failure to override the President's veto of the Civil Rights Act of 1990 by one vote. It is worth noting that at long last, the House and Senate, in the Americans with Disabilities Act and in the Civil Rights Act, included themselves in the coverage of the civil rights measures. The President also vetoed the Family and Medical Leave Act, and that veto also was sustained.

Also enacted during the 101st Congress were the Hate Crimes Statistics Act, a Child Care bill, the Education of the Handicapped Children's Act, an Older Workers Benefit Protection Act, a minimum wage increase for the first time in almost a decade, the reauthorization of the U.S. Commission on Civil Rights for 22 months, legislation providing entitlement payments pursuant to the Japanese American Redress Bill, and a Minority Farmers Rights Act.

The Racial Justice Act was passed by the House as part of the Crime Bill, but was eliminated in conference along with the federal death penalty provision. In addition, the Senate Judiciary Committee rejected the

nomination of William Lucas to be Assistant Attorney General for Civil Rights, on the grounds that he lacked legal and civil rights experience.

Senate Fails to Override the President's Veto of the Civil Rights Bill by One Vote

On October 24, 1990, the Senate failed by one vote to override the President's veto of the Civil Rights Act of 1990. The vote was 66-34. The Civil Rights Act had originally passed the Senate on July 18 by a vote of 65-34, and the House on August 3 by a vote of 272-154. The conference committee met on October 2 to work out differences between the House and Senate versions, and met again on October 11 to adopt a compromise package that proponents hoped would avert a veto. On October 16, the Senate passed the bill recommended by the conference committee by a vote of 62-34 (Democratic Senators Exon (NE), and Kerry (MA) and Republican Senators Stevens (AL), and Hatfield (OR) were absent). The House passed the bill October 17 by a vote of 273-154. The President vetoed the bill on October 22, 1990.

The Conference Committee's First Meeting

The House-Senate Conference Committee met for the first time on October 2 to work out the differences between the bills that had passed the Senate on July 19 and the House on August 3. The conference committee adopted language that had been added in the House to address the concern of some members that the bill would lead employers to institute hiring quotas simply to avoid a statistical imbalance in their workforces.

This language provided 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."

In addition, the conferees set a limit on the amount of punitive damages a judge or jury could order any employer to pay in cases of intentional discrimination under Title VII (no such damages were authorized by either House for disparate impact violations). The Senate bill had no such limit, and the House bill applied the limit to employers with fewer than 100 employees. The bill agreed to in conference provided that an employer 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, and equitable monetary damages awarded, whichever is greater.

Further Negotiations

The conference committee reported the bill on October 2. The President, however, renewed his threat to veto the bill. In an effort to avert a veto, Republican Senators Orrin Hatch (R-UT), Arlen Specter (R-PA), and James Jeffords (R-VT), and William Coleman, Secretary of Transportation in the Ford Administration, entered into negotiations, with Coleman representing the views of civil rights groups, and after several negotiating sessions worked out a compromise. Senator Hatch agreed to recommend the compromise to the White House, although he said that if the President could still not support the bill, he would have to support the President.

Conference Committee Reconvenes

On October 11, the House by a vote of 375-45 recommitted the bill to the conference committee. In committee, the changes contained in the Hatch-Specter compromise were agreed to and the revised bill was reported out by the conference committee.

The compromise included the following changes to the bill:

In a further attempt to address concerns that the provision in the bill reversing the *Wards Cove* decision would result in the use of quotas, the definition of business necessity was changed again so that in defending a business practice not involving selection,

the employer would have to prove only that the practice has a "significant relationship to a manifest business objective".

Language was added to make clear that nothing in the bill should be interpreted even "to encourage" an employer to adopt quotas.

Language was added to require that a plaintiff prove which "specific practice or practices are responsible for the disparate impact in all cases" except when an employer "has destroyed, concealed or refused to produce existing records that are necessary to make this showing...or...failed to keep such records."

The compromise also provided that in "mixed motive" cases, such as *Price Waterhouse*, where discrimination was a factor but the employer can show that the same decision would have been made for nondiscriminatory reasons, the court may grant only declaratory relief, injunctive relief, attorneys' fees and costs. Compensatory and punitive damages could not be awarded.

Modifications were made also to the *Wilks* section of the bill to allow more people to challenge consent decrees or other judgments in job discrimination cases in the future and to strengthen notice requirements for such decrees.

Under the modified "Zipes" provision, courts would be given discretion in determining who should pay the plaintiff's legal fees incurred in defending against an unsuccessful challenge to a court order or consent decree. The fees could be assessed against the unsuccessful third party challenger or the original defendant or through an equitable allocation determined by the court.

White House Rejects Compromise

Prior to the second conference committee meeting on October 11, Senator Hatch and other Senators presented the compromise package to Administration officials who said the revisions did not go far enough, and that the President could not support it. Hatch therefore backed away from the compromise. During debate on the conference compromise bill on the Senate floor, Senator Hatch said:

"So I made it very clear during the negotiations that I would go with this bill if all three sides agreed; that is the President...the civil rights community, and the House and Senate...I was asked if I would recommend it to the President. I said I would recommend to the President the language we came up with, but I also said that I would make it very clear I am not totally happy with it and if he rejects it, I am going to support the President....Now we failed. We did our very best. We tried to put this together in the best possible way. We tried to resolve it in the best possible way, but there are clearly such notable differences among the three groups..."

Senator Specter responded:

"...[T]he core of what I think is critical about what the distinguished Senator from Utah and I are in agreement on is that he found this compromise acceptable and that he recommended it to the President even though he reserved the right to vote against it, oppose it if the President did not go along and that I would hope...my colleagues will rely upon the professional judgement of the distinguished Senator from Utah in accepting it and recommending it as distinguished from the consideration of following the President."

In an October 12 letter to Senate Minority Leader Robert Dole, Attorney General Dick Thornburgh stated:

"In our view, the new amendments adopted in conference do not offer substantial improvement to S. 2104, indeed, in some respects they make the bill worse. Accordingly, the President will be compelled to veto S. 2104 in its current form.

"The new amendments recognize that the bill contains serious deficiencies, particularly with regard to the matters raised in connection with *Wards Cove Packing Co. v. Atonio*

FOUR OF THE MAJOR DIFFERENCES BETWEEN THE BILL CONGRESS PASSED AND THE PRESIDENT'S BILL

1. Proving discrimination in disparate impact cases.

The definition of business necessity: In both bills there are two definitions for business necessity -- the standard by which an employer can justify an employment practice that has been shown to have a disparate impact on women or minorities. The Congressional bill would apply the more definitive and restrictive standard to most employment practices while the President's bill would apply the looser standard in the vast majority of cases. In addition, under the President's bill the employer is given a choice of whether to defend its practices as necessary for successful job performance (in which case the strict standard applies) or on other grounds, e.g., customer preferences, in which case the loose standard would apply.

Identifying the particular practice: When an employee challenges a group of employment practices, the Congressional bill would require s/he to identify the specific practices that contributed to the disparate impact when it is reasonably possible to separate the elements of the decision-making process.

The President's bill would require the employee to identify the particular practice regardless of whether the employer's records would allow for such analysis or records are even available.

2. Damages

The Congressional bill would amend Title VII to allow for the award of compensatory and punitive damages for intentional discrimination. The amount of punitive damages would be limited to \$150,000, or an amount equal to the sum of compensatory damages awarded and equitable monetary damages which ever is greater.

The President's bill would permit judges to award up to a total of \$150,000 in compensatory and punitive damages and give judges vast discretion to deny any damages to victims of discrimination. Juries are barred from deciding what the remedy should be, raising serious constitutional questions.

3. Prompt and Orderly Resolution of Challenges to Consent Decrees and Orders

The bill passed by Congress seeks a balance between allowing everyone to have their day in court and endless challenges to employment discrimination settlements. Amendments were adopted that would allow more persons after-the-fact to challenge orders or consent decrees and notice requirements would have to be strengthened in future cases to prevent challenges.

The Administration's bill would allow challenges even years after a job bias remedy had been ordered, or agreed upon, and even if the person challenging it knew about the remedy and did nothing at all about it when it was initially entered. In addition the bill's notice requirement would allow the re-opening of every existing judgment or order.

4. Quotas

The Congressional bill includes language to make clear that the bill does not require or encourage an employer to adopt hiring or promotion quotas. The bill also makes clear that the amendments would have no effect on court ordered remedies, affirmative action plans, or conciliation agreements that do not violate Title VII.

The Administration's bill says that nothing in Title VII should be construed to [169]require, permit or result in the adoption or implementation of...quotas.[170] Because opponents of the bill do not recognize the distinction that exists between quotas and affirmative action remedies the wording could be intended to make illegal any voluntary or court-ordered affirmative action programs as well as the affirmative action requirements of the Executive Order on Affirmative Action which applies to federal contractors.

and *Martin v. Wilks*, among others. Unfortunately, the amendments do not make substantive changes in the bill and, therefore, do not remove any of the objections we have clearly stated in the past."

In response to the Administration's rejection of the compromise, proponents of the bill questioned whether the Administration had been negotiating in good faith. A Leadership Conference on Civil Rights statement said:

"The Attorney General's October 12 letter rejects every reasonable effort to compromise and makes clear that his opposition is premised on a desire to ratify, not repair, the Supreme Court decisions that have so weakened civil rights protections."

The LCCR statement further states:

"What may trouble Mr. Thornburgh is that the compromise does not embrace the Administration's demand that 'customer relationship efforts' be a defense to job practices that have a discriminatory impact. Accession to that demand would allow law firms, banks and other businesses to refuse to hire minorities or Jews or Catholics or women on grounds that customers prefer not to deal with them."

William Coleman described his meetings with White House Chief of Staff John Sununu and Counsel Boyden Gray in this manner:

"I would go into a room and have a discussion with Governor Sununu. Eventually we would agree on something and we'd ask Boyden Gray to put it in writing. It would never get put in writing. I'd sit down and say, 'O.K., explain what is wrong with the bill and if you convince me Congress made a mistake, I will change it.' They never would explain."

Congress Passes the Compromise Bill

The revised bill passed the Senate and House on October 16 and 17, and was sent to the President on October 19. Civil rights, women's rights, labor, disability, and religious leaders rallied in front of the White House on October 19 to urge the President to sign the bill. Statements from the White House suggested that there might be room for further negotiations, and proponents of the bill spent the weekend waiting to hear from the White House. But in the end, the Administration would offer only proposals that had been rejected by the proponents of the bill repeatedly during the previous several months. Senator Edward Kennedy (D-MA) said in response to the President's proposal:

"The President's last-minute proposal is a cynical attempt to appear to support civil rights while actually satisfying the anti-civil rights forces in his own party. The so-called proposed compromise is a sham that would leave wide gaps in our anti-discrimination laws.

"This proposal would fail to overrule key aspects of the Supreme Court decision that has undermined the protection of these laws. And it would not permit women and religious minorities who are victimized by sex discrimination and bigotry on the job to obtain full compensation for the injustice they suffer.

"The President's actions demonstrate that he is more interested in appeasing extremists in his party than in providing simple justice for the millions of working women and minorities who face bias on the job."

The Leadership Conference on Civil Rights in its detailed analysis of the White House's October proposal said:

"The White House proposal of October 20th, although portrayed as a compromise, would be disastrous to the rights of minority and women workers to fair and non-discriminatory treatment in the workplace. Instead of restoring the rights impaired by Supreme Court decisions, it would in fact endorse and codify three of the decisions --- *Wards Cove*, *Lorance*, and *Wilks*. The White House proposal would allow employers

who have engaged in discriminatory practices to determine the standard these practices would be judged by, and thus would wipe out two decades of progress under the *Griggs* decision....

"The White House knew in advance that its proposal could not be accepted. Some of its elements were contained in the [Representative] Michel and [Senator] Kassebaum substitutes already rejected by the House and Senate by decisive margins. This is consistent with the White House pattern of blocking any compromise, and threatening to veto the civil rights bill regardless of its content. Half a dozen times in June and July, the civil rights community accepted White House offers of language or concepts, only to be told within 24 hours that the White House had repudiated its own language or concepts."

The President's Veto

On October 22, the President vetoed the Civil Rights Act of 1990, and sent to the Senate a proposal he knew would not be accepted by the Congress.

"I am today returning without my approval S. 2104, the 'Civil Rights Act of 1990.' I deeply regret having to take this action with respect to a bill bearing such a title, especially since it contains certain provisions that I strongly endorse.

"Discrimination, whether on the basis of race, national origin, sex, religion, or disability, is worse than wrong. It is a fundamental evil that tears at the fabric of our society, and one that all Americans should and must oppose...One step that the Congress can take to fight discrimination right now is to act promptly on the civil rights bill that I transmitted on October 20, 1990. This accomplishes the stated purpose of S. 2104 in strengthening our Nation's laws against employment discrimination."

Thus, President Bush became the third President to veto a civil rights bill, and the first President to have his veto of a civil rights bill sustained. Proponents of the bill said they would reintroduce the civil rights bill early in the 102nd Congress, and that it would be their number one priority

Americans with Disabilities Act

On July 26, 1990, at a large Rose Garden Ceremony, President Bush signed into law the Americans with Disabilities Act, the most comprehensive civil rights measure since the 1964 Civil Rights Act. The House passed the bill recommended by the conference committee on July 12 by a vote of 377-28, and the Senate on July 13 by a vote of 91-6. Slightly different versions had initially passed the Senate on September 7, 1989 by a 76-8 vote, and the House on May 22, 1990 by a vote of 403-20.

The bill defines "individual with a disability" as an individual who has "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 following description of the bill borrows from Department of Justice documents.

Employment

The Employment section of the bill provides that an employer, employment agency, labor organization, or joint labor-management committee may not discriminate against a qualified individual with a disability because of the disability in regard to any term, condition or privilege of employment. The bill covers employers of 15 or more employees, and takes effect on July 26, 1992, except that for the first two years after that date it covers only employers with 25 or more employees.

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. The term does not include an employee or applicant who is currently engaging in the illegal use of drugs.

The bill allows religious organizations to give preference in employment to their members and to require that all applicants and employees conform to the religious tenets of such organization.

Complaints are to be filed with the Equal Employment Opportunity Commission, and the remedies available are the same as are available under Title VII of the Civil Rights Act of 1964, i.e., back pay and injunctive relief.

Public Services

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 of the Rehabilitation Act of 1973 (entities receiving federal funds) would apply to all services, programs and activities of state and local governments. The general provisions of this section become effective on January 26, 1992, and will be enforced by the Department of Justice. Individuals may also file private lawsuits.

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 alternative methods of providing the services must be offered, if those methods can easily be accomplished without much difficulty or expense. Private clubs and religious organizations are exempt.

Complaints are to be filed with the Attorney General who may file lawsuits to stop the discrimination and obtain the award of monetary damages as well as penalties. Individuals may also file private lawsuits to stop the discrimination but monetary damages may not be awarded. This provision becomes effective on January 26, 1992.

Public Transportation

The bill requires public transit authorities to acquire accessible vehicles and make certain alterations to transportation facilities to make them accessible to persons with disabilities, including persons in wheelchairs. New buses ordered on or after August 26, 1990 must be accessible to individuals with disabilities.

In addition, a public transit authority must also provide alternative transit 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. New bus stations and alterations to existing stations must be accessible. These provisions become effective on January 26, 1992. Complaints are to be filed with the Department of Transportation. Individuals may also file private lawsuits.

New rail vehicles ordered on or after August 26, 1990, must be accessible, and existing rail systems must have one accessible car per train by July 26, 1995. New rail stations and alterations to existing stations must make them accessible. Existing "key stations" in rapid rail, commuter rail, and light rail systems must be made accessible by July 26, 1993, unless an extension of up to 20, and in some cases 30 years is granted for stations that need extraordinary expensive structural changes to, or replacement of, existing facilities. Existing intercity rail stations (Amtrak) must be made accessible by July 26, 2010. Individuals may file complaints with the Department of Transportation or bring private lawsuits.

Private Transportation

New over-the-road buses ordered on or after July 26, 1996 (July 26, 1997, for small companies), must be accessible. The law requires the Office of Technology Assessment to conduct a study to determine the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service, and the most cost effective means for providing such access. The study is to be submitted to the Congress and the President by July 26, 1993 and the President may, based on the findings of the study, extend the deadline for an additional year. Other new vehicles, such as vans, must be accessible, unless the transportation company provides service to persons with disabilities that is equivalent to that operated for the general public. Individuals may file complaints with the Department of Justice.

Telecommunication Relay Services

Telephone services offered to the general public must include interstate and intrastate telecommunication

relay services so that such services provide to individuals who use nonvoice terminal devices because of disabilities opportunities for communication that are equivalent to those provided to individuals able to use voice telephone services. The provisions are effective on July 26, 1993. Complaints are to be filed with the Federal Communications Commission.

Family and Medical Leave Act

The Family and Medical Leave Act passed the House on May 10, 1990 by a vote of 237-187, and the Senate on June 14, 1990 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, 1990, the House fell 53 votes short of the two-thirds 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 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 for 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.

In vetoing the legislation, the President said the Federal Government should not mandate leave policies, but leave them to be negotiated by employers and employees. The United States is the only industrialized country that does not have a national policy of maternity or parental leave. For example, Japan provides 12 weeks of partially paid maternity leave; Canada provides up to 41 weeks with 60 percent of salary the first fifteen weeks; in European nations, 5 to 6 months of paid leave is the norm for new mothers. One hundred and thirty five countries provide at least maternity leave, and 127 provide some wage replacement. France, Great Britain and Italy first furnished maternity benefits prior to World War I, and these benefits are now part of more general paid sick leave laws providing benefits for all workers unable to work for medical reasons.

In the U.S., twenty states now affirmatively require employers to provide some form of job guaranteed leave for family and/or medical reasons, and six states provide such for state employees. The terms and conditions vary widely, which highlights the need for a federal minimum standard to provide consistent coverage.

Following the House's failure to override the veto, Senator Christopher Dodd (D-CT) reintroduced a Family and Medical Leave Bill (S. 2973) that was similar to the bill he originally introduced in the 101st Congress. The new Dodd bill 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. No action was taken on the bill.

A Family and Medical Leave Act will be introduced in the 102nd Congress as in the last three Congresses. Supporters are optimistic that they will be able this time to garner the votes to pass the bill and override a veto if necessary.

Hate Crime Statistics Act

The House on June 27, 1989, passed the Hate Crime Statistics Act by the overwhelming vote of 368-47 (HR 1048). A companion bill (S 419) was passed by the Senate on February 8, 1990 by the vote of 92-4. The bill was signed by the President on April 23, 1990.

The Hate Crime Statistics Act establishes a system to gather statistics on crimes where the victim's race, religion, ethnicity or sexual orientation is a factor. The statistics will provide a national base and allow for the monitoring of hate crimes. The collection of data on the extent and nature of hate crimes is viewed as essential if the Nation is to address the problem of hate crimes. In the words of a study conducted for the Department of Justice:

"One of the most pressing considerations related to bias crime is the need for adequate data. Accurate and complete data are needed to understand the severity, pattern, and location of bias crimes. With improved data collection, law enforcement officials and prosecutors will be better able to make appropriate resource allocation decisions and to target specific neighborhoods or organizations for special attention.

Joan Weiss, former executive director of the National Institute Against Prejudice and Violence, in assessing the extent of hate crimes said:

"In Maryland, one of only eight states in the country with data collection legislation, between 350 and 500 incidents based on race, religion, and ethnicity were reported to the State Human Relations Commission each year from 1981 through 1986...The New York City Police documented between 172 and 286 incidents each year from 1981 until 1986. Then, in 1987, in the wake of the Howard Beach racial attack, they documented 463 incidents. In Boston, the police department recorded over 2,700 incidents from 1978 through 1987."

Child Care

The Congress passed Child Care legislation as part of the conference report on the Omnibus Budget Reconciliation Act. The provisions authorize a new child care and child development block grant program subject to an annual appropriation, and increases the amount of the Earned Income Tax Credit.

Appropriated funds will be allocated to the states based on the number of children in the population under the age of five, and the number of children participating in the school lunch program. States are required to use 75 percent of the monies to provide direct child care services, improve the quality of child care, and increase the availability of child care services. Eligible parents have the option to obtain a voucher for payment to any licensed, regulated, or registered child care provider, or to enroll a child in a child care program that receives funding through the program.

The other 25 percent of the monies distributed to the states is to be used for early childhood development, before and after school child care services, and quality improvement. All child care facilities funded under the block grant must meet minimum state health and safety standards.

The child care provisions also increase the amount of the Earned Income Tax Credit, adjust the credit for family size, and provide a supplemental EITC of \$500 for families with a child under one year of age. EITC is a tax credit that is available to low-income working families with children. EITC is *refundable*, i.e., families whose tax credit exceeds their income tax liability receive the difference in the form of a payment from the government.

Some organizations within the Leadership Conference on Civil Rights that support federal involvement in providing child care opposed the legislation because of concerns about the separation of church and state. Sholom D. Comay, President of the American Jewish Committee, said the legislation:

"allows vouchers to be used for religious child care and religious employers to require that their employees follow the religious tenets of the organization. Government has the obligation to help parents by supporting child care programs that meet their needs. It does not have the obligation to support, and indeed may not support, religious beliefs. We need to pass a federal child care program that helps to create accessible, affordable and quality care, not one that violates our basic principles."

Older Workers Benefit Protection Act

The Older Workers Benefit Protection Act (OWBPA) passed the House on October 3 by a vote of 406-17, and the Senate on September 24 by a vote of 94-1. The legislation forbids discrimination in employee benefits, and establishes minimum standards to assess the validity of waivers of claims under the Age Discrimination in Employment Act.

The bill overturns the Supreme Court's decision in *Public Employees Retirement System of Ohio v. Betts*. There, on June 23, 1989, the Court in a 7-2 decision ruled that a section of the Age Discrimination in Employment Act (ADEA) that provides an exemption for employee benefit plans in effect exempts discrimination in benefits unless shown to be a subterfuge for discrimination in the non-fringe benefit aspects of the employment. The OWBPA makes clear that the ADEA forbids discrimination in all employee benefit plans, as well as in every other aspect of employment that is not specifically exempt from coverage.

The bill also adopts the "equal benefit or equal cost" principle contained in the Labor Department and EEOC interpretations of the ADEA. DOL and EEOC had interpreted the benefit exemption in the ADEA as applying only to employee benefit plans providing reduced employee benefits for older employees that are justified by the increased cost of providing those benefits to such employees. Thus, if the employer can demonstrate that the cost of providing equal benefits is greater for older workers than for younger workers, then the employer can comply with the ADEA by spending equal amounts for the benefits per employee regardless of the level of benefits provided younger vs. older employees.

Racial Justice Act

On October 26, House and Senate conferees working on the Omnibus Crime Bill dropped the federal death penalty section of the bill, and thus the Racial Justice Act. This action was taken because it was clear that the conferees would not reach agreement on the death penalty provisions, which risked not reporting a bill for Congressional consideration before adjournment.

On October 5, 1990, the House had voted 216 to 204 to reject a motion by Representative Sensenbrenner (R-WI) to strip the Racial Justice Act from the Omnibus Crime Bill (HR 5269). The House rejected the Sensenbrenner motion after adopting a compromise version of the Racial Justice Act offered by Representative Hughes (D-NJ) by a vote of 218-186. The Hughes compromise was offered to address the assertion of opponents of the bill that the Racial Justice Act would in effect outlaw the death penalty. The Hughes amendment would have made it easier for states to challenge the allegation that the death penalty was applied in a discriminatory manner.

In the Senate, the Racial Justice Act was part of the Omnibus Crime Bill (S 1970) as it was introduced by Senator Joseph Biden on November 21, 1989. 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 bill.

The Racial Justice Act addresses the well-demonstrated pattern of racial bias in the application of the death penalty. The measure would prohibit imposition of the death penalty if a state or a federal criminal defendant could show, by 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 demonstrated by a preponderance of evidence that the apparent racial disparity is explained by non-racial factors.

Minimum Wage Increase

On November 17, 1989, the President signed into law a minimum wage increase for the first time in almost a decade. The bill (HR 2710) increases the minimum wage from \$3.35 a hour to \$4.25 over a two year period (\$3.80 on April 1, 1990, and \$4.25 on April 1, 1991). The bill allows a subminimum training wage -- 85 percent of the minimum but no less than the current \$3.35 -- for 16 to 19 year old workers during their first three months of employment. The training wage could be paid the same workers by another employer for an additional three months if the second employer certifies that the workers are still in training. The bill also includes an exemption from the increase for businesses with gross sales under \$500,000.

The bill passed the House on November 1 by a vote of 382-37, and the Senate on November 8 by a vote of 89-8. Final passage came after months of negotiations following President Bush's June 13 veto of an earlier version. The vetoed bill would have raised the minimum to \$4.55 over three years, and included a 60 day training wage for first jobs. The Administration had initially proposed an increase to \$4.25 over three years and a six-month training wage for any new hire.

U.S. Commission on Civil Rights Extension and Appropriation

On November 17, 1989, the House by a 389-0 vote accepted a Senate compromise amendment to the U.S. Commission on Civil Rights reauthorization bill which provides a 22 month extension of the Commission to September 30, 1991. The Senate had approved the amendment on November 16 by voice vote.

The Commission's 1983 reauthorization was scheduled to expire on November 30, 1989. On November 15 the House passed a six-month extension, despite White House support of a six-year extension. Civil rights advocates supported the six-month extension. They were reluctant to support a longer extension before knowing who would be nominated to fill four Commission seats that were to become vacant in December of that year.

In February, 1990, President Bush appointed Arthur Fletcher, an assistant secretary of labor during the Nixon Administration, Chair of the Commission. President Bush also appointed Charles Pei Wang, president, China Institute in America. Senate Majority Leader Robert Dole appointed Russell G. Redenbaugh, partner and director of an investment banking firm in Philadelphia, and House Minority Leader Robert Dole appointed Carl Anderson, vice president for public policy of the Knights of Columbus and former legislative assistant to Senator Jesse Helms (R-NC). The other Commissioners are Mary Frances Berry, University of Pennsylvania Professor, Blandina Cardenas Ramirez, director of minority concerns, American Council on Education, William Allen, Harvey Mudd Professor, and Esther Gonzalez-Arroyo Buckley, a science teacher from Texas.

The Commission's appropriation level for Fiscal Year 1991 has been increased from \$5.7 million to \$7.75 million.

Minority Farmers Rights Act

The 1990 Farm Bill includes the Minority Farmers Rights Act (MFRA). Proponents of the MFRA were disappointed that the conferees dropped a provision that would have established a voluntary national registry of minority farmers to enable monitoring of minority land ownership, and to locate and lend support to minority farmers.

The MFRA does provide for the targeting of FmHA [Farmers Home Administration, the government's lender of last resort to small farmers] direct operating loans to minority farmers. The provision mandates that "to the maximum extent possible" monies distributed in a county be allocated to minority farmers in proportion to their representation in the county, e.g., if minority farmers are 25 percent of the farmers in the county, they are to receive 25 percent of the FmHA monies lent in that county. Other provisions include an outreach and education program to minority farmers; a 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 improvements; and studies of both the appeals process for minority farmers' complaints of discrimination and affirmative action procedures in USDA employment and contracting.

Joanne Durham of the National Family Farm Coalition said that passage of the bill is a clear victory for minority farmers, although the language in the bill is not as strong as the Coalition wanted, and will require oversight and monitoring of the implementation of the law.

SUPREME COURT HEARS ORAL ARGUMENT IN SCHOOL DESEGREGATION CASE

On Tuesday, October 2, 1990, the Supreme Court heard oral argument in the Oklahoma City, Oklahoma school desegregation case that addresses the question of when court supervision of a formerly segregated school system may end, *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

In 1977, District Court Judge Luther Bohannon declared the school system unitary, i.e., free from the vestiges of prior discrimination. But he kept in place the injunction and stated that the court "does not foresee that the termination of its jurisdiction will result in the dismantlement of the [school desegregation] 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." In 1985 the school board substituted a neighborhood school assignment system for grades K-4, and the plaintiffs challenged the school board's action. In 1987, Judge Bohannon dissolved the 1972 school desegregation decree, and terminated any further jurisdiction over the school district. The court of appeals reversed, finding that the school board "had not made a sufficient showing of changed circumstances that would justify the dissolution of the injunction." The importance of the injunction to civil rights lawyers representing the African American children is that without the injunction in place, plaintiffs would face a greater burden of proof if forced to go back into court to challenge new segregative actions. (For a thorough discussion of the case, see *CIVIL RIGHTS MONITOR*, vol. 5, no.1.)

The Argument

Readers should remember that questions asked by Justices during oral argument are not a reliable guide to how the Justices will vote.

In arguing before the Court, Ronald L. Day, attorney for the school board, asserted that once a school board that operated a dual system has achieved a unitary school system, the vestiges of discrimination have been eliminated and the constitutional violation has been remedied. At that point, Day argued, court supervision of the school district should end. In response to a question from Justice Blackmun on the definition of unitary status, Day said that a school system is unitary once the system has dismantled unlawful segregation and eliminated the vestiges of segregation to the extent practical. Justice O'Connor asked if a school system achieves unitary status as soon as the plan is put in place. Day responded that there must be a period of good faith sustained operation under the plan.

Day said that eight years ago the school board decided that demographic factors made the school desegregation plan burdensome on black students as they were bused to schools outside their neighborhoods. The school board therefore decided to eliminate the busing plan for grades K-4 and establish neighborhood schools. While this action resulted in 11 of 64 schools becoming predominantly black, Day asserted that the only similarity between the old segregated system and the neighborhood school plan was the race of the student bodies in some of the schools. But this he said was due to racial residential patterns and not to school board policies.

Justice Marshall asked Day how the school board is injured by being required to continue to operate under the busing plan. Day responded that the school board was not harmed but young black students were harmed because they were bused outside their neighborhoods. Justice Marshall then asked why black students weren't supporting the school board argument if that were the case, and what assurance there was that the school board would continue to follow the Constitution if court supervision ended. Day responded that the school board would have to operate pursuant to the 14th amendment. Justice Marshall said that once court supervision ended a challenge to school board action would require the filing of a new lawsuit.

U.S. Solicitor General Kenneth W. Starr argued for ten minutes in support of the school board position. Starr said the U.S. Department of Justice is party to almost 500 school desegregation cases, and its assumption is that federal judicial power terminates when a segregated system is eliminated. Federal supervision he argued should be transitional. Starr continued that the question of when unitary status is achieved needs to be answered by the Supreme Court, and that the Supreme Court's decision in *Green v. County School Board of New Kent County, Virginia* points the way. Starr said that Justice Brennan's opinion in the *Green* case looked to six components of school systems in assessing whether segregation has been eliminated "root and branch" from the assignment of students and faculty to extra-curricular activities.

Justice O'Connor asked how a school system eliminates the last vestiges of segregation when residential segregation remains and in the past segregated schools may have contributed to residential patterns. Starr replied that in *Green* the Supreme Court said that residential segregation cannot be seen as a vestige when there has been good faith compliance with the desegregation decree. The school board cannot realistically affect neighborhood segregation Starr argued. Justice Kennedy asked, is that because the vestige can never be eliminated or because neighborhood segregation is not a vestige. Starr responded that it was the latter. Justice Kennedy then asked what the busing accomplished as the eleven schools that are predominantly black under the neighborhood assignment plan were black under the segregated system. Either busing did not work at all or it should be continued, Justice Kennedy said. Starr responded that school desegregation had eliminated the student assignment policies that promoted segregation. Starr said that the perception of the schools had also changed. The state's support of segregation has ended and the segregation signs have come down from the schools, Starr observed.

Justice Marshall questioned Starr as to what had changed as the student assignments are now based on neighborhoods and not race, but African American students are still in segregated schools. Starr said that there has been an elimination of state support of segregation. Justice Marshall repeated that the racial make-up of the schools had remained the same. The difference Starr said is that the racial make-up is now determined by demographics and not by state action.

Julius Chambers of the NAACP Legal Defense Fund presented argument on behalf of the plaintiff African American school children and their parents. Chambers began by saying that the question in this case is whether Oklahoma can resegregate ten elementary schools through neighborhood assignments. Justice Scalia immediately challenged Chambers' use of the word segregation and said that students are free to choose to transfer to schools where students of their race constitute a minority, and that people can move into any neighborhood they chose, and enroll their children in the neighborhood school. Chambers responded that there are limits on the majority-to-minority transfer program, and that transportation is provided only for designated schools. Further, Chambers asserted that there is no evidence the transfer plan will desegregate the schools or that white families will move into African American neighborhoods.

Chief Justice Rehnquist asked for Chambers' definition of segregated schools. Chambers responded that they are schools that are racially identifiable because of the actions of the state, and where vestiges of the past practices survive. Chambers added that when the district court terminated the case in 1977 it did not dissolve the permanent injunction and it did not expect the desegregation plan to be terminated.

Justice O'Connor questioned how long a school desegregation plan must remain in place. If 100 years from now there is still residential segregation, does this order have to remain in place, O'Connor asked. Chambers replied that the order should remain in place until all vestiges of segregation have been eliminated, and that the school system should not be allowed to resegregate 40 percent of the students. Justice Scalia asked, if a quarter century of busing hasn't worked and we still have residential segregation what has been accomplished? Chambers countered that the busing plan had been very successful in desegregating the schools.

Chambers elaborated on his statement that vestiges of segregation remain in Oklahoma City. The system has a history of de jure segregation and should not be allowed to reinstate the same segregated system. The neighborhood plan it has returned to is based on the same policies in place prior to 1972, Chambers said. Justice White countered that it is not the same segregated system, as it is not against the law for blacks and whites to go to school together any more in Oklahoma City. Chambers responded that the school board has returned to the same geographic zones under which it had operated the segregated system.

Justice Kennedy said that there was a difference in that any family, assuming economic ability, can move into any neighborhood. And Justice O'Connor said that the majority-to-minority transfer plan was a change from the past. Chambers said that while there are differences, the present plan perpetuates black segregated schools and that is the same as before.

Chambers continued that when the district court declared the system unitary, the school board did not ask for dissolution of the plan, and all parties in the case expected that the plan would remain in effect. There has not been an opportunity to litigate the issue of whether the school board should be allowed to eliminate the plan, Chambers said.

A decision in the case is expected by summer. Justice Souter had not been sworn in at the time of the argument. A tie vote would uphold the court of appeals decision for the African American plaintiffs. But the Supreme Court could decide the case for reargument to allow Justice Souter to participate.

FETAL PROTECTION CASE ARGUED BEFORE THE COURT

On Wednesday, October 10, 1990, the Supreme Court heard oral argument in *United Auto Workers v. Johnson Controls, Inc.*, No. 89-1215. The case involves a challenge to the policy of Johnson Controls, a battery manufacturing company, of excluding all fertile women from jobs where there is a risk of exposure to lead at a certain level. The question before the Court is whether the exclusion policy is unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964. Subsidiary questions include: who bears the burden of proving that the employer's justification meets Title VII standards, and whether that justification is to be measured by the bona fide occupational qualification defense or may be upheld under the legitimate business justification defense.

Background

Title VII of the Civil rights Act of 1964 prohibits employment discrimination on the basis of race, color, national origin, religion and sex. Section 703(e) provides that "notwithstanding any other provision of this title (1) it shall not be an unlawful employment practice for an employer to hire and employ people...on the basis of...religion, sex, or national origin in those certain circumstances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." This BFOQ defense provides a very narrow exemption from Title VII's discrimination prohibition for facially discriminatory policies that are related to the 'essence' or the 'central mission' of the business.

Title VII forbids, in addition to intentional discrimination, those practices and policies, regardless of their intent, that have a discriminatory impact on protected classes and that cannot be justified as necessary to the conduct of the business. Statistical data are typically used to determine whether tests and other criteria for employment disproportionately exclude minorities and women.

The Argument

Readers should remember that questions asked by Justices during oral argument are not a reliable guide to how the Justices will vote.

UAW attorney Marsha Berzon began the argument by stating that the issue in the case is the validity under Title VII of a policy that bans women who are not infertile, and applies to all women regardless of their age, marital status, plans to have children, use of birth control, or the reproductive capacity of the spouse. Berzon asserted that there are risks to the offspring of men, as well as to all people exposed to lead. Johnson Controls policy, Berzon said, violates basic Title VII policy, and does not fall within the bona fide occupational qualification defense which this Court has defined very narrowly. Title VII as amended by the Pregnancy Discrimination Act does not allow employers to disadvantage a woman simply because she is a woman, Berzon said.

Justice Scalia questioned Berzon as to whether she would accept a policy that excluded only pregnant women or women more than four or six months pregnant. Berzon responded that the company could fashion an acceptable policy that treated pregnancy the same as other temporary disabilities.

Berzon continued that under the policy women are relegated to second class citizenship because they may become pregnant. She predicted that if the Johnson Controls policy were allowed to stand, such policies would be instituted in industries that are not dependent on women workers and would not be put in place in industries where women are needed. The result will be that women will be able to find work only in low paid traditional jobs, the situation that existed prior to Title VII. We will have cut the heart out of Title VII and the Pregnancy Discrimination Act, Berzon said.

Berzon also pointed out that there are other physical risks to pregnancy. Maternal health, she said, is dependent on economic status and prenatal care. Pregnant mothers who do not have the economic security that allows them to eat healthy foods, and get adequate prenatal care subject the fetus to harm. Further, Berzon said female doctors are four times more likely to suffer from miscarriages than other women, but no one would recommend that doctors should be banned from getting pregnant.

Justice Scalia asked about the Occupational Safety and Health Administration's standards [OSHA has established a series of steps to be followed by workers planning families, but does not recommend that women of childbearing age be excluded from the workplace], and questioned whether adherence to the OSHA standards would protect an employer from a damage suit if an employee's child were born deformed. Berzon said that she could only speculate because there has never been such a suit, but that it would appear that as long as the employer were not negligent and had given adequate warning it would be protected from liability. Justice Scalia said but there would be liability for the mother. Berzon said that assumes that the mother acted negligently.

In concluding, Berzon said that the case should be remanded to the trial court.

Stanley S. Jaspan argued on behalf of Johnson Controls that this case is about whether Congress intended through Title VII to knowingly expose fetuses to toxic substances. Justice Stevens asked how often this happens and whether the lead level can be further reduced so as to reduce the risk. Jaspan responded that under the company's voluntary program, where women were advised of the dangers, and required to sign a statement attesting to their knowledge of the risk, at least eight women became pregnant with blood levels above what the Centers for Disease Control consider safe. Justice Scalia asked why OSHA doesn't consider it an unsafe level, and said that courts and judges were being put in the unusual position of being asked to become medical experts. Jaspan responded that OSHA sets a floor, not a ceiling, and encourages voluntary policies.

Justice O'Connor said that the attorney was not coming to grips with the Pregnancy Discrimination Act which provides that pregnant employees are to be treated the same as all other employees with temporary conditions related to the ability to do the job. Safety concerns are not going to rise to the level of a defense under BFOQ, O'Connor said. Jaspan responded that the suggestion that normal business operations and the ability to do the job do not include concern for health and safety would certainly be a strange notion for most manufacturers today.

Justice Scalia said that by including not doing harm to the fetus as part of the job qualification you are making a dead letter of the Pregnancy Discrimination Act which requires the same treatment for pregnant women as for other workers. The issue of harm to the fetus was always the justification used for discriminating against pregnant women, Scalia asserted. Jaspan responded that if there is no exclusion for BFOQ then an employer can never exclude a woman because of pregnancy regardless of the danger to the fetus. One purpose of the

Pregnancy Discrimination Act was fetal health and to interpret it as prohibiting an employer from protecting the fetus is an improper interpretation, Jaspan said.

Justice Scalia said women shouldn't smoke or drink but the government doesn't prohibit pregnant women from smoking or drinking; the government leaves it up to the mother. Jaspan responded that this case was not about whether government should establish a restriction, but whether a private employer can establish a fetal protection policy.

Justice Scalia asked, what is the appropriate risk? How is a court to determine how health and safety conscious an employer may be and not violate Title VII. Is the risk worth 1 damaged fetus in a million. How are the courts going to manage this rule you are urging us to take on, Scalia asked. Jaspan said that he didn't know where the numbers would fall, that it would be necessary to look at the total circumstances. Jaspan went on to say that the OSHA standards give broad discretion to company medical officials, and the Department of Labor's position is that if an employer knows that OSHA's standards are inadequate then the employer must take additional steps. Further, he said, the U.S. Department of Justice and Equal Employment Opportunity Commission in their brief take the position that OSHA standards are not dispositive. This Court has said not to leave common sense at the door step when evaluating Title VII. It would be leaving common sense at the door step not to take health and safety into consideration. This is an obligation and a right under the BFOQ, Jaspan concluded.

A decision in the case is expected by July 1991.

FIFTH CIRCUIT RULES THAT JUDICIAL ELECTIONS ARE NOT COVERED BY SECTION 2 OF THE VOTING RIGHTS ACT AS AMENDED IN 1982

On September 28, 1990, a six-judge majority of the thirteen-member Fifth Circuit sitting en banc ruled that when Congress amended Section 2 of the Voting Rights Act to add an "effects test" for dilution of minority voting strength in elections for "representatives", Congress did not intend the amendment to apply to judges. While agreeing that the Voting Rights Act was not violated here, five judges opined that section 2 is not totally inapplicable to judicial elections, but that "there can be no dilution of votes for election of a single judge because each judge holds a complete judicial office." A twelfth judge agreed with the result but not with the breadth of either of those opinions. Judge Johnson in a dissenting opinion concluded that the Voting Rights Act reaches all elections, and that the focus of the Voting Rights Act is on the rights of the voter, and not on the function of the office: "Whether an office-holder wields his power in an individual or collegial manner is simply not the relevant inquiry."

Background

In 1980, the Supreme Court ruled in *City of Mobile v. Bolden*, 446 U.S. 55, that to prove voting discrimination, proof of racial discriminatory *intent or purpose* is necessary. The fact that a particular voting practice (in this case at-large elections of city commissioners) resulted in minorities not being able to exercise effectively their right to vote did not violate either the equal protection clause of the fourteenth amendment or the Voting Rights Act.

In response to *Mobile*, Congress in the 1982 Voting Rights Act Amendments established that local election practices can be found to be discriminatory if the results of such practices have a negative impact on minority voters. Congress achieved this result by adding an effects test to section 2 of the Voting Rights Act.

The relevant part of section 2 as amended in 1982 provides:

"No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...

A violation...is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political sub

division are not equally open to participation by members of a class of citizens...in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice...."

The Facts

The League of United Latin American Citizens Council No. 4434 filed suit in federal district court alleging that the Texas laws "providing for county-wide, at-large election of judges of the trial court of general jurisdiction" discriminated against blacks and Hispanics in nine counties, and that "the imposition of a single-member system was necessary to prevent dilution of black and Hispanic voting strength."

The district court judge rejected LULAC's claims of violation of the 14th and 15th Amendments to the Constitution, but found that the Texas laws did have the unintended result of diluting minority voting strength in violation of the Voting Rights Act as amended in 1982. The district court divided the nine counties into sub-districts, and ordered an election in those new districts for May 5, 1990. The state appealed and the Fifth Circuit stayed the district court's order.

A panel of the Fifth Circuit heard the case on April 30, and handed down an opinion on May 11. The panel ruled that judges were indeed representatives of the people and thus covered by section 2 of the Voting Rights Act, but that "the elections of trial judges were not subject to voter-strength dilution challenges because their offices are single-member ones; and there is no such thing as a 'share' of a single-member office." Four days later, the Fifth Circuit ordered rehearing of the appeal en banc.

The Opinions

Judge Gee wrote the majority opinion in which Judges Jolly, Jones, Smith, Duke and Barksdale joined. The opinion concludes that in amending section 2 of the Voting Rights Act, Congress applied the results test only to vote dilution involving representative political offices, and that since the judiciary serves no representative function, judicial elections are not subject to vote dilution claims. The opinion states:

"...Congress was at great pains to phrase the new Section 2 in such language as to make clear that its results test applies to voting in elections of *representatives* only; that as of the amendments's time judicial offices had never been viewed by any court as representative ones; that characterizing the functions of the judicial office as representative ones is factually false -- public opinion being irrelevant to the judge's role, and the judge's task being, as often as not, to disregard or even to defy that opinion, rather than to represent or carry it out; that, because of the highly intrusive nature of federal regulation of the means by which states select their own officials, legislation doing so should not be pushed beyond its clear language; and that, in view of these considerations, we would place such a construction on the 1982 enactment reluctantly and only if Congress has clearly mandated such a singular result."

Judge Higginbotham in a separate opinion, in which Judges Politz, King and Davis joined and Judge Johnson joined as to part I, and Judge Weiner joined as to part II, concluded in part I that elections of judges are covered by section 2 of the Voting Rights Act, and thus the results test:

"The Voting Rights Act plainly covered judicial elections before the 1982 amendments. It is equally plain that there is little evidence that Congress intended any retrenchment by its 1982 amendments. In sum, defendants are left with the unconvincing argument that the changes of the 1982 amendments were fundamental in ways unique to judicial elections. Certainly, the Voting Rights Act intrudes heavily into state matters but it is no more specifically intrusive in judicial elections than in any others. We would hold that Section 2 of the Voting Rights Act applies to judicial elections."

Judge Higginbotham then concluded in part II that the lower court decision should be reversed on the grounds that "there can be no dilution of votes for a single judge because each judge holds a complete judicial office," and "each acts alone in wielding judicial power, and once cases are assigned there is no overlap in decision-making." Higginbotham cites minority vote dilution cases in which courts of appeals have distinguished between multi-member bodies, such as a city council, and elections for single-member offices, e.g., mayor of a city. Further, the opinion cites the decision of the Supreme Court in *City of Port Arthur v. United States* where the Court "struck down a run-off requirement for seats on a multi-member city council, but did not mention the run-off for mayor."

This opinion recognizes that there is a difference between a traditional single member office, and the system of electing judges with overlapping jurisdictions in each Texas county, but points out once elected each judge acts independently "with no overlap in decision-making."

The Higginbotham opinion also asserts that creating judicial sub-districts would decrease the impact or influence of the minority voter and retard the goal of the Voting Rights Act:

"The current system of electing district judges at least permits voters to vote for each and every judicial position within a given district, generally a county. It is more likely, therefore, that minority voters will have some influence on the election of each judge. Under the district court's order, each voter would have the opportunity to vote for only one judge in each district, the judge whose position was assigned to the subdivision. At the same time, a minority litigant will be assigned at random to appear before any district judge in the county.

The Dissent

Judge Johnson argues in dissent that section 2 of the Voting Rights Act clearly applies to judicial elections, and strongly disagrees with the exemption in the Higginbotham opinion for single office holders. The focus, Judge Johnson says, should be on the voter and not on the function of the office:

"Congress enacted the Voting Rights Act in 1965 'to rid the country of racial discrimination in voting.'...Since the inception of the Act, the Supreme Court has consistently interpreted the Act in a manner which affords it 'the broadest possible scope' in combatting racial discrimination....It is indisputable that Texas' elected judges are 'candidates for public or party office.' Thus, by its express terms, the Voting Rights Act applies to state judicial elections. Indeed, this is the only result consistent with the plain language of the Act....By exempting an entire class of elected officials from Section 2 simply on the basis of their judicial function, the majority has not only inextricably placed this Court at odds with the conclusions of other circuits, but also has struck a devastating blow to the Voting Rights Act's ability to alleviate racial discrimination in the voting process."

In response to Judge Higginbotham's opinion, Judge Johnson writes:

"Nothing in the language of Section 2 suggests that a reviewing court should concentrate on the type of election under dispute -- whether it is for a mayor, an alderman, a legislator, a constable, a judge or any other kind of elected official. Rather, the sole focus of Section 2 is the minority voter -- specifically, whether the minority voter has been allowed the opportunity to participate fully in the democratic process....Whenever a number of officials with similar functions are elected from within a discrete geographic area, there exists the inherent potential for vote dilution. The concurrence, however, ignores this verifiable fact, and concludes that, because the full authority of the elected position is exercised exclusively by one individual, there can be no impermissible dilution of the minority vote....The essential inquiry is whether the minority vote is diluted -- whether minority citizens have an equal chance of electing candidates of their choice....[M]inority voters have asserted and proven that any influence they may potentially have as a cohesive voice -- whether as to the election of one judge or several -- is submerged at the ballot box by white bloc voting."

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