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SUPREME COURT RULES IN SCHOOL DESEGREGATION CASE

On January 15, the Supreme Court in a 5-3 decision remanded the *Board of Education of Oklahoma City Public Schools v. Robert L. Dowell* case to the District Court to determine whether the school board

"had complied in good faith with the desegregation decree...and whether the vestiges of discrimination had been eliminated to the extent practicable". If the District Court determines that the school board has met this obligation, the Supreme Court opined, the injunction against the school board should be lifted. Second, the Court said the District Court should review the school district's 1985 neighborhood assignment plan to determine if its implementation violated the equal protection clause of the Constitution.

The Court's opinion overturned the decision of the 10th Circuit Court of Appeals which had found that the school board "had not made a sufficient showing of changed circumstances that would justify the dissolution of the injunction." The Supreme Court ruled that "the Court of Appeals' test is more stringent than is required either by our cases dealing with injunctions or by the Equal Protection Clause of the Fourteenth Amendment."

Background

In 1977, District Court Judge Luther Bohannon declared the Oklahoma City school system unitary, i.e., free from 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. The neighborhood assignments resulted in student populations in 11 of 64 elementary schools greater than 90 percent African American, in 22 schools greater than 90 percent white, and 31 racially mixed schools. 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 significant showing of changed circumstances that would justify the dissolution of the injunction." The importance of the injunction is that without the injunction in place, plaintiffs will 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, and the oral argument, see *CIVIL RIGHTS MONITOR*, vol. 5, no. 1 and vol. 5, no. 2.)

The Opinion

Chief Justice Rehnquist wrote the opinion of the Court, in which Justices White, O'Connor, Scalia, and Kennedy joined. In discussing the lifting of the injunction, Chief Justice Rehnquist writes:

"The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'"

"Petitioners [the school board] urge that we reinstate the decision of the District Court terminating the injunction, but we think that the preferable course is to remand the case to that court so that it may decide, in accordance with this opinion, whether the Board made a sufficient showing of constitutional compliance as of 1985, when the SRP [student reassignment plan] was adopted, to allow the injunction to be dissolved. The District Court should address itself to whether the Board has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."

The majority did not clearly state how a school system is to assess when all vestiges have been eliminated, or define the phrase "to the extent practicable." The Court left these determinations to the lower courts, but indicated that lower courts should take guidance from the *Green v. New Kent County School Board*.

The Court said:

"In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but 'to every facet of school operations -- faculty, staff, transportation, extra-curricular activities and facilities.' [quoting *Green*]"

A key question when the case goes back to the district court is whether the court concludes that housing segregation is a continuing vestige of the dual school system which would bar the district from returning to a system of "neighborhood schools."

The district court found that present residential segregation was the result of economics and personal preference in choosing neighborhoods and was "too attenuated to be a vestige of former school segregation." The court said:

"From the time of this court's original decision in this case over 25 years ago, the Oklahoma City Board of Education has taken absolutely no action which has caused or contributed to the patterns of the residential segregation which presently exist in the areas of Oklahoma City....No Court is equipped with the judicial power or machinery necessary to eradicate residential segregation. This phenomenon develops even in the midst of court ordered desegregation....Neither this court nor the Oklahoma City Board of Education can govern and control where people choose to live....The evidence showed that no desegregation decree has had the effect of eliminating residential segregation in America."

The Court of Appeals reversed:

"Based on the divergent test on demographic change, the court concluded the Board has not taken action to cause or contribute to presently existing residential segregation.... While there is evidence of demographic change, that evidence does not support a return to neighborhood schools in the elementary grades because the same neighborhoods remain predominantly white and predominantly black. Moreover, the [neighborhood assignment] plan restores the effects of 'past' discriminatory intent remedied by the decree by recreating racially identifiable elementary schools..."

The Supreme Court said the matter should be reconsidered by the district court but did not give any guidance.

The Dissent

Justice Marshall wrote the dissent which was joined by Justices Blackmun and Stevens. Justice Marshall wrote:

"The practical question now before us is whether, 13 years after that injunction was imposed, the same School Board should have been allowed to return many of its elementary schools to their former one-race status. The majority today suggests that 13 years of desegregation was enough. The Court remands the case for further evaluation of whether the purposes of the injunctive decree were achieved sufficient to justify the decree's dissolution. However, the inquiry it commends to the District Court fails to recognize explicitly the threatened reemergence of one-race schools as a relevant 'vestige' of *de jure* segregation.

"I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions. Because the record here shows, and the Court of Appeals found, that feasible steps could be taken to avoid one-race schools, it is clear that the purposes of the decree have not yet been achieved and the Court of Appeals' reinstatement of the decree should be affirmed. I therefore dissent."

In discussing the vestiges of segregation, Justice Marshall writes:

"The Court has indicated that 'the ultimate end to be brought about' by a desegregation remedy is 'a unitary, nonracial system of public education'...We have suggested that this aim is realized once school officials have 'eliminate[d] from the public school all vestiges of state-imposed segregation,'...whether they inhere in the school's 'faculty, staff, transportation, extracurricular activities and facilities,'...or even in 'the community and administration[s] attitudes toward [a] school,'...Although the Court has never explicitly defined what constitutes a 'vestige' of state-enforced segregation, the function that this concept has performed in our jurisprudence suggests that it extends to any condition that is likely to convey the message of inferiority implicit in a policy of segregation. So long as such conditions persist, the purposes of the decree cannot be deemed to have been achieved."

As the MONITOR went to press, the Supreme Court on February 19 accepted for review a Georgia school desegregation case that addresses when a formerly segregated school district may be freed from federal court supervision. The case, *Freeman v. Pitts*, No. 89-1290, involves an appeal by school officials from the decision of the 11th Circuit Court of Appeals that the Dekalb County, Georgia school system had not sufficiently erased the legacy of segregation, and that school officials should consider broader measures including busing. The school system has been under federal court supervision since the late sixties. The district is 57 percent African American, with half of the African American students attending schools that are at least 90 percent African American, and 25 percent of the white students attending schools that are at least 90 percent white.

DEPARTMENT OF EDUCATION POLICY ON MINORITY SCHOLARSHIPS

On February 6, 1991, during his confirmation hearings before the Senate Committee on Labor and Human Resources, Secretary of Education designate Lamar Alexander (former Governor of Tennessee) said that within a few days of taking office he would discard the Department of Education's latest policy statements on race-based scholarships and would order a broad review of the policy. Alexander said that the effect would be that the Department of Education letter of December 4 and the clarification statement of December 18 on minority scholarships would be gone, and the Department would review this policy in the way it should be reviewed.

Alexander said that he would take these actions for three reasons. First, he said the Department's recent actions had sent exactly the wrong signal to minority students: "the message should be we want you in, not we want you out, and a high percentage of minority students depend on scholarships to attend college." Second, he said the recent actions of the Department were not the way to develop policy: "We need to know what is going on on college campuses, and we need to hear from the colleges and universities." Third, he said the actions had caused massive, unnecessary confusion. Alexander said the Department will step back and take a thorough look at this issue with input from the higher education community, the Attorney General, the Committee and anyone else who is interested.

Background

On December 4, 1990 the Assistant Secretary for Civil Rights, Michael Williams, issued a press release indicating that he had advised the Executive Director of the Fiesta Bowl (College Football Game) that it would be a violation of Title VI of the Civil Rights Act of 1964 for the Universities of Louisville and Alabama (the schools scheduled to play in the Fiesta Bowl) to assist Fiesta Bowl organizers in their efforts to give the schools \$100,000 each earmarked for minority scholarships.

The letter stated:

"The Title VI regulation includes several provisions that prohibit recipients of ED funding from denying, restricting, or providing different or segregated financial aid or other program benefits on the basis of race, color, or national origin...OCR interprets these provisions as generally prohibiting race-exclusive scholarships...[the University of Louisville and the University of Alabama] may not directly, or through contractual or other arrangements, assist the Fiesta Bowl in the award of those scholarships unless they are subject to a desegregation plan that mandates such scholarships."

Title VI of the Civil Rights Act of 1964, as amended by the Civil Rights Restoration Act of 1988, prohibits race, color, or national origin discrimination by recipients of federal financial assistance.

The Department's announcement was met with outrage from the higher education community as well as the Congress. Robert T. Atwell, President of the American Council on Education, said:

"The Education Department's Office for Civil Rights has advised the Fiesta Bowl that the Civil Rights Act of 1964 prohibits race-exclusive scholarships administered by colleges and universities. This claim, if allowed to stand, apparently would reverse over a decade of legal precedent and advice received by institutions from that office that such scholarships, correctly administered, are allowed under law. It also would represent a giant step backward in efforts to improve educational opportunities for the nation's minority students. We believe this advisory is incorrect and misguided, and may be

politically motivated. Therefore, we will advise institutions of higher education that offer minority scholarships to continue their current practices."

Representative James Sensenbrenner Jr. (R-WI), who was the ranking Republican on the House Judiciary Subcommittee on Civil and Constitutional Rights in the 101st Congress, said: "We should not pull the rug out from under minority students who are trying to better their lives by obtaining a college education."

In response to the vehement protests and the confusion caused by the December 4 press release, Assistant Secretary Williams held a second news conference on December 18 to revise his statement of December 4. Williams announced "a six-point administrative policy regarding race-exclusive scholarships to prevent disruption to the efforts of colleges and universities to attract minorities to their campuses and to reassure students that no scholarships that have already been awarded, whether in the current year or in a multi-year cycle, will be affected in any way."

The revised policy states that the Title VI regulations will permit "universities receiving federal funds to administer scholarships established and funded entirely by private persons or entities where the donor restricts eligibility for such scholarships to minority students. Under Title VI, however, private universities receiving federal funds may not fund race-exclusive scholarships with their own funds."

Williams' revised statement was met with the same outrage from the higher education community which argued that there was no legal basis for Williams' position and that the Department should not establish policy through press releases. Williams also angered a number of conservatives who accused the Administration of back pedaling for purely political reasons.

Hearings

On December 19, 1990, Representative Augustus Hawkins (D-CA), Chair of the House Education and Labor Committee, held his last hearing before retiring from the House, on the Department's policy. Williams declined to attend the hearing. In opening the Hearings, Rep. Hawkins said:

"Regrettably, late yesterday the Department of Education cancelled Assistant Secretary Williams previously agreed to appearance. That decision is an affront to the Committee, to the Congress and to the American people...The latest policy announced yesterday is a hoax. It disapproves scholarships established and funded by colleges, but approves those established and funded by private persons. Such a distinction has no basis in law or fact; moreover, it is contrary to the express letter of the Civil Rights Restoration Act -- enacted over the veto of the Reagan-Bush Administration. Accordingly, the latest policy is indefensible and serves merely as an invitation to years of litigation. Such uncertainty and instability is neither wise nor necessary." [We should note that what Hawkins was referring to was that the Civil Rights Restoration Act provided for institution-wide coverage for colleges and universities, i.e., that colleges that receive federal funds could not use funds from other sources to discriminate. Accordingly, if minority scholarships are in fact discriminatory, it would not matter that the source of the funds was private.]

David S. Tatel, former Director of the Office for Civil Rights from 1977 to 1979 when it was part of the U.S. Department of Health, Education and Welfare, said in testimony before the House Committee on Education and Labor on December 19, 1990:

"Until the week before last, the Department of Education, and the Department of Health, Education & Welfare before it, had interpreted Title VI and its implementing regulations to permit minority scholarship programs, either as part of court-ordered or department-approved desegregation plans or as legitimate efforts to increase the number of underrepresented minorities on campus and to promote diversity. As long ago as 1972, OCR indicated that 'student financial aid programs based on race or national origin may be consistent with Title VI if the purpose of such aid is to overcome the effects of past discrimination.'...The Assistant Secretary's effort to alter this long-standing policy should be of great concern to the Congress for two important reasons. The first is procedural. The question of the legality of minority scholarships raises issues of enormous importance: minority access to higher education; relations between the races, which are not getting any better in our country; and subtle questions of constitutional law. Questions like these should not be resolved by an Assistant Secretary of Education acting unilaterally and without any consultation or fact-finding.

"It is unfortunate that the Assistant Secretary chose to proceed in this manner. Because of the importance of minority scholarships and their long-standing legality, it would have been far preferable for OCR to have proceeded through the formal regulatory process, or at least to have sought public comment before making its announcements. This would have enabled OCR to hear and consider the views of the university community, of civil rights organizations, and of the business community. It would also have enabled OCR to learn some very important facts about minority scholarships that the agency clearly does not now know, such as the number and scope of such scholarships, the extent to which such scholarships are funded by private donors, the impact such scholarships have had on minority enrollments and higher education, the proportion of total scholarship aid that minority scholarships represent, and the impact, if any, that minority scholarship programs have had on non-minority students. It is, to say the least, disappointing that OCR attempted to deal with this important issue without such information.

"The second concern is with the substance of the Assistant Secretary's announcements. Minority scholarships have played an important role in increasing minority access to higher education, and they have done so without any evidence that they have had an adverse effect on non-minority students. This is an important balance, it has worked for over two decades, and there does not appear to be any legitimate reason for changing it now."

Richard F. Rosser, President of the National Association of Independent Colleges and Universities, related the breadth of scholarship assistance to minority students at NAICU institutions:

"According to the latest figures from the Department of Education, 82 percent of all African-American undergraduates attending independent colleges and universities received financial assistance, as did 72 percent of all Hispanic undergraduates, and 59 percent of all Asian-American undergraduates. In 1986, 309,000 minority students attending public and independent colleges and universities received a total of three-quarters of a billion dollars in aid from the institutions' own resources."

A Statement by the NAACP Legal Defense Fund opposing the position of the Office for Civil Rights on minority targeted scholarships states: "It is not known what percentage of total financial aid is specifically targeted for minorities; however, such targeted money is generally believed to be only a small percentage of total aid available." Further, the bulk of financial assistance comes from the general funds of institutions, and not from private restricted scholarships which are very few in number (Testimony of Richard Rosser, NAICU).

As the *MONITOR* went to press, the nomination was still pending before the Senate Committee on Labor and Human Resources.

SUPREME COURT AGREES TO REVIEW WHETHER JUDICIAL ELECTIONS ARE COVERED BY SECTION 2 OF THE VOTING RIGHTS ACT

On January 18, 1991, the Supreme Court accepted for review cases from the states of Louisiana and Texas that address whether the effects test of Section 2 of the Voting Rights Act, as amended in 1982, applies to the election of judges.

In 1982, Congress amended the Voting Rights Act to establish 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 subdivision 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 Texas cases

League of United Latin American Citizens v. Mattox was initially filed on July 11, 1988, on behalf of Mexican American and African American voters, and on February 28, 1989, the district court granted the intervention of the Houston Lawyers' Association and five African American voters, *Houston Lawyers' Association v. Mattox*. The plaintiffs alleged 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 nine metropolitan counties challenged, Harris, Dallas, Bexar, Tarrant, Travis, Lubbock, Midland, Ector, and Jefferson, included 172 (44 percent) of the state's then 375 district judges.

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.

On September 28, 1990, a six judge plurality of the thirteen-member Fifth Circuit 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."

In seeking Supreme Court review of the cases, the plaintiffs state that the Fifth Circuit decision in this case is in conflict with relevant decisions of the Supreme Court that held that Section 5 of the Voting Rights Act applies to judicial elections, and that the "proscribed practices covered by Section 2 and 5 are the same." The plaintiff-petitioners also state that the Fifth Circuit decision is in conflict with the Sixth Circuit decision in *Malory v. Eyrich*, 839 F.2d 275, in which the court held that claims of vote dilution in county-wide elections of judges in Cincinnati and Hamilton County, Ohio were covered by Section 2 of the Voting Rights Act. Further, they contend that the decision is "contrary to the will of Congress, as expressed in the legislative history and reaffirmed by this Court, that the Act have the 'broadest possible scope.'" [Section 5, which is currently applicable to nine states (mostly in the South and Southwest) and parts of eight others, requires Federal approval (preclearance) of any voting changes, no matter how minor, before they may be implemented. Under Section 5, the state or locality has the burden of proving that the proposed change does not have a racially discriminatory purpose and will not have a racially discriminatory effect.]

The brief requesting Supreme Court review asserted:

"By ignoring the teachings...[of this Court], and the intent of Congress, the Fifth Circuit's en banc ruling has carved out an exception to the coverage of the Voting Rights Act which will deny thousands of minority voters an equal opportunity to vote for judges of their choice in an election system free of discriminatory elements. If the decision of the Fifth Circuit is allowed to stand, then the law will be that discrimination in voting will not be tolerated, except in the election of judges. This Court is called upon to correct this blatant denial of minority voting rights and to effect the will of Congress that the nation's electoral systems be free of discrimination."

In response to the plaintiffs' request for Supreme Court review, Texas state officials wrote that they do not oppose the Court' granting of the petition for review as "the questions raised are of undoubted significance to

the nation's jurisprudence, many of its state judicial systems, and minority voters." State officials also concede that the Fifth Circuit opinion is in conflict with a 1988 decision of the Sixth Circuit, *Mallory v. Eyrich*.

The Louisiana cases

In 1986, African American citizens filed suit in federal court challenging the at-large election of two of the seven-members of the state's supreme court, *Chisom v. Roemer*, No. 90-757. Five of the supreme court judges are elected from single-member districts, and the two challenged judges are elected from a multimember district which is twice the size of the smallest supreme court district, and has by far the largest African American population." This latter district, Supreme Court District No. 1, is comprised of the New Orleans metropolitan area and includes four parishes. Plaintiffs alleged that the system diluted the voting strength of the African American citizens in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth amendments of the Constitution.

In 1987, the District Court dismissed the case on the ground that Section 2 of the Voting Rights Act did not cover judicial elections. The Fifth Circuit reversed and remanded the case in 1988, and the Supreme Court denied review. After a trial on the merits, the District Court ruled that the plaintiffs had not established that the method of electing judges violated the Constitution or Section 2 of the Voting Rights Act. The plaintiffs appealed, and on November 2, 1990, a panel of the Fifth Circuit applied the en banc Fifth Circuit ruling in *LULAC* and ruled that the Voting Rights Act does not apply to judicial elections. The panel remanded the case "to the district court with instructions to dismiss all claims under the Voting Rights Act for failure to state a claim upon which relief may be granted." The Supreme Court granted review on January 19, 1991.

In another Louisiana case, *Clark v. Roemer*, No. 90-952, the Supreme Court granted review to address the question of whether the district court was in error in allowing elections for state judges to occur under voting changes that the Department of Justice had objected to pursuant to the preclearance provisions of Section 5 of the Voting Rights Act.

The case when filed in 1986 involved challenges under Section 2 of the Voting Rights Act and the Constitution to at-large voting in mostly majority white multi-member election districts for state trial and intermediate appellate court judges in Louisiana, and a few unprecleared voting changes. In 1987, the complaint was amended to challenge a larger number of unprecleared changes involving the election of state judges over a period of 20 years.

Subsequent to filing of the suit, the state submitted the unprecleared changes to the Department of Justice, and in 1988 the Attorney General objected to many of the changes including the creation of 47 new judgeships to be elected at-large with a majority vote requirement. The plaintiffs sought to enjoin the 1990 state judicial elections involving voting changes that had not been precleared by DOJ. The District Court allowed the elections, "but enjoined the winning candidates for any uncleared judgeships from taking office."

Following the Fifth Circuit en banc ruling in *LULAC*, the District Court on October 2, 1990 lifted an injunction it had previously issued against elections under the existing at-large system in eleven judicial districts where a violation of Section 2 had been found. Further, on October 22, the court denied the injunctive relief and permitted the elections to occur and the winners to take office. In an October 31 opinion, the court reasoned that a large number of the objectionable changes did not need to be precleared because "subsequent voting changes in the same judicial districts had been submitted and precleared."

"When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number."

The Supreme Court granted review on January 19, 1991.

Oral arguments in the cases have been scheduled for April 22, 1991: *Chisom v Roemer* at 10:00 a.m., *LULAC* at 11:00 a.m., and *Clark v Roemer* at 1:00 p.m.

BROOKS INTRODUCES THE CIVIL RIGHTS ACT OF 1991

On January 3, 1991 the Civil Rights Act of 1991 was the first bill introduced in the House of Representatives by Representatives Jack Brooks (D-TX), Don Edwards (D-CA), Hamilton Fish (R-NY), Richard Gephardt (D-MO), William Gray (D-PA), Steny Hoyer (D-MD), Vic Fazio (D-CA), Pat Schroeder (D-CO), Olympia Snowe (R-ME), Edolphus Towns (D-NY), Solomon Ortiz (D-TX), Norman Mineta (D-CA), and Robert Matsui (D-CA). The bill, H.R. 1, will amend 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-six years to protect the rights of minorities and women. (For background, see CIVIL RIGHTS MONITOR, vol. 5, no. 2, no. 1; vol. 4, nos. 5&6, no. 4, no. 3, no. 2.)

Representative Jack Brooks (D-TX), chair of the House Judiciary Committee, and principal sponsor of the bill, on introducing the bill, said:

"Since passage of the Civil Rights Act of 1964, this Nation has made great strides in providing greater opportunity in the workplace for all Americans. Yet, testimony taken during joint hearings of the House Judiciary Committee and the Education and Labor Committee during the last Congress revealed clearly that difficulties in the workplace still exist for women and minorities. In addition, the accomplishments that have been made through decades of struggle were placed in jeopardy by the Supreme Court by a series of restrictive and damaging civil rights decisions in 1989....

"When this act is passed -- at the beginning of another great decade of American history -- it will provide the needed impetus to business to overcome the last vestiges of second class citizenship for women and minorities in the workplace, to ensure a level playing field for all Americans, and to assure that our brothers and sisters are treated fairly and equitably in their struggle for jobs equal to their skills and abilities."

Representative Don Edwards (D-CA), chair of the Judiciary Subcommittee on Civil and Constitutional Rights, and co-sponsor of the bill said:

"The Congress has an obligation to make sure that victims of discrimination have a fair and equitable opportunity to obtain legal redress. Victims of discrimination should not have to leap over insurmountable and unnecessary barriers in order to make their case in court. H.R. 1 reaffirms the intent of Congress to provide meaningful and effective relief to victims of discrimination. Speedy enactment of the Civil Rights Act of 1991 will guarantee that victims of discrimination have meaningful and effective relief. The Subcommittee on Civil and Constitutional Rights, which I chair, plans to move quickly on this bill, and we hope to have this bill on the floor as quickly as possible."

Senate supporters of the Civil Rights Act are expected to introduce a similar bill shortly.

Hearings

The House Subcommittee on Civil and Constitutional Rights held its first hearing on February 7, 1991. The only witness was Assistant Attorney General for Civil Rights John R. Dunne who expressed the Administration's opposition to H.R. 1, asserting once again that the bill would "introduce the destructive force of quotas into our Nation's employment system."

"Let me reiterate for the Administration...we will not accept a bill that results in quotas or other unfair preferences. Such quotas are not only unfair; they are counterproductive. This Administration understands the crucial difference between inclusive affirmative action to cast the recruitment net as widely as possible, which helps overcome the effects of discrimination, and rote adherence to racial and ethnic quotas -- a pernicious practice which provides at most a Pyrrhic victory even for those who temporarily benefit."

Dunne said that the Administration would send to Congress by the end of the month a civil rights package that will address the Supreme Court's decisions in *Patterson v. McLean Credit Union* [limited the reach of the 1866 Civil Rights Law by ruling that the law does not cover racial harassment on the job], and *Lorance v. AT&T Technologies, Inc.* [Court ruled that a challenge to a facially neutral seniority system must be timely filed in relation to when the system is first put in place and that persons who are adversely affected only later may not file a challenge at that time even though the effect on them could not have been foreseen]. Dunne said the Administration will also call for "effective remedies against sexual harassment on the job." [The Administration has prepared a bill which the Attorney General sent to a number of members of Congress on March 1, 1991, and that is expected to be introduced on March 12, 1991.]

Dunne further said that the Department of Justice had continued to monitor the impact of the Supreme Court decisions in:

Price Waterhouse v. Hopkins [Court concluded that when a plaintiff proves that discrimination was a motivating factor in an employment decision, the defendant can avoid a finding of liability by showing that the same decision would have been made even if the discrimination had not occurred],

in *Martin v. Wilks* [Court ruled that court-approved consent decrees are open to challenge by other persons affected by the decree for apparently an indefinite period of time], and

in *Wards Cove Packing Co. v. Atonio* [Court revised the standards governing proof of discrimination in Title VII disparate impact cases, standards the Court established unanimously eighteen years earlier].

Dunne said that the monitoring shows that in the eighteen months since the Supreme Court decisions, plaintiffs have continued to win cases in the courts.

The DOJ released a memorandum outlining the results of its monitoring:

"The [*Price Waterhouse*] decision has worked favorably for plaintiffs: of the reported lower court decisions...15 of 19 have been victories for plaintiffs.

[*Wilks* does not seem to have resulted in the wholesale disruption of employment discrimination decrees...Three Title VII decisions have been reported in which *Wilks* played a major role. None of these decisions overturned a decree.

We have identified 41 decisions in which the elements of *Wards Cove* were discussed as a significant basis of the decision. Of these cases, 11 are not relevant to an analysis of the impact of *Wards Cove* because plaintiffs failed to show a statistical imbalance at all....The remaining 30 decisions have divided fairly evenly between plaintiffs and defendants....In all, there have been 11 rulings favorable to plaintiffs, including nine decisions on the merits after a full application of the *Wards Cove* principles.

The Leadership Conference on Civil Rights in response to the DOJ memorandum issued a statement and analysis of the memorandum which reads:

"The Justice Department is flatly wrong in asserting that the decisions in *Wards Cove*, *Price-Waterhouse*, and *Wilks* have had no impact....The Justice Department's analysis simply fails to recognize the harsh impact which the *Wards Cove* decision has already had. This impact is evident in three specific areas: *Wards Cove*'s overall effect on employment discrimination law, the specific court decisions affected by *Wards Cove*, and the positions taken by the Justice Department itself in actual litigation concerning *Wards Cove*....*Wards Cove* has...has a significant effect in a number of important individual job bias cases. In at least a dozen cases *Wards Cove* either caused a court to reverse a previous decision finding that an employment practice had an illegal disparate impact, or contributed to a decision rejecting a job discrimination claim. The Justice Department has failed to recognize the specific impact of *Wards Cove* in these cases, and in fact failed to mention several of these cases whatsoever."

The LCCR analysis lists 29 challenges that have been brought under *Wilks*, and states:

"The Justice Department is certainly correct that most of the 'reverse discrimination' collateral attacks and interventions under *Martin v. Wilks* which have been decided to date have upheld the challenged decrees. This confirms the argument of the bill's proponents that these challenges are not meritorious, and that it is best to resolve these questions once and for all at the time of the adoption of the original decree."

In relation to the DOJ's review of *Price Waterhouse* the LCCR analysis asserts:

"The Justice Department's review of *Price Waterhouse*'s impact in the lower courts focuses exclusively on the number of favorable rulings obtained by individual plaintiffs and defendants. This numerical survey completely ignores the fundamental question of whether proven, intentional discrimination should be condoned by Title VII and unremedied in the courts....In fact, a reading of lower court opinions indicates that *Price Waterhouse* has served to legitimate blatant discrimination in the workplace. For example, in *EEOC v. Alton Packaging Corp.*, 901 F.2d 920 (1990), the court found no Title VII liability, despite the fact that the plaintiff provided direct proof that intentional discrimination had played a role in the employer's promotion process. The court found that one of the two persons who decided not to promote the plaintiff had stated that 'if it was his company, he wouldn't hire any black people,' and the other person making the decision had yelled at another black employee '____ it, you people can't do a _____ thing right.' However, because the employer could show that the plaintiff would not have been promoted even if the workplace were free from bias, the defendant escaped all liability for its conduct under *Price Waterhouse*, and the plaintiff could not obtain injunctive relief or attorneys fees. Because of *Price Waterhouse*, the same two managers who harbor racial animus can continue to make promotion decisions that affect black employees."

As the *MONITOR* went to press, mark-up of the bill was scheduled in the House Judiciary Subcommittee on Civil and Constitutional Rights on March 12, and in the House Education and Labor Committee on the same day.

CONGRESS INTRODUCES FAMILY AND MEDICAL LEAVE ACT

On January 3, 1991, the Family and Medical Leave Act of 1991 (H.R. 2) was introduced in the House by Representatives William Clay (D-MO), Patricia Schroeder (D-CO), Marge Roukema (R-NJ), Bart Gordon (D-TN), and Curt Weldon (R-PA). A companion bill was introduced in the Senate on January 14, by Senators Christopher Dodd (D-CT), Edward Kennedy (D-MA), Robert Packwood (R-OR), and James Jeffords (R-VT).

FMLA guarantees job security, previously earned seniority, and continued health insurance coverage for workers who need to take leave to care for a newborn or newly-adopted child, or to care for a seriously ill child, spouse, or parent. The FMLA provides the same guarantees for workers who need leave to recover from their own serious medical conditions. The employee is entitled to take up to twelve weeks of unpaid leave per year for any combination of family or medical leave.

In the 101st Congress, the bill passed the House on May 10, 1990 by a vote of 237-187, and the Senate on June 14, 1990 by voice vote. Despite the 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 was marked up on March 7 in the House Subcommittee on Labor-Management Relations, and mark-up is scheduled for March 13 in the House Post Office Committee (because of its federal employee coverage), and March 19 in the House Education and Labor Committee.

ADA DRAFT REGULATIONS ISSUED BY THE DEPARTMENT OF JUSTICE AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

On February 21, 1991, the Department of Justice issued draft regulations to enforce the public accommodations provisions of the Americans with Disabilities Act (Title III). The notice of proposed rulemaking published in the Federal Register on February 22 provides for a 60 day comment period, and public hearings to be held in Dallas, Texas on March 4-5, Washington, D.C. on March 13-15, San Francisco, on March 18-19, and Chicago on March 27-28.

The Equal Employment Opportunity Commission issued draft regulations to implement the employment provisions of the ADA (Title I). The regulations were published in the Federal Register on February 28, and provide for a 60 day comment period to April 29, 1991. No public hearings are scheduled.

On January 22, the Architectural and Transportation Barriers Compliance Board (ATBCB) issued "proposed guidelines to provide guidance to the Department of Justice in establishing accessibility standards for new construction and alterations in places of public accommodation and commercial facilities." The ATBCB guidelines provided technical architectural and design guidance for making newly constructed buildings and altered buildings accessible to individuals with disabilities.

The Department of Justice will also issue regulations to enforce the provisions of ADA that cover state and local governments (Title II). The Department of Transportation has issued regulations to implement the accessibility requirements for newly purchased or leased vehicles (Titles II and III), and will issue regulations to implement other transportation provisions; and the Federal Communications Commission will issue regulations for telephone relay systems (Title IV).

Background

Title III of the Americans with Disabilities Act provides that 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, retail stores, convention centers, recreational facilities, hotels, doctor offices, banks, theaters, pharmacies, grocery stores, and shopping centers. Existing facilities must be made accessible if the changes are "readily achievable", i.e., can easily be accomplished without much difficulty or expense. If an entity can demonstrate that the removal of a barrier is not readily achievable, then the legislation requires that such goods, services, facilities, etc. be provided through alternative methods if such methods are readily achievable. Auxiliary aids and services must be provided unless this would cause an undue burden.

New construction and renovations must be designed to be readily accessible to and usable by people with disabilities. The requirements for new construction refer to facilities designed or constructed for first occupancy after January 26, 1993. Elevators need not be installed if the building has fewer than three stories or has less than 3,000 square feet per floor; however, if the building is a shopping center, shopping mall, or offices for health care providers this exception does not apply, nor does it apply if the Attorney General decides that other categories of buildings require elevators.

The provisions of Title III become effective on January 26, 1992.

Title I of the ADA 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.

The DOJ Regulations

In issuing the proposed regulations, Attorney General Dick Thornburgh said:

"These regulations represent a fair and balanced enforcement tool for the Americans with Disabilities Act. The Department of Justice has sought to strike a balance between the right of persons with disabilities to enter the mainstream of society and the workplace, and the financial and physical limits of the business community and others undertaking these changes. The promulgation of these regulations is a major agenda item of the Civil Rights Division and one of my personal priorities as Attorney General. When viewed in its proper perspective, the ADA is truly another 'emancipation' in the history of this country. Forty-three million disabled Americans represent the largest minority group in America today. And of these 43 million, two thirds of them are unemployed, even though many want to work and have the skills -- or at least the potential -- to make a valuable contribution to our nation's workforce."

The Department of Justice states that the regulations will apply to more than 3.8 million private enterprises in the U.S. that operate more than five million places of public accommodations, including food stores, restaurants, auto dealers and service stations, motion picture theaters, banks, hotels and other lodgings, real estate firms, etc,

The regulations require:

- "(1) the elimination of unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy the goods and services of a public accommodation, e.g., excluding mentally retarded individuals from a restaurant or requiring a blind person to present a driver's license as identification for cashing a check;
- (2) reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, e.g., permitting the use of guide dogs and other service animals;
- (3) removal of physical barriers in existing facilities where readily achievable, including measures such as installing ramps, lowering shelves, and creating designated accessible parking spaces;
- (4) the use of readily achievable alternative measures when removal of physical barriers is not readily achievable, e.g. home delivery or curb service;
- (5) the provisions of auxiliary aids, such as sign language interpreters, captioning, and large print or Braille when necessary to ensure effective communication, unless an undue burden would result; and
- (6) accessible design and construction of newly built facilities and alterations in accordance with guidelines issued by the ATBCB.

The DOJ has established an Office on the Americans with Disabilities Act in the Civil Rights Division, to be headed by John L. Wodatch, a civil rights attorney with more than 21 years of experience with the Federal Government. Copies of the notice of proposed rulemaking are available from the Office on the American with Disabilities Act, (202)514-0301 (Voice), or (202) 514-0381 (TDD)

EEOC Regulations

In announcing the proposed regulations, EEOC chair Evan J. Kemp, Jr. said: "President Bush set in motion a process to combat discrimination against people with disabilities when he signed the Americans with Disabilities Act on July 26, 1990. We will enforce Title I of the ADA with the same sense of responsibility, fairness, and purpose that we enforce other civil rights statutes." Chair Kemp went on to say: "We want to allow maximum flexibility to business to meet the requirements of the ADA. With dramatic advances in technology occurring every day and with individual differences among each and every person with a disability, the federal government cannot pretend to know every way to make a reasonable accommodation." EEOC estimates that the cost to businesses of making a reasonable accommodation to a worker's disability averages less than \$100.

The regulations provide:

"Employers may not ask job applicants about the existence, nature or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs.

Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA or the regulations, when an employer acts on the basis of such use. Tests for illegal use of drugs are neither prohibited nor encouraged. Employers may hold illegal users of drugs and alcoholics to the same performance standards as other employees.

Employers may refuse to assign an individual to a job involving food handling if the individual has an infectious or communicable disease that has been determined by the Secretary of Health and Human Services to be communicable to others through food handling, and the infectiousness and communicability of the disease cannot be eliminated by reasonable accommodation.

Employers may establish qualification standards for a job that will exclude individuals who pose a direct threat to the health and safety of the individual or others, if that risk cannot be lowered to an acceptable level by reasonable accommodation. However, an employer may not simply assume that a threat exists; employers are required to establish through objective, medically supported methods that there is genuine risk that substantial harm could occur in the workplace."

Copies of the regulations are available from the Office of Equal Employment Opportunity by calling (202)663-4395 (voice) or (202)663-4399. EEOC has also established a 800 number, 1-800 USA EEOC. For further information about the regulations, contact Elizabeth M. Thornton, Deputy Legal Counsel, (202)663-4638 (voice), or (202)663-7026 (TDD).

Persons wanting additional information should contact Patrisha Wright or Liz Savage, DREDF, 1633 Q Street, NW, Suite 220, Washington, D.C. 20009, (202)986-0375.

REPRESENTATIVE HAWKINS RELEASES REPORT ON SCHOOL FINANCE

In December 1990, Representative Augustus Hawkins (D-CA), the retiring Chair of the House Committee on Education and Labor, released a study on the impact of fiscal inequity in public schools on economically disadvantaged students. The report, *Shortchanging Children: The Impact of Fiscal Inequity on the Education of Students at Risk*, was prepared for the Committee by William L. Taylor and Dianne M. Piche, lawyers who specialize in civil rights and education. The study looks at the distribution of resources under state systems for financing public schools, and focuses on the impact of these financing systems on the availability of services that have been identified as essential to the success of at-risk students, pre-school programs, low teacher-student ratios, counseling services, experienced teachers, and state of the art curriculum.

In a statement releasing the study, Representative Hawkins said:

"This is the first study that links fiscal inequity to the deprivation of services that educators regard as vital to the success of America's school children. It points the way to innovative legislation to improve the education effectiveness of Chapter 1 of the Elementary and Secondary Education Act....[The study] goes beyond the debate about whether money is important in education to identify major disparities in the key services that money buys [and] zeroes in on how fiscal inequity stymies the federal government in its limited role of assisting at-risk students...If the Bush Administration is at all serious about achieving national goals in education, it must join the Congress in redressing the damaging consequences of fiscal inequity. I hope that Congress will make this a priority in 1991."

Findings and Recommendations

The findings include:

"The prevalent system of financing public schools through heavy reliance on locally raised property taxes leads to widespread disparities in expenditures among public school districts within states. Property-poor districts, which have lower assessed valuation per child, often tax at much higher rates than property-wealthy districts yet yield far fewer dollars for their effort.

"Inequitable systems of school finance inflict disproportionate harm on minority and economically disadvantaged students. On an inter-state basis, such students are concentrated in states, primarily in the South, that have the lowest capacities to finance public education. On an intra-state basis, many of the states with the widest disparities in educational expenditures are large industrial states. In these states, many minorities and economically disadvantaged students are located in property-poor urban districts which fare the worst in educational expenditures. In addition, in several states economically disadvantaged students, white and black, are concentrated in rural districts which suffer from fiscal inequity.

"Fiscal inequity in the states thwarts the Federal Government in carrying out its role of assisting in meeting the special needs of disadvantaged students and in assuring equality of opportunity. Although Federal policy is premised on the belief that educational programs and services provided to students with state and local funds are 'comparable,' and that Federal funds are a supplement to meet special needs, this is not the case in many states. Federal funds are used in property-poor districts to meet needs that are routinely met through state and local expenditures in other districts. The value of Chapter 1 funds is often severely impaired in property-poor districts because the assistance can be used only to fund one important service while funds are not available to provide other vital services that are interdependent."

The authors recommend that Congress consider passing legislation to:

"expand the comparability requirements of the Elementary and Secondary Education Act to the 50 states. States should be required to provide assurances that as to essential educational services all students in the state who are eligible for Chapter 1 aid are receiving services comparable to those provided to non-Chapter 1 eligible students.

"call upon the Secretary of Education by a date certain to collect and report to the Congress and the public, information that will permit an assessment of the impact of state public school finance systems on the availability of services to disadvantaged students. The information should include data for each school district (a) on the demographic characteristics of the district, including the numbers of minority students, and the numbers of economically disadvantaged and other students who have special needs, (b) on the fiscal capacity of the district and its expenditures for public education, and (c) on the levels of service provided for preschool programs and for reading programs in the early grades, on class size, on counseling and social services, on the experience and certification of teachers, and on the range and breadth of the curriculum."

Recent Litigation

The study also analyses a number of recent decisions in the area of school finance reform in which the highest appellate courts in four states -- Kentucky, Montana, New Jersey, and Texas -- "ruled that the school finance systems failed to provide the constitutionally-mandated level and quality of education" in property-poor districts.

"As a group, the four cases represent a significant departure from even the successful cases of the 1970s. In ascertaining liability, for example, the courts were unwilling to treat meager offerings in poorer districts as meeting a standard of an adequate minimum education. In the Kentucky case, the court looked not only to inputs, but to outcomes -- student performance on tests -- as a determinant of inequity. At the remedy

stage, too, the courts were innovative, calling for a thorough restructuring of the education system in Kentucky and moving forward toward equality of expenditures in New Jersey."

The cases are:

Rose v. Council for Better Education, No. 88-SC-804-TG (Supreme Court of Ky., June 8, 1989)

Helena Elementary School District No. 1 et al. v. State of Montana, 769 P.2d 684 (Mont. 1989)

Abbott v. Burke, No. A-63 (N.J., June 5, 1980)

Edgewood v. Kirby, 777 S.W. 391 (Tex. 1989)

Copies of the report are available from the House Committee on Education and Labor (202) 225-4527, or readers can contact the Law Offices of William Taylor (202) 659-5565.

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