

# Civil Rights Monitor

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# SENATE JUDICIARY COMMITTEE REJECTS JUDGE KENNETH RYSKAMP

On April 11, the Senate Judiciary Committee voted 8-6, along party lines, against confirming the nomination of Federal District Judge Ryskamp to the 11th Circuit Court of Appeals. The vote was on a motion to send the nomination to the Senate floor with a committee recommendation that Ryskamp be confirmed. The committee then killed the nomination by refusing on a tie vote, 7-7, to send it to the floor without a recommendation for or against. Senator Dennis DeConcini (D-AR) switched his vote. This is the first time a Bush Administration judicial nominee has been turned down. The Committee had conducted two days of hearings on March 19 and 20.

In statements prior to the vote, Democratic Senators said they had agonized over the decision, and that they were concerned that the nominee was insensitive to minorities. Republican Senators, Hatch (R-UT) in particular, made impassioned statements in support of the nominee. Senator Hatch said the nominee was opposed by liberal groups because his elevation to the 11th Circuit would give that Court a majority of conservatives: "It's time for us to stand up and say to these advocacy groups, that's not reason enough to do this to a man of this quality."

Senator Howell Heflin (D-AL), whose state is one of the three over which the 11th Circuit has jurisdiction, and who is himself a former judge, said:

"The perception of justice is extremely important. The Eleventh Circuit and the Fifth Circuit (out of which the Eleventh Circuit was created) have established an outstanding reputation for being bastions in enforcing 'equal justice under law'. Litigants who come before the Eleventh Circuit feel that they will be dealt with fairly and impartially. This perception must not be changed...Regardless of whether or not their concerns and sentiments are well founded,...[Florida] Hispanic officials, who are members of the President's own political party, as well as the Latin-American community of Florida, will have the perception that Judge Ryskamp will not be fair and impartial."

Senator Joseph Biden, Chair of the Judiciary Committee said:

"Today, this Committee performs one of its most important duties: Voting on the confirmation of a nominee to the federal bench. Judge Kenneth Ryskamp has been nominated to serve on the U.S. Court of Appeals for the 11th Circuit. Next to the Supreme Court, the Federal Courts of Appeals are the most important courts in this country...Over the past two years, this committee has approved every single person nominated by President Bush for the federal bench...The most troubling aspect of this nomination...[is his failure to adhere to precedent.]...Judge Ryskamp's record is undeniable: six times, *acting unanimously*, the Eleventh Circuit has had to reverse Judge Ryskamp for his disregard of binding precedents. All six cases -- all six cases -- involved civil rights or constitutional claims...To elevate Ryskamp to the Eleventh Circuit would be to risk that any future disregard for precedent would be that much more difficult to correct -- since for the 20 million people who live within the Eleventh Circuit, 99% of the time, that Court is their Court of last resort..."

## THE CASE AGAINST JUDGE RYSKAMP

(The following discussion borrows heavily from: People for the American Way Action Fund, Analysis of Hearing on Nomination of Kenneth L. Ryskamp to the U.S. Court of Appeals for the Eleventh Circuit, April 5, 1991; and Alliance for Justice, Memorandum on the Nomination Hearing of Judge Kenneth Ryskamp, April 5, 1991.)

### *Kerr v. City of West Palm Beach*

During the confirmation hearings, Senators questioned Judge Ryskamp about the substance of this decision and about controversial statements Judge Ryskamp made during the trial.

In the *Kerr* case, four black youths sued the West Palm Beach police department, the city, and individual police officers for violation of their civil rights by excessive police use of force when the youths were ap-

prehended by police dogs. Uncontroverted testimony at the trial established that the police used dogs to apprehend people suspected even of misdemeanors and non-violent felonies, that the dogs were trained to 'bite and hold' suspects even one who was not moving, that two of the dogs had steel-capped teeth, that the police affixed yellow stars to the side of their patrol cars for each apprehension by a police dog, that the police kept a 'bite book' at the station with pictures of suspects and their bites, and that other cities with similar demographics that used canine units did so with a record of far fewer bites per apprehension.

Judge Ryskamp excluded key evidence against the defendants; a decision that the Court of Appeals noted was "almost certainly erroneous." He commented that he would have ruled against all the plaintiffs and in favor of the police. And when the jury returned a verdict against all defendants, Judge Ryskamp set aside the verdict against the city and the police chief -- a decision unanimously reversed by the Court of Appeals.

At trial, Judge Ryskamp made the following statement from the bench:

"I think of countries where if you are guilty of a robbery they cut off your hand as a vivid reminder that this is forbidden. It might not be inappropriate to carry around a few scars to remind you of your wrongdoing in the past, assuming the person has done wrong, and of course in two of these cases the parties came in and admitted they were there to steal. That doesn't mean they don't have civil rights. They do have civil rights."

At his confirmation hearing, Judge Ryskamp persisted in attempting to justify his remarks by saying he was "noticing an irony," because the plaintiffs, if awarded damages by the jury, "might feel vindicated...and go out and steal again..." Ryskamp said, "I was thinking of their own welfare...and that a painful experience might be a deterrent." "It is ironic," Judge Ryskamp said, "that our civil rights law...may in a way foster crime, because it will positively reinforce these people."

### *Comments About Hispanics and the Miami Community*

In a meeting with Senator Simon's staff, prior to his confirmation hearings, Judge Ryskamp made observations about the character of the Miami community, and about Hispanics, particularly Cuban-Americans. Judge Ryskamp made the statements while trying to explain an English-only policy a private club he belonged to had adopted for a short period. Senator Simon's staff reported on the meeting in a memorandum. At the hearings, Senator Simon read from the memorandum and asked Judge Ryskamp if the following reported statements were accurate:

"Miami is like a foreign country.

Club members just wanted a place where we didn't have to hear Spanish.

In Miami, you send out two wedding invitations -- one with the Anglo time for Anglos and another for Cubans. Cubans always show up two hours late.

My wife gets very frustrated because the grocery store she has gone to for 20 years now has Spanish clerks and they have all the Spanish food on the shelves and she can't find food I can eat."

Judge Ryskamp did not deny or disavow these comments. Later, Judge Ryskamp telephoned a *Miami Herald* reporter to say that his comments had been taken out of context.

Following the Ryskamp testimony at the hearing, nine Cuban-American Florida state legislators - all Republicans - released a statement urging the Senate Judiciary Committee to reject Judge Ryskamp's nomination because he "demonstrated an insufficient sensitivity toward ethnic minorities." Both the Mexican American Legal Defense and Educational Fund and the National Council of La Raza announced their opposition to the Ryskamp nomination, based in part on these statements.

### *Membership in an 'Exclusive' Country Club*

One of the central concerns about the nomination of Judge Ryskamp was his longstanding membership in the Riviera Country Club in Coral Gables. One week before the hearing, Judge Ryskamp attempted to put questions about his club membership to rest by resigning.

Judge Ryskamp had failed to resign both upon his appointment to the district court in 1986 and his nomination to the Eleventh Circuit in 1990. Indeed, in a letter informing the Judiciary Committee that he had

resigned from the club and again in his testimony at the hearing, Judge Ryskamp adamantly denied that the Riviera Country Club had ever discriminated against Jews or blacks. Judge Ryskamp told the Committee that when he heard or read stories about discrimination at the club, he asked the Board of Directors and other club members whether the club discriminated, and that he was assured that the club had Jewish members and did not discriminate in its membership practices. Judge Ryskamp said that he believed that the allegations about discrimination at the Riviera Country Club were nothing more than inaccurate press accounts.

Judge Ryskamp continued to assert this view despite documentary evidence about the rejection of a proposed Jewish member, organized boycotts of the club, the club manager's own admission in a 1986 letter to all club members that legislation directed at discriminatory clubs would be disastrous for the Riviera Country Club, as well as extensive, continuing press coverage of the club's admission practices.

Miami representatives from the American Jewish Congress, the Anti-Defamation League of B'nai B'rith and the NAACP testified that Judge Ryskamp's statement that the club did not discriminate was "preposterous". They stated that it was impossible to be a resident of South Florida and be unaware that the Riviera Club did not welcome Jews or blacks.

Judge Ryskamp also told the committee that he had made no personal efforts to recruit black members. The lack of efforts by the club prior to 1990 to recruit black members apparently did not raise a red flag for Judge Ryskamp that the club may not have welcomed blacks. In an exchange with Senator Specter, the judge acquitted the club and asserted that no blacks had applied:

Senator Specter: Were there any black members of the club?

Judge Ryskamp: No.

Senator Specter: Did you make any inquiry as to why not?

Judge Ryskamp: No one had been proposed or submitted.

Senator Specter: Did you ask about that?

Judge Ryskamp: Yes, I did.

Senator Specter: Do you believe that to be true?

Judge Ryskamp: I believe that to be true.

Senator Specter: That no blacks had applied?

Judge Ryskamp: That is right. Where we are, there are not any black neighborhoods. Unfortunately, in the South, we still have areas that are generally considered to be black neighborhoods, and it is not totally surprising that no black has applied, but as far as I know, no one has ever been denied.

Applicants for membership in the Riviera Club must be recruited and sponsored by current members; one does not pick up an application form, complete it and return it to the club office. Judge Ryskamp had knowledge of the process as he sponsored his own son-in-law for membership.

## **SUPREME COURT RULES IN FETAL PROTECTION CASE**

In the *Johnson Controls* case, the issue was whether a company's policy of excluding all fertile women from

jobs where there is a risk of exposure to lead at a certain level was unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964 (see *CIVIL RIGHTS MONITOR*, Spring 1990 and Fall 1990).

On March 20, 1991 the Supreme Court ruled unanimously that "Johnson Controls' fetal-protection policy is sex discrimination forbidden under Title VII unless respondent can establish that sex is a 'bona fide occupational qualification'"...and that Johnson Controls' policy does not qualify as a BFOQ. The majority opinion was written by Justice Blackmun, and joined by Justices Marshall, Stevens, O'Connor, and Souter. Justice White, in a concurring opinion joined by Chief Justice Rehnquist and Justice Kennedy, agreed with the majority that the company's policy is overt sex discrimination, and thus is prohibited unless it is a BFOQ, but goes on to assert that the majority opinion errs in holding "that the BFOQ defense is so narrow that it could never justify a sex-specific fetal protection policy." The White opinion concurs in the Court's reversal and remand of the case "because on the record before us summary judgment in favor of Johnson Controls was improperly entered by the District Court and affirmed by the Court of Appeals." Justice Scalia issued a separate concurring opinion.

The decision has broad implications, as it is estimated that as many as 20 million women are employed in jobs that involve exposure to toxins and they could have run the risk of losing their jobs if the Supreme Court had ruled differently.

### *Background*

This case, *United Auto Workers v. Johnson Controls, Inc.*, No. 89-1215, involved a challenge to a battery manufacturing company's policy of excluding all fertile women from jobs where there is a risk of exposure to lead at a certain level. Under the policy women were also excluded from jobs in line of progression to jobs with a risk of lead exposure at a certain level. The company contended that the policy of protecting fetuses from workplace hazards responded to a legitimate concern for industrial safety which justified the exclusion of fertile women from certain jobs. Ultimately the company was trying to shield itself from liability in potential lawsuits that might be brought on behalf of children born with birth defects possibly attributable to their mothers' exposure to lead. The United Auto Workers and eight employees filed suit alleging the policy violated Title VII's prohibition against sex discrimination in employment.

The question before the Court was whether the exclusion policy was unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964. Subsidiary questions included who bears the burden of proving that the employer's justification meets Title VII standards, and whether the justification had to be tested by the BFOQ defense or could be defended as legitimate business necessity.

### *The Opinions*

Justice Blackmun's opinion for the Court states that "the bias in Johnson Controls' policy is obvious," and that because the policy explicitly excludes women on the basis of their sex, it may be defended only as a BFOQ. In analyzing the BFOQ defense the opinion points out:

"The BFOQ defense is written narrowly, and this Court has read it narrowly.... We have no difficulty concluding that Johnson Controls cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the Pregnancy Discrimination Act. Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization."

The opinion concludes:

"Our holding today that Title VII, as so amended, forbids sex-specific fetal-protection policies is neither remarkable nor unprecedented. Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the Pregnancy Discrimination Act means what it says.

"It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."

Justice White's concurring opinion states that the majority opinion while correct in its assertion that "Johnson Controls' fetal protection policy overtly discriminates against women, and thus is prohibited by Title VII unless it falls within the bona fide occupational qualification (BFOQ) exception...erroneously holds...that the BFOQ defense is so narrow that it could never justify a sex-specific fetal protection policy."

Justice White goes on to say that while the "fetal protection policy at issue here reaches too far," a fetal protection policy could be justified under the BFOQ defense if the "exclusion of women from certain jobs was reasonably necessary to avoid substantial tort liability;" that the BFOQ "defense is broad enough to include consideration of cost and safety of the sort that could form the basis for an employer's adoption of a fetal protection policy;" and that it is "proper to take into account an employer's interest in safety."

Justice Scalia concurred separately in an opinion in which he raised several concerns. He wrote that it is irrelevant whether the record contained evidence about harm to the male reproductive system: "treating women differently 'on the basis of sex' constitutes discrimination 'on the basis of sex' because Congress has unequivocally said so." Secondly, Justice Scalia asserts that the discussion about whether Johnson Controls has a factual basis for belief that women would be putting their children at risk in taking the jobs is also irrelevant. "By reason of the Pregnancy Discrimination Act, it would not matter if all pregnant women placed their children at risk in taking these jobs, just as it does not matter if no men do so." On the issue of liability under state tort law, Scalia asserts that "all that need be said in the present case is that Johnson has not demonstrated a substantial risk of tort liability -- which is alone enough to defeat a tort-based assertion of the BFOQ exception." Finally, the Justice writes that "the Court goes far afield...in suggesting that increased cost alone -- short of 'costs...so prohibitive as to threaten survival of the employer's business'...cannot support a BFOQ defense."

## SUPREME COURT ACCEPTS GEORGIA SCHOOL DESEGREGATION CASE

In January 1991, the Supreme Court addressed for the first time the question of when a formerly segregated school system can be released from court supervision, *Board of Education of Oklahoma City Public Schools v. Robert L. Dowell*. The decision left many questions unanswered including to what extent residential segregation is a vestige of a segregated school system that must be addressed before a school system can be freed from court supervision. The Court remanded the Oklahoma school desegregation 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". The Court said the district court should reconsider the issue of whether residential segregation was "too attenuated to be a vestige of former school segregation", but did not give any guidance in the area.

Now the Court has accepted for review a second case, from Georgia that raises similar questions. 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 (DCSS) had not sufficiently erased the legacy of segregation, and that school officials should consider broader measures including busing.

The issues before the Court are whether compliance can be attained on a piecemeal basis, i.e. student assignments, faculty assignments, and to what extent a school district can be held responsible for countering the effects of demographic changes that occurred after it initially desegregated its schools.

### *The DeKalb County, Georgia School District*

As of 1986 the DCSS enrolled 79,991 students in approximately 90 schools, with African American students 47 percent of the population. Fifty percent of the African American students attended schools that were more than 90 percent African American, and 27 percent of the white students attended schools that were more than 90 percent white. Sixty-two percent of the African American students attended schools at least 67 percent African American, and fifty-nine percent of white students attend schools at least 73 percent white.

African American administrators were 30 percent of the system's elementary school administrators, but 60 percent of the administrators at schools with African American student populations of more than 81 percent, and less than 10 percent of such persons in elementary schools with majority white student enrollments. Thir-

teen of the eighteen African American elementary principals were assigned to schools more than 90 percent African American in student enrollments. Similarly, 4 of the 5 African American high school principals were assigned to schools with African American populations of more than 95 percent.

The average number of years teaching experience for teachers in majority white schools was 9.79 compared to 5.19 in majority African American schools. In addition the per pupil expenditure in majority white schools was \$2,833, and in the majority African American schools it was \$2,492.

### *Background*

Prior to 1966, the DeKalb County School District operated a racially segregated school system. In 1966 the school board adopted a freedom-of-choice plan, which was successfully challenged in federal court by a class of African American students.

In June 1969, the district court ordered the school district to abolish the freedom-of-choice plan, to close all remaining segregated African American schools, and to adopt a neighborhood school attendance policy. The African American plaintiffs returned to court several times in the 1970s and early 80s to challenge school board actions that they alleged were in violation of the court order. During this period, the African American population of southern DeKalb County increased substantially as African Americans moved into the county from Atlanta, and whites relocated to the northern part of the county. In 1968, the DeKalb student population was approximately 6 percent African American, in 1986 it was 47 percent.

In 1986 the school board filed a motion seeking final dismissal of the case. The district court conducted a three-week trial on the question whether the school system had achieved unitary status. In 1988 the district court denied the school board's request for dismissal, and ordered the system to "equally distribute its experienced teachers and teachers with advanced degrees and to equalize expenditures among African American and white students." However, the district court refused "to impose additional duties on the DCSS in the areas of student assignment, transportation, and extracurricular activities." Both parties appealed.

The Court of Appeals affirmed in part, reversed in part, and remanded:

"We hold that a school system does not achieve unitary status until it maintains at least three years of racial equality in six categories: student assignment, faculty, staff, transportation, extracurricular activities, and facilities. The DCSS has not achieved unitary status. We affirm the district court's conclusion that the DCSS failed to fulfill its duties in the areas of faculty and staff. We reverse the district court's conclusion that the DCSS fulfilled its duties in the area of student assignment. Accordingly, we order the district court to require the DCSS to prepare and file a plan in accordance with this opinion in the shortest reasonable time."

On the issue of demographic changes, the court rejected the lower court's finding that the school district was not required "to eradicate segregation caused by demographic changes." The court of appeals cited the Fifth Circuit's decision in *Macon County Board of Education*:

"Not until all vestiges of the dual system are eradicated can demographic changes constitute legal cause for racial imbalance in the schools....Notwithstanding the school authorities' apparent good faith attempt to desegregate in 1970, the system has never achieved unitary status....Consequently, the school board in Tuscaloosa is still under an affirmative duty to dismantle the dual system, regardless of current housing patterns."

The Appeals Court opinion goes on to say that it had rejected a similar argument in its 1985 opinion in this case:

"...the DCSS planned to accommodate white population growth in the Redan High School area by building an additional facility. The district court accepted the DCSS's plan, finding that the DCSS simply planned to build a school where students lived and that a discriminatory intent did not motivate the DCSS's actions. We noted the discriminatory effect of the proposed Redan expansion and held that 'until the DeKalb County School System achieves unitary status, it has an affirmative duty to eliminate the effects of its prior unconstitutional conduct.'...We repeat what we said... the DCSS has not achieved unitary status; consequently, its affirmative duty remains in force."

## *The Parties' Positions*

In requesting review of the Eleventh Circuit's opinion the school board argued as follows:

"First, the...[11th Circuit's] holding that 'unitary status' is achieved with respect to any *Green* factor only when all aspects of a school system are maintained in some undefined level of racial balance for a predetermined period of times gives rise to an acknowledged conflict with the decision of the First Circuit...in which this Court held that a school board's failure to comply with a desegregation plan with respect to faculty hiring and promotion 'did not undercut' the achievement of unitary status in student assignment.

"Second, the Eleventh Circuit's holding that petitioners 'must take affirmative steps to gain and maintain a desegregated student population' -despite the fully supported finding by the district court that the 'resegregation' resulted solely from demographic shifts completely beyond petitioners' control- conflicts with this Court's decision in *Swann v. Charlotte-Mecklenburg Bd. of Education*."

The opposition to review from the African American school children states that the Supreme Court should not grant review because:

"The record in this case does not support the claim that DCSS achieved unitary status with respect to student assignment in 1969 and, without this factual predicate, Petitioners' assertion that the *Green* factors must be considered in isolation when reviewing unitary status is not properly before the Court."

Respondents also state that the petitioners' assertion that demographic factors alone caused the present segregation in the DeKalb County School system is not substantiated by the record in this case. They argue that there were practical steps the school board could have taken to address the demographic population shifts such as the busing of students, and that other school board actions that contributed to the racial identification of schools had an impact on residential patterns.

## **SUPREME COURT HEARS ORAL ARGUMENTS IN VOTING RIGHTS CASES**

On April 22, 1991, the Supreme Court heard oral arguments in several voting rights cases from Texas and Louisiana sharing the question whether the effects test in Section 2 of the Voting Rights Act, as amended in 1982, applies to the election of judges. The Voting Rights Act of 1965 was thought to cover judicial elections as well as elections for other offices. In 1980, the Supreme Court ruled that to prove voting discrimination under the Voting Rights Act, proof of racially discriminatory intent or purpose is necessary. In response, Congress in the 1982 Voting Rights Amendments added 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 rights 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..."

In amending Section 2 Congress for the first time used the term "representatives" in the Voting Rights Act. Thus, while it is clear that judicial elections would be covered if there was proof of intentional discrimination, the use of the word "representatives" raises a question about section 2, which prohibits practices that have a discriminatory effect. (For a thorough discussion of these cases, see *CIVIL RIGHTS MONITOR*, Fall 1990, and Winter 1991).



## The Arguments

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

The cases from Louisiana, which were consolidated for argument, are *Chisom v. Roemer*, No. 90-757, and *U.S. v. Roemer*, No. 90-1032. Solicitor General Kenneth Starr, arguing on behalf of the African American plaintiffs, said that the Fifth Circuit ruling that judges were not covered by section 2 of the Voting Rights Act because they are not representatives was wrong in light of the text of the Voting Rights Act, and its history. Starr said that while Congress provided no definition of representatives, judges are representatives because "they are elected by the people and are accountable to the people." The Voting Rights Act is about voting and about election to public office, the Solicitor General said.

Justice O'Connor asked Starr how there could be a vote dilution claim in light of the fact that the constitutional requirement of "one-person-one-vote" does not apply to judicial elections. [The Supreme Court held in 1973 in *White v. Register* that the one-person-one-vote principle did not apply to judges, thus allowing states to elect judges from jurisdictions of varying populations.] Starr acknowledged that the one-person-one-vote principle was not applicable here, and went on to say that the test is whether under the totality of circumstances, minorities have less opportunity to participate fully and elect persons of their choice. Justice Scalia pressed Starr: "less than what...you need a standard for vote dilution. What is the base line?" Starr responded that the base line is the language of the statute -- the totality of circumstances.

Starr also said that it is clear that judges were covered by section 2 prior to the 1982 amendments, and there is no indication that Congress intended to change the coverage when the act was amended. Pam Karlan, a University of Virginia Law Professor who also argued on behalf of the African American plaintiffs said that even with judicial districts of varied size, the state of Louisiana could still draw a majority minority district.

Attorney Robert G. Pugh who argued on behalf of Governor Roemer of Louisiana said this case is about 41 states that elect judges, and the Voting Rights Act which uses the word representatives in section 2. The section does not use the words "candidates" or "public officials" which would have clearly covered judges, it uses representative, he said. The word candidate is used four other times in the statute, and if anyone knows what a representative is it is the Congress. Justice Stevens asked Pugh if the word representatives was broader than legislators. Pugh responded that it was and included executive offices such as school board members.

The Texas cases which were also consolidated for argument are *Houston Lawyers' Association v. Attorney General of Texas*, No. 90-813, and *League of United Latin American Citizens v. Attorney General of Texas*, No. 90-974. Julius Chambers of the NAACP Legal Defense Fund argued the case on behalf of the minority plaintiffs. Chambers began by saying that this is the 14th time African and Mexican Americans have been before this Court asking that their voting rights be protected. Chambers disagreed with the position taken by the Solicitor General in the Louisiana cases: "The Department of Justice says the courts should weigh the totality of circumstances and in some cases allow the state to triumph. There is nothing in the Voting Rights Act that would allow for that." He said the Senate Committee Report makes clear that the state's interest is not an overriding factor.

Justice O'Connor asked if the Voting Rights Act requires that the Texas system of electing judges at-large be changed to elect judges from subdivisions. Chambers responded that the Voting Rights Act does require such a change. In response to a question about what standard should be used to determine whether minority vote dilution has occurred, Chambers said you look at the system the state has established, and within that system determine whether there are enough minorities to elect a representative of their choice. Justice White said the question before us is whether section 2 covers judges, and if so then the case should be remanded to the lower court for a remedy. Chambers agreed that the case should be remanded.

Renea Hicks, Special Assistant Attorney General of Texas argued on behalf of the state. He said that it is not clear that judges are covered by the Voting Rights Act: "While I do not adopt the theory of non coverage, the problem is that representatives does not clearly cover judges, and there is no indication that Congress addressed the question of judges." He went on to say that between 1965 and 1982 there is no empirical evidence that the Voting Rights Act covered judges. O'Connor said that there certainly were section 5 suits [suits in jurisdictions subject to close federal supervision under the Act] that held that judges were covered, and it would then seem odd to say that section 2 changed that. Hicks asserted that when a statute goes beyond the Constitution [in requiring an effects test] Congress has to be clear as to its meaning. Justice Scalia said if you apply a clarity test here then why just argue about judges, it is not clear that a Governor is a representative. Hicks responded that if you look at the legislative history, the executive branch is covered. Scalia rejoined if

you say it has to be said with clarity then we have to go back and say it with clarity about a lot of positions. Hicks said that if Congress intended to cover judges there should have been some deliberations about it given the uniqueness of their role.

A decision in the cases is expected by the first week in July.

## SUPREME COURT ACCEPTS HIGHER EDUCATION DESEGREGATION CASE

On April 15, the Supreme Court agreed to examine the issue of how far a state that maintained a racially segregated University system must go to desegregate the system. The Court accepted for review an en banc Fifth Circuit Court decision affirming the District Court's conclusion that the "State of Mississippi had met its affirmative duty to disestablish its former de jure segregated system of higher education." The Fifth Circuit held that "to fulfill its affirmative duty to disestablish its prior system of de jure segregation in higher education, the state of Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures."

The African American plaintiffs and the U.S. Department of Justice petitioned the Supreme Court to review the decision in order to determine the appropriate standard for assessing when states have met their constitutional obligation to dismantle their segregated university systems.

The question before the Supreme Court as expressed in the DOJ petition is:

"Whether Mississippi satisfied its obligation to dismantle its racially dual system of higher education, when state action continues to interfere on the basis of race with a qualified student applicant's choice of which school to attend."

### Background

The state of Mississippi operated a segregated system of higher education consisting of eight institutions until 1962 when the District Court ordered the admission of James Meredith, an African American student, to the University of Mississippi. Meredith was the first African American to attend one of the 5 historically white institutions (HWIs): the University of Mississippi, Mississippi State University, the University of Southern Mississippi, Mississippi University for Women, and Delta State University. In 1966 the first white student enrolled in one of the historically black institutions (HBIs): Jackson State University, Alcorn State University, and Mississippi Valley State University.

African American plaintiffs filed suit on January 28, 1975 alleging that the state of Mississippi was continuing to maintain a dual system of higher education in violation of the Constitution, sec. 1981 and sec. 1983 of the U.S. Code, and the Civil Rights Act of 1964. The Department of Justice filed suit alleging similar violations. After twelve years of attempts to reach a consensual resolution, trial began on April 27, 1987. On December 10, 1987, District Court Judge Biggers issued his opinion. The trial record established that in 1985-86, the University of Mississippi's African American undergraduate enrollment was 5.9 percent while Jackson State University's enrollment was 91.9 percent African American [these two universities are cited as they are the "premier" HWI and HBI respectively]. The percentage of African American faculty at the University of Mississippi was 1.5, and at Jackson State University 67.3.

Judge Biggers found that the standard that should be applied in higher education desegregation cases is the narrow standard articulated in *Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority*, where the court held that a "state's affirmative duty is satisfied by the good faith adoption of race-neutral policies and procedures." Judge Biggers rejected the broader standard established for elementary and secondary school desegregation in the Supreme Court's opinion in *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), and applied by the Sixth Circuit in a higher education case, *Geier v. Alexander*, that school districts have an affirmative duty to eliminate all vestiges of the segregated system. Judge Biggers' opinion explained:

"The ASTA court made a distinction between the state's duty in the higher education field as distinguished from the secondary and elementary education areas. This distinction was buttressed by the Supreme Court's...decision in 'Bazemore v. Friday' [which] involved a fourteenth amendment challenge of the North Carolina Extension Service 4-

H and Homemaker Clubs which had been racially segregated by law prior to 1965. Even though the clubs continued to exhibit marked racial imbalance, the Court found that the Extension Service has 'disestablished segregation' by adopting a policy allowing all club members to freely choose which club they wished to join...The Court distinguished *Green's* condemnation of 'ineffective' freedom of choice plans in local public schools on the grounds that 'while school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is not statutory or regulatory authority to deny a young person the right to join any club he or she wishes to join...Thus, *Bazemore* draws a clear distinction between elementary and secondary education systems and those systems where admissions are traditionally determined by voluntary choice.'

The District Court concluded that the state of Mississippi had met its duty to disestablish the segregated system by adopting "race-neutral policies and procedures in the areas of faculty and staff hiring and resource allocations."

A panel of the Fifth Circuit reversed and remanded the case, finding the following conditions:

Mississippi's higher education institutions' racial identity continues today; in 1986, more than 99 percent of the white students attended HWIs, and more than 71 percent of African American students attended HBIs. In 1986, only 60 of the 2,563 faculty employed by the HWIs were African American.

The HWIs and HBIs have different admissions standards. In 1962, following the enrollment of James Merideth to the University of Mississippi the Board of Trustees established a minimum score of 15 on the ACT for admission to the HWIs. The purpose was to deter the admission of African American students as the average score for Mississippi African students was 7, and for whites it was 18. In 1976, the minimum was set at 9 principally for the HBIs, and the three largest HWIs maintained a minimum of 15. In 1977 an exception to the 9 point minimum was established for admission to the HWIs for students who "fell into a special talents or high risk category." In 1985 the minimum scores were set at 15 for HWIs, and 13 for HBIs. The American College Testing Program advises that the ACT test be used in conjunction with other considerations, and emphasizes that in the case of minority students the ACT score is particularly inadequate as the sole criterion for admission. Despite these warnings, the state of Mississippi "continues to consider only the single ACT score to define the automatic admission pool."

Differences also continue to exist between the programs and course offerings at the HWIs and the HBIs. The Fifth Circuit panel opinion says:

"No historically black institution in 1981 or 1986 offered a professional degree in programs such as law, medicine, dentistry, or pharmacy. The historically black institutions, on average, offered fewer graduate programs and fewer fields of study than did the historically white schools, and, had a smaller number of their programs accredited."

The panel also found that "the historically white institutions...continue to unnecessarily duplicate programs offered at the historically black institutions. At the bachelors level, the historically white institutions unnecessarily duplicated 34.6% of the 29 programs offered by the historically black institutions as of 1985-86. At the masters level, the historically white institutions unnecessarily duplicated nine of ten programs offered by the historically black institutions during the same period."

State funding for the eight institutions is based on a formula that takes into consideration the number of student credit hours, field and level of instruction and mission of the institution. The formula results in the HBIs receiving less state funding than the three comprehensive HWIs. The formula does not consider the historical underfunding of the HBIs which helped maintain the segregated system. By not compensating for the historical disparities, the legacy of segregation is perpetuated.

Finally, the Fifth Circuit panel stated:

"We reject the district court's reading of *Green* and adopt the interpretation applied by the Sixth Circuit in *Geier*...that a state has an affirmative duty to eliminate all of the 'vestiges' or effects of de jure segregation, root and branch, in a university setting."

The Fifth Circuit sitting en banc reheard the case and affirmed the district court finding that "Mississippi had adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish."

Further briefs will be filed, and oral argument in the case will be heard during the next term which begins in October.

## **CITIZENS' COMMISSION ON CIVIL RIGHTS ISSUES REPORT ON THE BUSH ADMINISTRATION'S CIVIL RIGHTS RECORD**

The Citizens' Commission on Civil Rights, a bipartisan group of former federal officials, concludes in *Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term* that "despite modest improvements over Reagan administration policies, President Bush has led the nation away from equality of opportunity, failing to offer consistent moral leadership, and at times fanning the flames of racial intolerance."

The report, updating the Commission's 1989 *One Nation, Indivisible: The Civil Rights Challenge for the 1990's*, reviews civil rights policies during the Bush Administration's first two years. While commending improvements in voting rights and fair housing enforcement, the report is critical of the Administration's failure to address the continuing legacy of discrimination. The Commission criticizes the President's veto of the Civil Rights Act of 1990, noting the highly-charged "quota" rhetoric has contributed to escalating racial tensions. The Commission renews its call for the President to form a cabinet level task force to address the growing problem of racial tensions and conflicts. Other recommendations include support for the Civil Rights Act of 1991; broad implementation of the landmark Americans with Disabilities Act; greater diversity in federal judicial appointments; improved initiatives to address the needs of language minority students; examination of the impact of "choice" programs on desegregation and other efforts to provide educational opportunity.

The report includes a series of working papers contributed by civil rights experts examining the Administration's record in the following areas: veto of the Civil Rights Act of 1990; elementary and secondary education; sex discrimination in education; minority access to higher education; employment rights; immigration; health; fair housing and equal credit; affirmative action; voting rights; voter registration; 1990 census and minority undercount; rights of institutionalized persons; rights of persons with disabilities; the U.S. Civil Rights Commission; judicial nomination; and hate crimes.

The 194 page report is available for \$15 from the Citizens' Commission on Civil Rights, 2000 M Street, NW, Suite 400, Washington, D.C. 20036. Copies of *One Nation, Indivisible* are available for \$15; a set of both reports may be obtained for \$25.

### **FOR YOUR INFORMATION...**

The Leadership Conference on Civil rights has produced a ten-minute video which traces the history of LCCR from 1950 to 1990 against the backdrop of the civil rights movement. The video *My Mind on Freedom: 40 Years of LCCR* is available for \$15.00 prepaid from LCCR, 2027 Massachusetts Ave., NW, Washington, D.C.

The Urban Institute has released a report, *Opportunities Denied, Opportunities Diminished: Discrimination in Hiring*, which reports on the first major study directly measuring unequal treatment of black and white job-seekers. The report concludes that "when equally qualified young men -- one black and the other white -- apply for entry-level job openings, the white advances farther in the hiring process one out of every five times." The report contradicts claims that current hiring practices are effectively colorblind or favor black candidates. The study concludes that white applicants do face unfavorable treatment in 7% of job searches, but black applicants experience discriminatory practices almost three times as often. "In Washington, D.C. and Chicago, blacks are denied equal treatment one out of every five times they apply for an entry level position. The lack of fairness in the hiring process helps explain the widening gap between white and black unemployment."

ment figures." The study is based upon an analysis of 476 hiring audits conducted in the metropolitan Washington, D.C. and Chicago areas during the summer of 1990. Each audit consisted of a pair of young men -- one black and the other white -- matched in terms of age, physical size, education, experience, apparent energy level, articulateness, and other 'human capital' characteristics. Careful recruitment and training of the audit teams was understood as crucial to the validity of the study.

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