

# Civil Rights Monitor

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## Leadership Conference Education Fund

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The next issue of the *MONITOR* will include an article on the proposed policy guidance.

## CIVIL RIGHTS ACT OF 1991 ENACTED INTO LAW

On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991, ending a two and a half year campaign by civil rights advocates to reverse a number of Supreme Court decisions and provide a damages remedy for Title VII. The bill passed the House on November 7, 1991, by a vote of 381-38, and the Senate on October 30, 1991, by a vote of 93-5, with two Senators absent.

The passage of the bill was in large measure the result of the determined efforts of Senators John Danforth (R-MO) and Edward Kennedy (D-MA) to forge a compromise the President would sign. In the end, civil rights advocates asserted that the President gave up on his assertion that the bill was a quota bill because of the political climate created in part by the Clarence Thomas hearings and David Duke's campaign for governor of Louisiana. Paul Gerwitz, Yale Law School Professor, said that the "agreement on a compromise civil rights bill won virtually everything that civil rights advocates first sought two years ago."

In an op-ed in the November 18, 1991, Washington Post, William T. Coleman Jr., former Secretary of Transportation, Chairman of the NAACP Legal Defense Fund and an attorney, and Vernon E. Jordan, Jr., former President of the National Urban League, and an attorney, wrote:

"The new civil rights bill accomplished by a dedicated Danforth-Kennedy steadfast commitment, is a great achievement, both because it significantly strengthens civil rights protections and because it reestablishes a new political consensus on a subject that has historically divided us....

"In the end, President Bush wisely decided to ignore the advice of Mr. Gray [White House Counsel] and a few other administrative officials and to accept the compromise on civil rights. He put behind him the destructive and divisive tactics opponents have employed over the past 18 months."

The Civil Rights Act amends Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, sex, national origin, or religion, and the 1866 Civil Rights Law (section 1981 of the U.S. Code) which prohibits intentional race discrimination in the making and enforcing of contracts. The bill overturns Supreme Court decisions on employment law that added up to a major shift from equal employment opportunity law established over the past twenty-seven years to protect the rights of minorities and women. (For a thorough discussion of the background of the bill, see *SPECIAL CIVIL RIGHTS MONITOR ON THE CIVIL RIGHTS ACT OF 1991*, vol. 5, no. 6, Fall 1991.)

### THE BILL'S PROVISIONS

The bill is comprised of three major titles: Title I Federal Civil Rights Remedies; Title II Glass Ceiling Act of 1991; and Title III Government Employee Rights Act of 1991; as well as Title IV General Provisions; and Title V Civil War Sites Advisory Commission.

#### TITLE I — FEDERAL CIVIL RIGHTS REMEDIES

##### Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts, Reversing the *Patterson* Decision

Section 101 overturns the *Patterson* decision and makes clear that Section 1981's prohibition against discrimination covers all aspects of the employment relationship.

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

Section 101 affirms Congress' intent that this statute cover all aspects of and all benefits, terms, and conditions of a contractual relationship. In an employment case, this would make section 1981 applicable to racial/ethnic and certain religious discrimination in hiring, promotions, treatment on the job, demotions, discharges, retaliation and every other aspect of employment.

The new statutory language reads: "the term make and enforce contracts includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

Section 1981 has been interpreted to bar not only racial discrimination but also discrimination against some ethnic and religious groups.

#### Damages in Cases of Intentional Discrimination

Section 102 creates a separate provision, 1977a (section 1981a of 42 U.S. Code), to allow for limited monetary awards for victims of intentional discrimination who successfully sue under Title VII.

This section addresses a deficiency in Title VII, which prohibits gender, national origin, and religious discrimination in addition to racial discrimination, but which until now has not provided a damages remedy similar to that available under section 1981 for intentional racial discrimination. Section 1981 allows for compensatory and punitive damages while Title VII monetary awards have been limited to make-whole relief, i.e., back pay, and, where appropriate, front pay. The new section 102 also provides for damages in disability cases under the employment title of the Americans with Disabilities Act, and the relevant sections of the Rehabilitation Act of 1973.

Section 102 provides that a victim of intentional discrimination who cannot recover damages under section 1981 may recover compensatory and punitive damages under Title VII in addition to the make-whole relief that has been available. This provision is intended to prevent double dipping, i.e., filing a claim under 1981 and 1981a and collecting damages under both provisions. The sponsors Interpretive Memorandum, "intended to reflect the intent of all of the original cosponsors to S. 1745," and which at Senator Danforth request was printed in the Congressional Record states:

"In order to assure that a complaining party does not obtain duplicative damage awards against a single respondent under both section 1981 and section 1981a, the provision limits section 1981a damage awards to a complaining party who cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981)..."

"Moreover, this provision does not prevent a person from challenging discrimination which causes demonstrably different harms under each of the statutes. For example, a woman who suffers both race and sex harassment, and is injured in different ways by each may challenge the race discrimination under section 1981a, and if proven, may recover under both."

The section also includes a good faith exemption under the ADA and the regulations implementing the Rehabilitation Act: "...damages may not be awarded...where the covered entity demonstrates good faith efforts, in consultation with the person with the disability...to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business."

Unlike section 1981, the new provision places caps on the amount that can be received. Compensatory damages that are capped include future economic losses, and damages for pain and suffering. Exempted from the cap are back-pay, interest on back-pay, and other make-whole relief available under Title VII, and actual expenses already incurred. Punitive damages are available if the plaintiff shows that the employer engaged in discriminatory practices with malice or with reckless indifference to the federally protected rights of the aggrieved individual.

Compensatory and punitive damages are capped according to the size of the employer's workforce. For each individual these damages shall not exceed:

15 – 100 employees	\$50,000
101 – 200 employees	100,000
201 – 500 employees	200,000
500 or more employees	300,000

#### Attorney's Fees

Section 103 provides for the awarding of attorney's fees to victims of discrimination who successfully sue under the new damages provision. Such fees were already available under Title VII and section 1981.

#### Burden of Proof in Disparate Impact Cases, Reversing *Wards Cove*

Section 105 reverses all of the important holdings of the *Wards Cove* decision. First, it makes clear that once a plaintiff shows that an employment practice(s) has a disparate impact on the employment of minorities or women, the burden is on the employer to defend by showing that the practice is job related and justified by business necessity.

Second, where the challenge is to a group of practices, if the complaining party can show that the elements of the employer's decisionmaking process are not capable of separation it need not be demonstrated that each particular employment practice has a disparate impact on minorities and women.

Third, the section provides that an unlawful practice is established when "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Although the bill does not define business necessity or job related, section 3 of the bill provides that one of the purposes of this Act is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*...and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*... In *Griggs* the Court said:

"The question [is] whether an employer is prohibited by...Title VII from requiring a high school education or passing of a...test as a condition of employment...when...neither standard is shown to be significantly related to successful job performance...Neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."

Section 105 also states that the only legislative history for this section is a particular interpretative memorandum included in the Congressional Record of October 25, 1991. This statement is an instruction to the courts to disregard the floor statements of Senators in interpreting the law. This interpretive memorandum says simply that the "terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs*...and in the other Supreme Court decisions prior to *Wards Cove*..." It further states that when "functionally-integrated practices" are part of the employment decision making process they "may be analyzed as one employment practice."

#### Prohibition Against Discriminatory Use of Test Scores

Section 106 provides that in employment the bill prohibits the adjustment of scores, the use of different minimum scores, or any other alteration of scores "on the basis of race, color, religion, sex, or national origin." This provision does not negate the legal requirement that tests predict job performance fairly across racial and gender lines. Thus, a test that predicts job performance differently across racial and ethnic lines (e.g., whites performed better on the test than on the job, or blacks performed better on the job than the test predicted) is not a fair test and thus not "job related for the position in question and consistent with business necessity," so that its impact violates Title VII.

#### Prohibition Against Intentional Discrimination, Reversing *Price Waterhouse v. Hopkins*

Section 107 overturns *Price Waterhouse* and makes clear that "an unlawful employment practice has been established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." If the employer can show that nondiscriminatory reasons were sufficient to produce the adverse employment decision, the employer is not to be required to hire or reinstate the employee, and the employee may not be

awarded damages. However, a court may "grant declaratory relief, injunctive relief...and attorney's fees and costs demonstrated to be directly attributable" to the unlawful employment practice.

#### Preventing Unlimited Challenges to Court-Approved Remedies, Reversing *Martin v. Wilks*

Section 108 reverses *Wilks* and provides that an interested nonparty to decrees in employment discrimination cases (which often involve affirmative action plans) may not challenge the decree if he or she had notice of the decree "sufficient to apprise such person that ...[the decree] might adversely affect the interests and legal rights of such person," and had a reasonable opportunity to object. Nor may a nonparty challenge if a person with the same interests has already challenged the decree.

#### Protecting Americans Working Abroad, Reversing *EEOC v. Arabian American Oil Co.*

Section 109 allows citizens of the U.S. working abroad for U.S.-based employers to sue for discrimination. It reverses *Aramco* by adding to the definition of employee as stated in Title VII and the ADA: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."

This section does not apply to "conduct occurring before the date of the enactment of this Act."

#### Technical Assistance Training Institute

Section 110 instructs the EEOC to establish a Technical Assistance Training Institute "to provide technical assistance and training regarding the laws and regulations enforced by the Commission."

#### Education and Outreach

Section 111 instructs the EEOC "to carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to...individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission...."

#### Providing a Reasonable Opportunity to Challenge Purposeful Discrimination, Reversing *Lorance v. AT&T*

Section 112 allows an employee to challenge a seniority system as discriminatory when the system actually has an adverse effect on that employee. The section overturns the *Lorance* decision which held that any challenge to a facially neutral system must be filed soon after the system is first put in place and that persons who wait until they are adversely affected by the system to file a suit may be too late.

#### Expert Witness Fees, Reversing *Crawford Fitting Co. v J.T. Gibbons, Inc.*

Section 113 permits winning parties to collect the cost of hiring expert witnesses as part of their legal fees under Title VII, Section 1981, and the new damages provision, 1981a. The Court decision had denied such reimbursement.

#### Allowing Interest and Extending the Statute of Limitations in Actions Against the Federal Government, Reversing *Library of Congress v. Shaw*

Section 114 allows winning parties in discrimination cases against the Federal Government to collect interest to compensate for any delay in payment. This section also extends the statute of limitations for filing claims against the Federal Government from 30 to 90 days.

#### Limitations Period Under the Age Discrimination in Employment Act

Section 115 amends the Age Discrimination in Employment Act to provide that when the EEOC dismisses or otherwise terminates a charge, the aggrieved person is to be notified, and the person can file a civil action "within 90 days after the date of the receipt of such notice."

#### No Effect on Lawful Court Ordered Remedies, Affirmative Action, or Conciliation Agreements

Section 116 makes clear that nothing in the Act is to be read as affecting "court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law." A determination as to the lawfulness of such practices is to be made without reference to the amendments made by this Act.

## Coverage of the House of Representatives

Section 117 incorporates the Fair Employment Practices Resolution that the House passed in the 100th Congress. The resolution provides that employment practices must be free of discrimination on the basis of race, color, national origin, religion, sex, marital and parental status, handicap or age. Claims must be pursued through an internal grievance procedure. House employees are entitled to "the rights and protections under Title VII of the Civil Rights Act of 1964..."

## Alternative Means of Dispute Resolution

Section 118 encourages, where lawful and appropriate, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, and arbitration.

## TITLE II – GLASS CEILING

The purpose of this Title is "to establish a Glass Ceiling Commission to study the manner in which business fills management and decisionmaking positions; the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions; and the compensation programs and reward structures currently utilized in the workplace; and an annual award for excellence in promoting a more diverse skilled work force at the management and decisionmaking levels in business."

The Commission is to be comprised of 21 members: the Secretary of Labor, 6 chosen by the President, 4 by the Senate, 4 by the House, and 6 chosen jointly by the House and Senate.

## TITLE III – GOVERNMENT EMPLOYEE RIGHTS

The purpose of this Title is "to protect the right of Senate and other government employees (presidential appointees), with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability."

The Title provides that Senate and other government employees are covered under Title VII, section 15 of the ADEA, 501 of the Rehabilitation Act of 1973, and sections 102-104 of the ADA. State and local government employees and most Executive Branch employees were already covered. It authorizes the establishment of an Office of Senate Fair Employment Practices, and outlines four steps for consideration of alleged violations: counseling, mediation, formal complaint and hearing by a hearing board, and review of the hearing board decision by the Select Committee on Ethics, if requested. Any Senate employee aggrieved by a final decision, or any Senator who would be required to pay damages may petition for review by the U.S. Court of Appeals for the Federal Circuit. Senate and other government employees may sue for monetary damages in cases of intentional discrimination. Senators are personally liable for such damages.

## TITLE IV – GENERAL PROVISIONS

### Severability

Section 401 makes clear that if any provision of this bill is held invalid, the other provisions of the bill will not be affected by that action.

### Effective Date

Section 402 provides that except as otherwise specifically provided (see section 109, *Aramco*), the amendments made by this act shall take effect upon enactment. Civil rights advocates generally agree that the bill will cover cases that are presently pending, and is not limited to discriminatory actions that occur after enactment. But there is a concerted campaign by certain Republicans in the White House and Congress to portray coverage as restricted to actions taken after the date of enactment, i.e. after November 21, when the President signed the bill.

The section also provides that the amendments will not apply to the pending *Wards Cove* case.

### *Push for Legislation to Amend the Civil Rights Act of 1991*

Representative Jim McDermott (D-WA) and Senator Brock Adams (D-WA) have introduced the Justice for Wards Cove Workers Act (H.R. 3748, S. 1962) to eliminate the provision in the bill which exempts the pending *Wards Cove* case from application of the Civil Rights Act of 1991. This provision was agreed to by the

Senate sponsors of the bill to get the support of the Republican Senators from Alaska, Ted Stevens and Frank Murkowski. The new bill has already been reported out of the House Subcommittee on Civil and Constitutional Rights. The Senate bill has been referred to the Committee on Labor and Human Resources.

The language in the Civil Rights Act of 1991 that exempts *Wards Cove* provides "notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1983." The only known case that this applies to is the *Wards Cove* case.

On November 26, 1991, civil rights advocates in the House and Senate introduced legislation to remove the cap on damages in the CRA 1991. The principal sponsors of the Equal Remedies Act (S. 2062, H.R. 3975) are Senator Kennedy and Representative Barbara Kennelly (D-CT). As the MONITOR went to press there were 31 sponsors in the Senate and 50 sponsors in the House.

## CONGRESS PASSES FAMILY AND MEDICAL LEAVE ACT

On November 13, 1991 the House passed the Family and Medical Leave Act by a vote of 253-177. The Senate passed the bill on October 2, 1991 by voice vote after a compromise offered by Senator Christopher S. Bond (R-MO) was adopted by a vote of 65-32. Senator Bond's compromise amendment provided greater flexibility and additional safeguards for employers covered under the Act. It would also require greater accountability on the part of employees taking leave under S.5. Since there are differences (only one of any significance) between the Senate and House bills the bill will have to go to a conference committee. This will not occur until 1992.

The bill as it passed the Congress:

"Provides up to 12 weeks of *unpaid* job-protected leave per year for the birth or adoption of a child, or the serious illness of the employee or an immediate family member (child, parent, spouse). Permits employer to substitute an employee's accrued paid leave for any part of the 12 week period. *The House bill provides 18 weeks for federal employees.*

"Exempts small businesses and covers only employers with more than 50 employees (exempts 95 percent of employers).

"Restricts employee eligibility to those who have worked 1250 hours (25 hours per week) over the previous 12 months *and* at least 12 months for the employer.

"Permits employers to exempt 'key employees' from coverage under the Act (highest paid 10% of the workforce).

"Simplifies and streamlines the enforcement provisions to parallel long-standing Fair Labor Standards Act enforcement procedures. Eliminates all consequential damages and limits damage remedies to double actual losses. Establishes 'good faith' exception for employers with reasonable grounds for believing that they have not violated the Act.

"Protects employers by enabling them to recapture health insurance premiums paid during the leave if the employee does not return to work. Provides exception for an employee who provides medical certification that he/she is still unable to perform the functions of his/her position beyond the 12-week limit.

"Requires an employee to provide 30 days notice for foreseeable leaves for birth, adoption or planned medical treatments. Requires employee to make a reasonable effort to schedule planned medical treatments so as not to disrupt unduly the employer's operations.

"Redefines 'serious health condition' so that the employee must be unable to perform the functions of the position (employee illness) or that the employee is *needed* to care

for the ill family member (illness of immediate family member) in order to qualify for leave under the Act. Further limits serious health condition to illnesses which require continuing treatment by a health care provider.

"Requires an employee to provide medical certification to the employer justifying the need for leave for the employee's own illness or the illness of an immediate family member. The employer may require a second medical opinion.

"Permits employers to require that an employee taking intermittent leave for planned medical treatments transfer temporarily to an equivalent alternative position. Further requires the medical certification for intermittent leave to include the expected dates for medical treatments and the planned duration of the treatments.

Despite the compromise that was made to address the concerns of the business community, the Administration continued to oppose the bill and threatened a Presidential veto as in 1990.

### *Background*

The Family and Medical Leave Act of 1993 (HR-2) was introduced in the House of Representatives on January 3, 1991, by Representatives William Clay (D-MO), Patricia Schroeder (D-CO), Marge Roukema (R-NJ), Bart Gordon (D-IN), and Curt Weldon (R-PA). The companion bill (S-5) 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).

The campaign to enact family and medical leave legislation, led by a coalition of approximately 240 women's, civil rights, family, religious, labor, and professional organizations, has been a six-year-long effort. Last year, 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 a voice vote. Despite the strong bipartisan support for the bill, and major compromises that limited its coverage, President Bush vetoed the legislation on June 29, 1990. On July 25, 1990, the House fell 53 votes short of the two-thirds majority needed to override the veto.

### *The Need*

The United States is the only industrialized country that does not have a national policy of maternity or parental leave. As a result, 30 percent to 40 percent of employers with more than 50 workers do not offer job-guaranteed family and medical leave, according to a 1990 study commissioned by the U.S. Small Business Administration. The widespread lack of family and medical leave policies economically and emotionally devastates thousands of American families each year. *Working Families Speak: Case Studies of Americans Who Needed Family and Medical Leave*, available through the Women's Legal Defense Fund, tells their stories, stories such as this one:

"Mr. Censullo was working as a manager for a large video company in November 1989 when his wife Kathy gave birth to their second child by emergency cesarian section. On November 16, just two days after their baby Anthony's arrival, they learned that he had hypoplastic left heart syndrome; in other words, their baby's heart had only one working chamber. Doctors told them that Anthony could die at any time.

"Mr. Censullo immediately called his employer to tell him that he had to go to the hospital. The Censullos lived at the hospital through the weekend while doctors struggled to stabilize their son for surgery...

"During this time, Mr. Censullo periodically left messages at work, apprising them of his son's condition. On November 24,...his supervisor called him at the hospital, demanding to know when he would be returning to work. Mr. Censullo told him that, given his son's precarious hold on life, he was not in a position to give a definite return date...his boss then told him to separate his personal and professional problems: 'Get your priorities straight. You have an obligation to this company and you better figure out whether it's better to suffer one loss or two.'

"Later that day, just 10 days after Anthony's birth, Mr. Censullo received a mailgram from his supervisor, firing him.



"The Censullos were under extraordinary emotional stress during this time. 'We were almost going insane, waiting minute by minute to see if our baby was going to live. Losing Jim's job was the straw that broke the camel's back.'

"The Censullos have endured enormous financial strain as well receiving emergency Medicaid...to help cover Anthony's medical bills...Mr. Censullo had a difficult time finding a new job after being fired right before Christmas. He started a new job in January 1990 at an annual pay cut of \$11,000."

The Women's Legal Defense Fund which heads the coalition pushing for passage of the bill asserts that the FMLA is desperately needed to provide minimum, uniform standards that will ensure that working men and women like the Censullos are no longer forced to choose between their jobs and the well-being of their families. This legislation, WLDF maintains, is especially vital to Americans who are already economically vulnerable, such as women, single mothers, African-Americans and other minorities, older workers, and low-income workers.

## FAIRNESS IN DEATH SENTENCING

A conference agreement on the Omnibus Crime Bill passed the House on November 27 by vote of 205-203. On the same day the Senate failed to invoke cloture (to limit debate) on the motion to proceed to the bill by a vote of 49-38. President Bush had indicated he would veto the bill because he said "it would weaken our criminal justice system."

The House passed the Omnibus Crime Control Act (H.R. 3371) on October 23, 1991, and the Senate passed the Biden-Thurmond Violent Crime Control Act (S. 1241) on June 19, 1991. On November 24, House and Senate conferees had worked out a compromise Omnibus Crime Bill which included authorization of the death penalty for approximately 50 additional federal crimes, provided for a five-day waiting period for handgun purchases, and set a one-year limit on habeas corpus appeals by persons on death row. The conferees deleted the Bush Administration's so-called "Equal Justice Act" which was included in the House bill. The "Equal Justice Act" would have prohibited states from passing laws to provide relief from discrimination in the application of the death penalty, if that law permits a claim of discrimination to be based on statistical evidence. The EJA prohibited "any law, rule, presumption, goal, standard for establishing a prima facie case or mandatory or permissive inference that...requires or authorizes the invalidation of, or bars the execution of, sentences of death or other penalties based on the failure of a jurisdiction to achieve a specified racial proportion..."

### *Racial Discrimination*

Civil rights advocates had pushed for the inclusion of the Fairness in Death Sentencing Act (FDSA previously called the Racial Justice Act) as part of the Crime Package. The FDSA sought to address the well-documented pattern of racial discrimination in death penalty sentencing. Last year the General Accounting Office reviewed studies of capital cases and concluded that 82 percent of the studies had found racial bias to be a factor in the imposition of the death penalty. This year the Death Penalty Information Center with the support of the Southern Christian Leadership Conference released a study of the application of the death penalty in a Georgia judicial district. The study, *Chattahoochee Judicial District: Buckle of the Death Belt-The Death Penalty in Microcosm*, found that the District Attorney had asked for the death penalty in well over one-third of cases where the victim was white, but in only about one-twentieth of the cases where the victim was black.

The FDSA would have prohibited imposition of the death penalty if a state or a federal criminal defendant could show, by statistical evidence, racial disparities in the pattern of capital sentences based on the race of the defendant or the race of the victim. If the evidence showed a greater likelihood of death sentences where whites rather than minorities were the victims or disparities in sentencing between black defendants and white defendants, no death sentence could be imposed on the defendant unless the state demonstrated by a preponderance of evidence that the apparent racial disparity is explained by non-racial factors.

On June 20, 1991, the Senate voted 55-41 to strip the FDSA from the Crime Bill. The House took similar action on October 22, 1991, by adopting an amendment proposed by Representative William McCollum (R-FL) to replace the Fairness in Death Sentencing Act with the Administration's Equal Justice Act. At that point, advocates of the Fairness in Death Sentencing Act felt they had no choice but to seek to strip the Act of the McCollum provision in Conference.

# U.S. COMMISSION ON CIVIL RIGHTS REAUTHORIZED FOR 3 YEARS

The House and Senate have agreed to reauthorize the U.S. Commission on Civil Rights for three years, with a budget of \$7.16 million in 1992, leaving the funding decision open for the following two years. The reauthorization also requires the agency to issue at least one report annually. Representative Don Edwards (D-CA), Chair of the House Subcommittee on Civil and Constitutional Rights, had been critical of the agency for publishing only one report in the past two years, and therefore had initially supported a two-year reauthorization and an annual funding level of \$6 million.

## SUPREME COURT RULES IN VOTING RIGHTS CASES

On June 20, 1991, the Supreme Court ruled in four voting rights cases that addressed whether the effects test of Section 2 of the Voting Rights Act, as amended in 1982, applies to the election of judges. In the two cases from Louisiana, consolidated for oral argument, the Court ruled 6 to 3 "that the coverage provided by the 1982 amendment is coextensive with the coverage provided by the Act prior to 1982...that judicial elections are embraced within that coverage", and that the Act reached the election of justices of the Supreme Court of Louisiana. The Louisiana cases are *Chisom v. Roemer*, No. 90-757, and *U.S. v. Roemer*, No. 90-1032. Similarly, in two Texas cases, the Court ruled 6-3 that section 2 of the Voting Rights Act applies to the election of trial judges in Texas.

In a related case from Louisiana, the Court on June 3 ruled unanimously that the district court erred in allowing elections for state judges to occur under changed voting rules to which the Department of Justice had objected pursuant to the preclearance provisions of section 5 of the Voting Rights Act.

### *Background*

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

In response to *Mobile*, Congress in the 1982 Voting Rights Act amendments established that local election practices can be found to be discriminatory if 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...."

Section 5 of the Voting Rights Act requires approval from the Department of Justice of all voting law changes in nine states and parts of 13 others which have a history of discrimination in voting practices.

For a thorough description of these cases, see *CIVIL RIGHTS MONITOR*, Spring 1991, Winter 1991, and Fall 1990.

## The Opinions

In the Court's opinion in the Louisiana cases Justice Stevens wrote for the majority:

"Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of 'ridding the country of racial discrimination in voting.'...[In earlier cases] we said that the Act should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination. Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent, after a plurality of this Court had concluded that the original Act, like the Fifteenth Amendment, contained such a requirement...Thus, Congress made clear that a violation of section 2 could be established by proof of discriminatory results alone. It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection. Today we reject such an anomalous view and hold that state judicial elections are included within the ambit of section 2 as amended."

Justices White, Marshall, Blackmun, O'Connor and Souter joined in the opinion.

Justice Scalia wrote a dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined. Justice Kennedy also wrote a separate dissent. Justice Scalia's dissenting opinion asserted:

"Section 2 of the Voting Rights Act is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. It is a statute. I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the original one applies. If not and especially if a good reason for the ordinary meaning appears plain we apply that ordinary meaning....In my view, that reading reveals that section 2 extends to vote dilution claims for the elections of representatives only, and judges are not representatives."

The opinion in the Texas cases was also written by Justice Stevens with the same justices joining. The opinion states:

"As we have held in *Chisom*, the Act does not categorically exclude judicial elections from its coverage. The term 'representative' is not a word of limitation. Nor can the protection of minority voters' unitary right to an equal opportunity 'to participate in the political process and to elect representatives of their choice' be bifurcated into two kinds of claims in judicial elections, one covered and the other beyond the reach of the Act...It is equally clear, in our opinion, that the coverage of the Act encompasses the election of executive officers and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected. If a State decides to elect its trial judges, as Texas did in 1861, those elections must be considered in compliance with the Voting Rights Act."

Justice Scalia wrote a brief dissent in which Chief Justice Rehnquist and Justice Kennedy joined, saying that his reasons for dissenting were the same as in the *Chisom* case.

In the third case from Louisiana, *Clark v. Roemer*, the unanimous opinion was written by Justice Kennedy. The opinion said this:

"The case presents two discrete issues under section 5 of the Voting Rights Act. First, we must decide whether the District Court erred by not enjoining elections held for judgeships to which the Attorney General interposed valid section 5 objections. Second, we must determine whether the State's failure to preclear certain earlier voting changes under section 5 was cured by the Attorney General's preclearance of later, or related voting changes."

On the first question, the Court ruled:

"Section 5 requires States to obtain either judicial or administrative preclearance before implementing a voting change...The State of Louisiana failed to preclear these

judgeships as required by section 5...In short, by the fall 1990 election, Louisiana had with consistency ignored the mandate of section 5. The District Court should have enjoined the elections."

In response to the second question the Court states:

"The requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under section 5...The District Court's holding upsets this ordering of responsibilities under section 5, for it would add to the Attorney General's already redoubtable obligations the additional duty to research each submission to ensure that all earlier unsubmitted changes had been brought to light. We reaffirm...[an earlier ruling] in rejecting this vision of section 5."

## SUPREME COURT HEARS ORAL ARGUMENT IN GEORGIA SCHOOL DESEGREGATION CASE

On October 7, 1991, the Supreme Court heard oral argument in a Georgia school desegregation case that addresses when a formerly segregated school district may be freed from 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 (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, staff, transportation, extra curricular activities, facilities, (the *Green* factors as outlined by the Supreme Court in *Green v. County School Board of New Kent County* in 1968) and to what extent a school district can be held responsible to counter the effects of demographic changes that occurred after it initially desegregated its schools. (For a thorough discussion of the case, see *CIVIL RIGHTS MONITOR*, Spring 1991.)

### *The Argument*

The following is a brief summary of the oral argument. Readers should remember that questions asked by Justices during oral argument are not a reliable guide to how the Justices will vote.

Attorney Rex E. Lee, who was U.S. Solicitor General during the Reagan Administration, presented the argument for the school district. He argued that in 1969 the school district complied with a desegregation order imposed by the Office for Civil Rights of the then U.S. Department of Health, Education and Welfare and closed the segregated black schools. There was compliance and desegregated schools in 1969, he said. Lee asserted the racial imbalance the schools are now experiencing is due to the rapid increase of the black population in the southern part of the county and was not caused by any actions of the school board. Justice O'Connor questioned whether there was any indication that the demographic movement was attributable to racially identifiable schools. Lee responded that there was no finding of that nature, and Justice O'Connor asked, but aren't we really unsure?

Lee continued that the district court had retained jurisdiction in two areas, faculty and allocation of resources, but had relinquished jurisdiction in the four other areas. The Court of Appeals held that a school system must achieve unitary status in all six categories for at least three years, and demographic changes cannot be a defense to racial imbalance until all vestiges of segregation have been eradicated. Justice O'Connor questioned whether the *Green* factors are distinct constitutional violations or whether together they constitute a single violation. Lee responded that the *Green* factors were guidelines. The school district, he said, was asking for relief from a new, expanded order imposed on a system that had operated under an old order for 16 years.

Justice Stevens noted figures in the record that show a growing trend between 1969 and 1975 in the number of schools with an African American population of 50 percent or more, and questioned whether in 1975 the school district had a duty to prevent schools from becoming increasingly racially identifiable even if that were due to demographic factors. Lee responded that the school district would have asked for the same thing in 1975 as it is asking for today. He asserted the issue is causation and the Supreme Court's decision in *Swann* had established that federal judicial authority may address constitutional violations only. [*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)].

Justice Kennedy questioned whether the constitutional violation was the stigma to the entire black community, and stated that the nature of the violation extends beyond simply desegregating and then asserting that additional relief is not required even if the schools are racially identifiable one year later. There is de facto racial

imbalance in schools across the country but consistently the law has looked to who caused it, that is, whether it was the result of a constitutional violation. In this case the District Court's findings show that the racial imbalance was not caused by the school board, Lee said.

Lee concluded that the school district had complied with HEW's neighborhood assignment order for 22 years, and in the DeKalb County school district racial imbalance there can no more be traced to constitutional violations then it could be in Philadelphia or Atlanta. Busing and "drastic gerrymandering" would be necessary to address the racial imbalance today, Lee stated.

U.S. Solicitor General Kenneth W. Starr argued for ten minutes in support of the school district's position. Starr agreed with Lee that causation is a critical part of the inquiry. This Court says the federal court remedy is excessive if it goes beyond curing the constitutional violation, Starr pointed out. He continued that the 1969 school desegregation plan was formulated with the guidance of HEW and this Court's *Green* decision, and the district court found that the school board acted in good faith. Justice Kennedy questioned whether there was a responsibility to address demographic shifts immediately after the system is desegregated. Starr responded in the negative.

Attorney Christopher A. Hansen, ACLU, argued on behalf of the African American students and their parents. He began by saying that the case involved three facts: the school district was intentionally segregated for many years; the district court found that the system had never fully desegregated and that vestiges of segregation remained; and today the schools are still separate and unequal with the black schools receiving fewer resources. Justice Scalia asked what Hansen was referring to when he spoke of resources. Hansen responded that less money was spent per pupil in the African American schools, and the teachers were less experienced than in the white schools. Justice Scalia asked isn't the principal element of difference in resources that teachers with less experience are paid less. Hansen answered that factors such as the age of the school and the experience of teachers explained some of the difference but not the entire difference.

Hansen pointed out that the district court found that in two instances the school district had not complied in good faith: the desegregation of faculty and resources. Justice White asked counsel, if the faculty had been desegregated and the resources equalized, would the school district have a constitutional duty to reassign students when racial imbalance was due to demographic factors? Hansen answered that the school board's responsibility was not to counteract purely demographic changes, but that the board had a responsibility to maintain desegregation for at least three years. You cannot cure years of segregation with one hit of desegregation, he argued.

The lawyer continued that the remedy has to cure the segregation that has built up; it must break the pattern. But, here, he went on, the district court ignored the possibility that the *Green* factors interact together. When African Americans are assigned to one school that says something to the community about that school, Hansen asserted. Justice White noted that the district court found that the school board was not responsible for the demographic changes. Hansen responded that the district court said the school board couldn't have done anything about purely demographic changes, but the court also said that magnet schools and grade reorganization would have broken the pattern early on. Hansen said the district court found that from 1969 to 1975 the school board affirmatively took action to make student assignments worse. Thus, he said, the question posed is did the DCSS cure segregation after 1969, not whether it caused that segregation.

Justice Scalia asked, if the school district violates the law in faculty and resources only would it be necessary for the remedy to include students? Hansen replied that faculty and resource violations affect student assignments and that the factors, therefore, have to be remedied together. He asserted that the district court found that today and over the years there were things the school district could have done but did not do to desegregate the schools. In fashioning a remedy, Hansen said, it is important to remember that the school district has never effectively desegregated. The appellate court was correct in ruling that the school district has a duty to take all steps necessary to obtain racial balance throughout the student population, and that it is the school district's duty to break the pattern of segregation, Hansen concluded.

## **SUPREME COURT HEARS ORAL ARGUMENT IN MISSISSIPPI HIGHER EDUCATION SCHOOL DESEGREGATION CASE**

On November 13, 1991, the Supreme Court heard oral argument in a Mississippi higher education case, *U.S. v. Mabus*, No. 90-1205, and *Ayers v. Mabus*, No. 90-6588. On April 15, the Supreme Court had agreed to ex-

amine 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 is what is required of the state of Mississippi to satisfy its affirmative obligation to eliminate the effects of its discriminatory system. In assessing what standard should be applied there is on the one hand, *Bazemore v. Friday*, a Fourteenth Amendment challenge to the North Carolina Extension Service 4-H and Homemaker Clubs which had been racially segregated by law prior to 1965. The Supreme Court ruled that even though the clubs continued to exhibit marked racial imbalance, the Extension Service has 'disestablished segregation' by adopting a policy allowing all club members to freely choose which club they wished to join. On the other hand, are elementary and secondary school cases (*Swann v. Mecklenburg School District*, *Green v. New Kent County School Board*), in which the Supreme Court said that there are extensive affirmative action requirements and the ultimate test is actual desegregation. The issue is where, between these two poles, the obligation of a formerly segregated higher education system lies.

### *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 five 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.

The trial record established that in 1985-86, the African American student enrollment at the HWIs was:

University of Mississippi	5.9%
Mississippi State University	11.0%
University of Southern Miss	14.2%
Mississippi Univ for Women	18.0%
Delta State University	17.6%

The African American enrollment at the HBIs was:

Jackson State University	91.9%
Alcorn State University	95.6%
Mississippi Valley State University	99.3%

For a thorough discussion of the background of this case, and the lower court decisions, see *CIVIL RIGHTS MONITOR*, vol. 5, no. 4, Spring 1991.

### *Executive Branch Changes Position*

It is worth noting that between the time the Supreme Court granted review of this case and the oral argument, the Executive Branch reversed its position on whether Mississippi's constitutional obligation included enhancement of the historically black institutions.

In a brief filed in July, the Department of Justice (DOJ) took the position that the state did not have an obligation to provide additional funding to the HBIs. The brief stated: "We [do not] discern an independent obligation flowing from the Constitution to correct disparities between what was provided historically black schools in terms of funding, programs, facilities, and so forth and what was provided historically white

schools...There is, in any event, a fundamental point to the demands imposed on the State by the Constitution, as opposed to a State's considered view of what constitutes sound educational policy: It is the students and not the colleges that are guaranteed the equal protection of the laws."

In October, after leading black educators reportedly lobbied President Bush on this issue, the DOJ filed a highly unusual second brief in the case reversing its position and observing in a footnote, "suggestions to the contrary in our opening brief...no longer reflect the position of the United States."

The second brief states:

"More broadly, it is incumbent on the State of Mississippi to eradicate discrimination from its system of higher education. Over the years, that discrimination manifested itself in a deprivation of equitable and fair funding to historically black institutions which sought faithfully, and under difficult circumstances, to serve the interest of black students in Mississippi. Those students were deprived of the unfettered choice demanded by the Equal Protection Clause. Indeed, those historic disparities operated to deprive prospective students of all races of the full range of choices that would have been theirs to enjoy but for the State's discriminatory practices. The time has now come to eliminate those disparities and thereby unfetter the choice of persons who can hereafter choose freely among the State's institutions of high learning."

### *The Argument*

The following is a brief summary of the oral arguments. Readers should remember that questions asked by Justices during oral argument are not a reliable guide to how the Justices will vote.

Attorney Alvin O. Chambliss, Oxford, Mississippi, presented the argument for the private plaintiffs in the case. He began by outlining the history of segregated higher education in Mississippi, stating that in 1954 when the Supreme Court was deciding *Brown v. Board of Education* the state of Mississippi admitted that it spent less on the historically black institutions than the historically white institutions, and that it was sending blacks out of state to attend graduate school. Chambliss continued that during the 1970s and 1980s, there was a 14 percent decrease in the black enrollment in state higher education institutions, and that today there is a downward trend in the number of degrees awarded to blacks. He asserted that this is a history Mississippi wants to walk away from. Chambliss said that blacks are still suffering under this system, through the misuse of ACT [a standardized college admission examination] scores, and the hostility toward blacks that exists at the University of Mississippi, the flagship HWI. This is the same system as existed in 1962. Today 99 percent of whites go to the HWIs, Chambliss said.

In response to a question from Justice O'Connor, Chambliss said that the state's obligations were defined not just by the Constitution, but by policies issued by the Department of Health, Education, and Welfare (now the Department of Education) under Title VI of the Civil Rights Act of 1964. [The higher education desegregation criteria were developed by HEW to implement a court order that federal funding of segregated systems of higher education was in violation of Title VI of the Civil Rights Act of 1964. HEW was ordered to begin enforcement proceedings against states which failed to desegregate their higher education systems. The criteria focussed on three major areas: (1) disestablishment of the structure of the dual system; (2) desegregation of student enrollment; and (3) desegregation of faculty and administrative staffs, nonacademic personnel, and governing boards. The criteria also require states to "specify steps to be taken to strengthen the role of traditionally black institutions in the State system". For a more thorough discussion see, U.S. Commission on Civil Rights *The Black/White Colleges: Dismantling the Dual System of Higher Education*, April 1981.]

Justice Scalia questioned what remedies the plaintiffs were pushing for. He said if the objective is the elimination of de facto segregation then the HBIs won't be predominantly black, and if the de facto segregation is the result of preference then strengthening the HBIs invites continued segregation. Chambliss responded that Title VI is important in considering the remedy because it provides objective criteria to measure whether desegregation of the system is being accomplished in a fair manner. He added that there will always be some racially identifiable campuses, but that a system where only two percent of the faculty and one percent of the administration at the HWIs is black is not desegregated.

Solicitor General Kenneth W. Starr argued for the Department of Justice's position that the state of Mississippi created and has maintained a dual system of higher education and that there are three clear signs of that system. He began by saying that the way in which students enter the system is discriminatory, because the admissions test channels blacks to the HBIs. Chief Justice Rehnquist questioned isn't it the same test for blacks and whites? Starr responded that it is, but that the test has a discriminatory effect. He continued that the test

was first applied after James Meredith sought admission to the University of Mississippi, and it operates today to channel black students because of different minimum standards at the HBIs and the HWIs. Starr said the state uses only that test to determine admission although the makers of the test specifically say that the test should not be used as the sole criterion for admission. Justice Blackmun asked: do you want lower standards for all, what would you propose? Starr responded that the state should use other criteria, such as high school grades and recommendations. Changing the admission criteria, he said, would increase the enrollment of blacks at the HWIs.

Chief Justice Rehnquist questioned whether there had been District Court findings on the admissions process. Starr said the District Court found no discriminatory intent in using the ACT test, but that the District Court was wrong. Rehnquist said, isn't the appropriate question whether the test is intended to discriminate at this time? Starr replied that the District Court finding can stand but that the court used the wrong standard in assessing whether the intent in using the test is to discriminate. We challenge the standard the court applied said Starr: the proper standard is, is this a remnant of the prior segregated system?

Starr continued: because of unnecessary program duplication (for example, at two schools in the Mississippi delta, one HWI and one HBI) and with the facilities quite dissimilar, it is unrealistic to expect students with choice to go to an institution that is in poor condition and underfunded. Scalia asked, why have not qualified black students or faculty chosen to go to the HWI; isn't much of this caused by personal preference? Starr said that for 70 percent of the black students, the admission standards prevent choice. He asserted that the state should seek to eliminate program duplication, not create perfect duplication: the state should identify its program needs, and then use the HBIs to address those needs.

Justice Kennedy asked how placing such programs at the HBIs would increase the black enrollment at Old Miss. Better facilities at the HBIs does not address Old Miss, Kennedy said. Starr answered that to address Old Miss you must give me my argument about the ACT admission criteria--the admission criterion should be changed and the state should build up the HBIs by placing new programs at these schools.

Attorney William F. Goodman, Jr., Special Assistant Attorney General of Mississippi, argued on behalf of the state. He began by stating that the Supreme Court had granted review of this case because of Mississippi's history, to assess whether today given the years of affirmative action on the part of the state to dismantle its segregated system more than freedom-of-choice is needed. The question that needs to be addressed is whether qualified black students can freely choose among the institutions, Goodman said. He asserted that access to education in Mississippi has been accomplished: one third of black university students in the state attend HWIs. Justice Stevens questioned whether Goodman was using current figures or the figures shown by the record. Goodman said he was using current figures, and Rehnquist asked him what the record shows. [The record shows that in 1985-86 over 99 percent of the white students were enrolled in HWIs and over 71 percent of the black students were enrolled in HBIs.] Goodman continued that the debate is about the three HBIs and whether any institution can claim a right to certain programs, and to be a certain size. He stated that DOJ in its first brief had said students have rights, not institutions.

Goodman said that the state did not dispute the significance and importance of HBIs. The state, he asserted, has been giving enhancement dollars and equity funding to the HBIs for 30 years. The schools that are underfunded, he said, are the three comprehensive HWIs. Rehnquist questioned what he meant by underfunding, and after additional prodding from Rehnquist, Goodman answered: Insufficient funds in the eyes of educators to do the job.

O'Connor asked, if the evidence established that HBIs were underfunded and that resulted in deficiencies which remain today, so that state action caused those deficiencies, should the remedy include addressing those deficiencies? Goodman said: no, the fact that an institution is small and receives less money does not mean it is inadequate; there is diversity among institutions: large, small, rural, urban. Justice Thomas asked whether Goodman would make a distinction between schools that are small as the result of a segregated system and schools that are small but had not been subjected to segregation. Goodman said he would not make such a distinction today.

Rehnquist asked if the state's position is that in 1960 the state had said, from now on there will be no racial barriers, we will use the same test, and nothing more is required. Goodman responded in the negative and Stevens followed up by reading from the state's brief citing the Appeals Court decision: "Because Mississippi, in thought, word and deed, discontinued 'prior discriminatory practices' and adopted and implemented 'good-faith, race-neutral policies and procedures,' the court of appeals held that the state had satisfied its affirmative duty to disestablish." Stevens asked, isn't that what the court of appeals said about your position and isn't that argument similar to what Rehnquist said? Goodman responded that Mississippi has never hidden its past, and took affirmative action in eliminating its segregation. We never said that all we needed to do was to



wake up and say we no longer segregate, he continued, but desegregation cannot put an obligation on the state to control student choice.

Justice White asked what was the purpose of the ACT admissions requirement. Goodman said the standard was adopted in 1976, not in 1962. White asked the purpose in having different standards for admission to the schools. Goodman said that in 1976, the state thought about raising the standard for the HBIs but concluded that would put them out of existence as most of the black students in the state would not be able to meet a higher standard. White asked: why does the state oppose the admission standards the DOJ is recommending. Goodman said it was unbecoming for the DOJ to be imposing standards on the state. White said that may be, but why does the state oppose. Goodman said the state is defending its process. Rehnquist said: if the present standards pass constitutional muster than it is not the DOJ's responsibility to impose standards. Goodman agreed.

Justice Souter said that the state's argument sounded like *Bazemore* and asked Goodman to explain in what respect the state's standard is different from *Bazemore*. Goodman argued that the standard under *Bazemore* is all the state is required to do, and by any interpretation of *Bazemore* we have met the test. O'Connor said but in *Bazemore* the segregation was not attributable to the state. Goodman said that there was a responsibility for the state to adopt new policies and implement them and we have done that. Souter said but isn't the difference that in *Bazemore* once the policy was modified, there wasn't an administrative process in place that continued to encourage the prior system? Goodman said: As I see it, *Bazemore* is an answer to this case, but it doesn't have to be the only answer.

White said given the obligation under Title VI and the Constitution, at what date was the state in compliance. Goodman first said, after the new policies were put in place, and White pressed him for a date. He responded, by 1980. White asked for the earliest date and Goodman, said mid to late 70s. Goodman continued that the crux of this case is not choice, but the belief that the HBIs are entitled to be preserved by the state. The HBIs cannot be preserved by judicial decree, he said, but by the alumni, the executive branch, and the legislative branch.

Chambliss in rebuttal contended that choice in Mississippi is fettered by factors that prevent free choice or encourage racial choice: ACT, the staff composition, programs, racial hostility at Old Miss. *Brown v. Board of Education* and other cases have established that the state's duty is to make whole, not simply to introduce racial neutrality Chambliss concluded.

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