

# Civil Rights Monitor

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## Leadership Conference Education Fund

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# CONGRESS CONSIDERS EXTENSION OF A BILINGUAL PROVISION OF THE VOTING RIGHTS ACT

On February 26, 1992, the Senate Subcommittee on the Constitution held a hearing on legislation to extend section 203, Bilingual Election Requirements, of the Voting Rights Act (VRA) which is due to expire in August of this year. Subcommittee Chair Paul Simon (D-IL) has introduced a bill to extend the bilingual requirements until June 29, 2007, when the other provisions of the VRA will expire. Senators Orrin Hatch (R-UT), Dennis DeConcini (D-AZ), Arlen Specter (R-PA), Edward Kennedy (D-MA), Daniel Inouye (D-HI), John McCain (R-AZ), Tom Daschle (D-SD), Dave Durenberger (R-MN), Alan Cranston (D-CA), Jeff Bingaman (D-NM), Timothy Wirth (D-CO), and Howard Metzenbaum (D-OH) have joined in the introduction of the Voting Rights Act Language Assistance Amendments of 1992 (S. 2236).

In addition to extension, the bill makes a change in the provision relating to the coverage of Native Americans. The change assures that Native Americans living on reservations that cross county and state lines will be entitled to bilingual assistance when five percent of the reservation voting-age population is non-English. The new provision adds to the present coverage which applies only where five percent of a county's voting age population consists of non-English speaking Native Americans.

## Hispanic Caucus Bill

On February 25, 1992, Representative Jose Serrano (D-NY) introduced legislation on behalf of the Congressional Hispanic Caucus to extend section 203 until the year 2007 and to add two new provisions. The bill includes the Native American provision also contained in the Senate bill, and it amends the general coverage provision to include a numerical threshold of 10,000 as an alternative to the five percent trigger now contained in section 203. A Congressional Hispanic Caucus news release explains the new provisions in this manner:

"The current formula for calculating which counties are covered by Sec. 203 has left out many large Hispanic communities. The VRA states that a county must provide bilingual assistance to voters if five percent of voting age citizens do not speak English well enough to make an informed vote. As a result, some densely populated urban counties are not covered because the total population dwarfs the Hispanic community. For example, Los Angeles County has over three million Hispanics but is NOT covered by Sec. 203. That is because the 200,000 voting age Hispanic citizens who speak English poorly comprise less than five percent of the county's 8 million people. The Voting Rights Improvement Act of 1992 would require that a county is covered if they meet the five percent trigger OR if they have more than 10,000 voters who speak English poorly. The provision would also allow more Asian communities to be covered by Sec. 203.

"Because Native American reservations frequently cross state or county boundaries, many large Native American populations are not covered by Sec. 203. For example, the Tohomo O'odam tribe in Southern Arizona, the fifth largest tribe in the U.S., is uncovered by Sec. 203 even though more than 80 percent of its members speak the O'odam language. While the reservation falls into three counties, the most substantial portion of the reservation is in Pima County. Under current law, only the limited English proficient population of the O'odam tribe in Pima County is used in determining coverage. Similar to the case of Hispanics in Los Angeles County, the huge urban population of Tucson, the largest city in Pima County, overwhelms the population of the O'odam tribe. The Voting Rights Improvement Act of 1992 would amend the definition of 'political subdivision' to include, where appropriate to cover Native Americans, the reservation or its equivalent."

## Background

The following borrows heavily from a document prepared by the National Council of La Raza, *Section 203: Language Assistance Provisions of the Voting Rights Act*.

Section 203, and two other language assistance provisions, were added to the Voting Rights Act in 1975 to address the exclusion of limited English proficient voting age citizens from effective participation in the electoral process. The other two provisions are section 4(f)(4) which covers jurisdictions that met certain criteria in the November 1972 presidential election, and section 4(e) which primarily protects voters educated in Puerto Rico in American-Flag schools by prohibiting "states from conditioning the right to vote...on ability to read, write, understand, or interpret any matter in the English language."

Section 203 is based upon the Congressional finding that the unequal educational opportunities commonly suffered by language minorities tend to result in high illiteracy rates and low voting participation, thus preventing these citizens from exercising their right to vote.

The bilingual election requirements of Section 203:

"Prohibit any state or 'political subdivision' (defined as a county or parish) with significant numbers of limited English proficient (LEP) Hispanic, Asian American, Native American, and Alaskan Native voters, who also have an illiteracy rate above the national average, from conducting English-only voting assistance and elections;

"Require covered jurisdictions to provide 'any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots,' in the language of the applicable language minority."

Under current law, a state, county, or parish is subject to section 203's requirements if the Director of the Census determines that:

- more than five percent of its voting age citizens are members of a single language minority and do not speak or understand English sufficiently to participate in the electoral process; and
- the illiteracy rate of this group is higher than the national illiteracy rate (defined as failure to complete the fifth grade).

## Hearing Testimony

The Senate Subcommittee on the Constitution heard from a number of witnesses who testified in support of extension of the bilingual provisions of the Voting Rights Act. The only opposition to extension was expressed by the Executive Director of English First, "an organization of citizens who wish to make English the official language of government in America."

During the hearing, Senators Simon and Hatch both expressed support for an amendment to their bill to address the need for an alternative numerical benchmark. Senator Hatch stated:

"I also note that there is a serious flaw in the current statute that...[our bill] does not yet address. Because of the percentage threshold provisions of the statute...the following anomaly exists:

"A county with 10,000 citizens of voting age, including 501 citizens of a language minority with an illiteracy rate higher than the national average, must provide bilingual assistance to those 501 citizens. A county with 500,000 voting age citizens, including 25,000 citizens of a language minority, need not provide assistance to those 25,000 citizens...A statute that requires one county to provide assistance to 501 members of a language minority but does not require a county with 25,000 members of the same, or a different, language minority to provide the same assistance makes no sense.

"I intend to offer an amendment at the appropriate time to address this anomaly. I seek the advice and assistance of the witnesses and others as to the best and most realistic way to address this problem."

The first witness was House-sponsor Serrano who testified in support of extension and an amendment to address problems faced by the Native American community, and of including the 10,000 benchmark in the coverage formula. Serrano said:

"Experience over these last 10 years with Section 203 provisions confirms its effectiveness, but also reveals some inadequacies in the method by which jurisdictions are identified for coverage. Relying exclusively on the five percent trigger deprives large limited English proficient populations of badly needed assistance.

"Many jurisdictions with numerically small limited English proficient voting populations are covered by Section 203 because the total eligible voting population is numerically small, while other jurisdictions with much larger target populations are not covered...significant jurisdictions such as Los Angeles County, California, Cook County, Illinois, Queens County, New York, Philadelphia, Pennsylvania, and Essex County, New Jersey all have an estimated total of at least 300,000 limited English proficient Latino voters [but] have been denied bilingual voting assistance because none of these counties meet the five percent standard...

"Similarly, large Asian American communities in California (Los Angeles, San Francisco, and Santa Clara counties) and three New York City counties (Kings, Queens, and New York) are currently not covered by section 203, though they would benefit from language assistance."

John Dunne, Assistant Attorney General for Civil Rights, Department of Justice, testified in support of a fifteen year simple extension of section 203 of the Voting Rights Act, and urged the subcommittee to make prompt passage of proposed extension legislation drafted by the Department of Justice a top priority.

In response to questions from Senator Simon about whether the Administration would be willing to support the amendment for Native Americans, and the 10,000 benchmark, Dunne said that "before expanding the scope, we need a better sense of the scope of the problem."

George Tryfiates, Executive Director, English First, testified in opposition to the bilingual provisions of the Voting Rights Act asserting that bilingual ballots and other bilingual voting procedures are "a perversion of the intent of the Voting Rights Act." He added:

"The Voting Rights Act was Congress's response to invidious discrimination against racial minorities at the polling place. Obviously, a person's ability to understand English is not immutable in the way a person's race is. Thus, to use the Voting Rights Act to address these two widely disparate matters is foolish at best and dangerously divisive....A policy of bilingual ballots begs the fundamental question: Should it be necessary for a person to understand English before he or she can participate in the political process? We believe that the answer to that question is yes. And, most Americans would agree that the answer to that question is yes. The responsibility is with the voter who already knows that he or she needs to learn English."

The House Subcommittee on Civil and Constitutional Rights is scheduled to hold hearings on the bilingual provisions on April 1 and 2, 1992.

## MEASURES TO AMEND THE CIVIL RIGHTS ACT OF 1991 ARE PENDING IN CONGRESS

In order to gain the support of enough members of Congress to override a threatened presidential veto of the Civil Rights Act of 1991, civil rights advocates in Congress last year agreed to several compromises including an exemption for the long running *Wards Cove* case, and a cap on damages for intentional discrimination. Civil rights advocates now are pushing for passage of legislation to remove the exemption and the cap. On March 11, the Senate Labor and Human Resources Committee, chaired by Senator Edward Kennedy (D-MA), voted both measures out of committee by voice votes.

The Justice for Wards Cove Workers Act (H.R. 3748, S. 1962) would eliminate an exemption in the 1991 Act which prevents the complaining workers in the *Wards Cove* case from enjoying the broader fair employment protections provided by the Act. The bill was introduced in the last session by Representative Jim McDermott (D-WA) and Senator Brock Adams (D-WA) and presently has 90 cosponsors in the House and 11 in the Senate.

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 to which this applies is the *Wards Cove* case itself.

Representative McDermott in a February 24, 1992 letter to House members states:

"Last fall, Congress enacted the Civil Rights Act of 1991. It overturns the standards for job discrimination cases defined in *Wards Cove Packing Co. v. Atonio*, a 1989 Supreme Court decision that had made it more difficult for victims of discrimination to challenge employers' discriminatory practices.

"But for the 2,000 American cannery workers who brought the *Wards Cove* case 17 years ago, the Civil Rights Act is a lie. The reason is a special provision...added at the insistence of Alaska' Senators. It exempts the *Wards Cove* case, and that case alone from the Act. It means that for those Asian-Pacific and Alaska Native workers, and for no other Americans, the Supreme Court decision of *Wards Cove v. Atonio* will forever be the law of the land."

The Equal Remedies Act (S. 2062, H.R. 3975), introduced in the last session of Congress, would remove the cap on damages in the CRA 1991. The principal sponsors are Senator Edward Kennedy (D-MA) and Representative Barbara Kennelly (D-CT), and there are 32 additional sponsors in the Senate and 95 in the House.

A fact sheet prepared by the National Women's Law Center states:

"Both compensatory and punitive damages are available without statutory limitation to victims of *intentional* race and national origin discrimination under a post-Civil War statute, section 1981. Under the CRA, however, regardless of the egregiousness of the discrimination or the extent of their loss, recoveries of women, people with disabilities, and certain religious minorities are limited according to a sliding scale. For employers of one hundred or fewer employees -- 97.5 percent of all employers in the country -- the cap is set at \$50,000. Employers with over 500 employees never have to fear an award over \$300,000.

"The damages remedy in the CRA is modeled on section 1981. There is absolutely no evidence of abuse under section 1981, however, to justify the caps. Indeed, studies show that damage awards under section 1981 are limited in number and modest in amount. While many awards will accordingly be under the caps, it is unconscionable to deny full recovery to women and people with disabilities who incur larger losses or who suffer from egregious discrimination. Under the existing scheme, those most harmed will be forced to accept incomplete compensation. Moreover, by making awards predictable, caps permit employers, in effect, to budget for discrimination. Discrimination must never be a predictable cost of doing business."

In a related development, the Supreme Court said that uncapped damages are available for sex discrimination under Title IX of the Education Amendments of 1972 (see SUPREME COURT RULES THAT COMPENSATORY DAMAGES ARE AVAILABLE UNDER TITLE IX, p. 12).

## ADMINISTRATIVE ENFORCEMENT AND JUDICIAL INTERPRETATION OF THE CIVIL RIGHTS ACT OF 1991

The following borrows heavily from The Lawyers' Committee for Civil Rights Under Law, *Analysis of Cases and Authorities on the Application of the Civil Rights Act of 1991 to Pending Cases and to Pre-Act Conduct*, by Richard T. Seymour, Michael Selmi, and Sharon Vinick. Persons wanting additional information should contact the Lawyers Committee, Suite 400, 1400 Eye Street, NW, Washington, D.C. 20005.

Section 402 of the Civil Rights Act of 1991 provides that "except as otherwise provided, the amendments made by this Act shall take effect upon enactment." Civil rights advocates generally agree that the bill covers cases that were pending at the time of enactment, and applies to pre-Act conduct for which a suit may be brought after the CRA 1991 became law. But the White House immediately sought to portray coverage as restricted to actions taken after the date of enactment, i.e., after November 21, when the President signed the bill, and thus also not applying to pending cases. The Administration, through the Equal Employment Opportunity Commission and the Department of Justice, has adopted this interpretation, and the issue is being addressed in litigation around the country.

On December 27, 1991, the Equal Employment Opportunity Commission issued *Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct*. The policy states that "the Commission will not seek damages under the Civil Rights Act of 1991 for events occurring before November 21, 1991." The policy guidance applies only to damages claims, and does not, for example, address whether disparate-impact cases should be subjected to the same narrow interpretation.

On February 13, 1992, the U.S. Commission on Civil Rights provided the EEOC, as requested, a legal analysis of EEOC's policy guidance. The Commission's legal analysis concludes:

"that the EEOC's policy guidance is erroneous in that it misconstrues time honored principles of statutory construction, overlooks significant judicial interpretation of statutory language similar to that in the 1991 Civil Rights Act...Furthermore, the EEOC, having acknowledged the existence of considerable judicial precedent supportive of the applicability of the damages provisions of the Act to pending charges and pre-Act conduct, and having failed to provide sufficient justification for not seeking to avail itself of those stronger remedies, would appear through the execution of such policy to fall far short of traditional standards of aggressive statutory enforcement required by its enabling legislation...The EEOC, therefore, should rescind and restructure its proposed policy guidance in accordance with applicable judicial precedent."

The National Treasury Employees Union (NTEU) has sued the EEOC over its "policy guidance", asserting that because the EEOC adjudicates claims of employment discrimination by Federal agencies, the policy guidance is "final agency action for which there is no other adequate remedy" within the meaning of the Administrative Procedure Act [APA]. The suit alleges that inasmuch as the Policy Guidance violates the 1991 Act, it is also in violation of the APA. The NTEU has moved for summary judgment and a hearing has been set for April 10, 1992, *National Treasury Employees Union v. Kemp*, C.A. No. C 92-0115 BAC (N.D. Calif., filed January 2, 1992).

So far two cases have been taken to the Supreme Court on the question of whether the Civil Rights Act of 1991 applies to pending cases. Both cases are claims filed under section 1981. [Section 101 of the Civil Rights Act overturned the Supreme Court's *Patterson* decision and made clear that section 1981's prohibition against discrimination covers all aspects of the employment relationship. In *Patterson* in June 1989 the Court had limited the reach of section 1981, ruling that the law's prohibition of racial discrimination in the making and enforcing of contracts covered only hiring and not problems or behavior such as racial harassment that may arise on the job.]

In both cases the Court granted the petition for review, vacated the judgment of the Circuit, and remanded the case "for further consideration in light of the Civil Rights Act of 1991." The significance of this action is that the Court is treating the issue of the applicability of the Act to pending cases as an open issue, one it is likely to consider after lower courts rule.

The cases are:

- *Gersman v. Group Health Ass'n*, No. 91-724, 60 U.S. Law Week 3519, 1992. The plaintiff is a computer software services corporation whose only shareholders were Alan Gersman (its president) and his wife. The corporation had entered into a renewable contract with Group Health. According to the complaint, after a new Group Health official took office an assistant to the official responsible for the contract allegedly inquired whether Mr. Gersman was Jewish, and thereafter the contract was not renewed. Plaintiffs sued under section 1981, and the Court of Appeals for the District of Columbia Circuit found that under *Patterson* challenges to terminations of contracts could not be maintained under sec. 1981. At the time the Court of Appeals considered this case the CRA of 1991 had not become law.

- *Holland v. First Virginia Banks*, No. 91-974. As in *Gersman* the Court of Appeals for the Fourth Circuit held that a section 1981 claim was barred by *Patterson*. Again, the Court of Appeals decision antedated the CRA 1991 becoming law.

Numerous trial courts have been asked to apply the CRA 1991 to a variety of legal claims, with some judges applying the Act to pending cases and to conduct that occurred prior to enactment of the Civil Rights Act and others taking the position that the Act does not apply to pre-enactment conduct or to pending cases.

## CIVIL AND WOMEN'S RIGHTS GROUPS URGE THE DEPARTMENT OF EDUCATION TO WITHDRAW ITS PROPOSED POLICY GUIDANCE ON MINORITY SCHOLARSHIP PROGRAMS

Civil and women's rights groups are urging the Department of Education to withdraw its proposed policy guidance on minority scholarships. On December 10, 1991, the Department of Education published in the Federal Register proposed policy on the applicability of Title VI of the Civil Rights Act of 1964 to student financial aid that is awarded, at least in part, on the basis of race or national origin, and written comments were solicited by March 9, 1992.

The stated purpose of the proposed guidance is to answer the question "under what circumstances may colleges offer such race-exclusive scholarships, or other scholarships designed to create diversity, without violating federal law, specifically Title VI of the Civil Rights Act of 1964." The Department published six principles to provide guidance to higher education institutions that use scholarships to increase the racial and ethnic diversity of their student bodies. The principles are:

"RACE-NEUTRAL AID FOR DISADVANTAGED STUDENTS -- Colleges may make awards to disadvantaged students without regard to race, even if that means that such awards go disproportionately to minority students...A disadvantaged student...may be students from low income families...from school districts with high drop-out rates, or students from single-parent families or from families in which few or no members have attended college...

"SCHOLARSHIPS TO CREATE DIVERSITY -- A college may consider race as one factor among several when awarding scholarships designed to help create the kind of campus educational environment that results from having a student population with a variety of experiences, opinions, backgrounds, and cultures.

"RACE-EXCLUSIVE AID TO REMEDY DISCRIMINATION -- A college may award race-exclusive scholarships when that is necessary to overcome past discrimination.

"FEDERAL RACE-EXCLUSIVE SCHOLARSHIPS -- Congress wrote Title VI, and Congress (within the limits of the U.S. Constitution) may create exceptions to Title VI. Therefore, to the extent federal race-exclusive scholarships -- for example -- the Patricia Roberts Harris Fellowship program, which helps minorities pursue graduate and professional studies -- seem to conflict with Title VI, the Department will consider Congress' specific legislative action to create an exception to the more general provisions of Title VI.

"PRIVATELY FUNDED RACE-EXCLUSIVE SCHOLARSHIPS THAT DO NOT LIMIT AID OPPORTUNITIES FOR OTHER STUDENTS -- A college may administer private donor race-exclusive scholarships (a scholarship where the private donor restricts eligibility to students of designated races or national origins) where that aid does not limit the amount, type or terms of financial aid available to any student.

The following are excerpts from the National Women's Law Center's comments on the proposed policy guidance:

*"The Civil Rights Laws Permit Education Institutions to Take Voluntary, Affirmative Steps To Address The Underrepresentation Of Protected Groups Without Requiring An Adjudication Of Discrimination"*

"...Indeed, the Department's own regulations specifically authorize both remedial and affirmative action programs under these statutes...

"While the proposed policy guidance (PPG) acknowledges the regulation, it interprets it to prohibit scholarship programs specifically targeted to address the underrepresentation of members of the very groups protected by the statutes. Instead it would permit only those scholarship programs which enhance 'diversity' within the university, with diversity used in the most general sense of the term. This interpretation, which is accompanied by no analysis, would turn the civil rights acts which were enacted to prohibit and redress specific forms of pernicious discrimination into general, nearly meaningless statements of support for the proposition that universities benefit from having a broad range of students. That range, as contemplated by the PPG, includes minorities and women, to be sure, but it also includes oboe players and students from England. This reading of Title VI is simply not supportable....

*"The Proposed Policy Guidance Inexplicably And Inexcusably Ignores The Serious Problem Of Discrimination Against Women In Scholarship Program"*

"The proposed policy guidance raises the question of whether it is a violation of the civil rights laws to target scholarship resources to members of certain protected groups, particularly racial minorities. However, it inexplicably ignores the very real problem of scholarship discrimination *against* members of protected groups, including women and minorities, and *in favor of* whites and males. We find the Department's decision to devote its first major statement in many years on the subject of scholarship discrimination to 'reverse discrimination' to represent a fundamentally wrong-headed policy. We urge the Department to re-examine its priorities and to put its resources into eradicating discrimination against those for whom the statutes were passed, and for whom the discrimination and the ensuing burdens have long been documented but remain unremedied....

*"The Proposed Policy Guidance Fails As A Matter of Law As It Incorrectly Interprets Both The Civil Rights Restoration Act and The Principle of Significant Assistance"*

"...the proposed policy guidance seriously misconstrues two key aspects of the governing law as it seeks to carve out an exception to permit colleges to 'administer private donor race-exclusive scholarships (a scholarship where the private donor restricts eligibility to students of designated races or national origins) where that aid does not limit the amount, type or terms of financial aid available to any student.' The proposed distinction between 'private donor race exclusive scholarships' which are 'administered' by the institution and scholarships which are funded by the institution -- which is presented without explanation or legal justification -- is in direct contravention of both the Civil Rights Restoration Act (CRRA) passed by Congress in 1988 and the well-established principle that recipients may not circumvent the civil rights laws by extending significant assistance to an entity which discriminates...

"The CRRA clarified that these laws prohibit discrimination in *all* activities of an education institution which receives any federal funds, whether or not such funds flow to the particular activity at issue...Accordingly, if it is a violation of the civil rights acts for a recipient institution to fund a race exclusive scholarship with its own funds, it necessarily follows that it is a violation of these laws to fund a scholarship with private funds....

"...we urge the Department not to promulgate the PPG as a final regulation. Instead, the Department should reinforce the longstanding principle that recipients are permitted to take race, sex, national origin, age and disability into account in order to address the underrepresentation of protected groups in the academic community as well as historic discrimination against members of these groups. Moreover, the Department should devote its resources to eradicating the very real discrimination which continues to keep women and minorities from full and equal participation in academia."



## Higher Education Community Response

In a March 4, 1992, letter to Assistant Secretary Michael Williams, Department of Education, Robert Atwell, President, American Council on Education, on behalf of nineteen higher education association whose members represent most of the nation's colleges and universities, urged the Department to withdraw the proposed guidance. The letter reads:

"The Proposed Guidance is disappointing and troubling...It falls short of understanding that many schools need minority-targeted financial aid to combat those barriers and to achieve campus diversity. It does not explain why the Department is reversing established policy holding most minority-targeted aid programs lawful. The Proposed Guidance, which would bar minority-targeted aid in all but limited circumstances, is in our judgment legally flawed, factually insupportable, and not in the public interest.

"This policy would signal to many minority students not that the door to educational opportunity will be opened, but that it will be closed. Such a signal, coming from the government itself, would likely confirm many minority students' skepticism that the costs and risks of seeking higher education are worth sustaining."

## Related Litigation

On January 31, 1992, the U.S. Court of Appeals for the Fourth Circuit reversed a district court decision holding that the minority scholarship program at the University of Maryland is constitutional because it met "a compelling governmental interest", and was "narrowly tailored to the achievement of that goal." The Fourth Circuit remanded the case "for a determination as to the present effects of past discrimination at UMCP", and stated that "should no further evidence be available upon remand, summary judgment for the plaintiff/appellant would be appropriate."

The appellant, a nineteen year old Hispanic male who enrolled in the University of Maryland, College Park in the fall of 1989 applied for a Banneker scholarship which provides full tuition, room, board and mandatory fees. He met the academic qualifications, but only African American students are considered for the 20 Banneker scholarships, which the University established in 1978 as "a partial remedy for past discriminatory action by the State of Maryland."

The Fourth Circuit opinion states:

"In determining whether a voluntary race-based affirmative action program withstands scrutiny, one cannot simply look at the numbers reflecting enrollment of black students and conclude that the higher educational facilities are desegregated and race-neutral or vice versa. It may very well be, given the complexities of institutions of higher education and the limited record on appeal, that information exists which provides evidence of present effects of past discrimination at UMCP, but no such evidence was brought to our attention nor is it part of the record. The Supreme Court has declared that in some situations the State *may* enact a race-exclusionary remedy in an attempt to eliminate the effects of past discrimination. The proper focus at this stage is whether present effects of past discrimination exist and whether the remedy is a narrowly tailored response to such effects."

## SUPREME COURT RULES IN VOTING RIGHTS CASE

On January 27, 1992, the U.S. Supreme Court ruled 6-3 that section 5 of the Voting Rights Act of 1965, as amended (VRA), does not require covered jurisdictions to submit changes in the decisionmaking authority or allocation of power among state and local officials to the Department of Justice or to the U.S. District Court for the District of Columbia for preclearance. The majority asserted that "such changes have no direct relation to, or impact on, voting." The cases are *Presley v. Etowah County Commission*, No. 90-711, and *Mack and Gosha v. Russell County Commission*, No. 90-712.

Section 5 requires nine states and portions of thirteen other states, with a history of racial discrimination in voting, to submit any changes in "voting qualification or prerequisite to voting, or standard, practice, or proce-

dures with respect to voting" for an administrative or judicial determination that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color..."

It is worth noting that Justice Clarence Thomas, in his first civil rights decision voted with the majority in narrowing the Voting Rights Act.

The dissenting opinion reasons that the statutory definition of voting includes "all action necessary to make a vote effective," and thus section 5 is "not limited to changes directly affecting the casting of a ballot."

## Background

In 1986, for the first time in "modern history" an African-American was elected county commissioner in Etowah County, Alabama, and two African-Americans were elected commissioners in Russell County, Alabama. Prior to these elections both counties were involved in separate litigation that challenged the at-large election system for commissioners and the counties entered into consent decrees (Etowah in 1986, Russell in 1985) that expanded the commission, and changed the election system to a district-by-district system. The Etowah Commission was expanded from five to six members, and the Russell Commission from five to seven members. The changes required by the consent decrees were precleared by the Department of Justice. Elections were held in 1986 under the new systems; two new members were elected in Etowah, one black, one white; and two new black members were elected in Russell.

In 1987, the Etowah County Commission passed by a vote of 4-2 the Road Supervision Resolution that gave the four "holdover" commissioners joint control over the repair, maintenance, and improvement of all roads in the county. Previously each commissioner, although elected at-large, had total control over the roads in his district and the road budget for that district. The two new commissioners were given responsibility for the maintenance of the courthouse, and the operation of the engineering department. On the same day by the same vote the Commission also passed the Common Fund Resolution, which provided that all road funds would be kept in a common account and would be allocated by the Commission as a whole. Thus, each commissioner, no longer had the sole authority to determine how funds would be spent in his district.

In 1964 the Russell County Commission consisted of three members, but in 1972 expanded to five members pursuant to a 1972 federal court order. As in Etowah, the Russell County commissioner although elected at-large had responsibility for a separate residency district and control over the funds allocated for that district. The two new commissioners jointly shared responsibility for "one newly-created residency district for Phoenix City, the largest city in Russell County."

In 1979, following the indictment of a commissioner on charges of corruption, the Commission passed a resolution "delegating control over road construction, maintenance, personnel, and inventory to the county engineer" (unit system).

In 1989, the plaintiffs in these cases "filed a single complaint in the Federal District Court for the Middle District of Alabama alleging racial discrimination in the operation of the Etowah and Russell County Commissions in violation of prior court orders, the Constitution, Title VI of the Civil Rights Act...and section 2 of the Voting Rights Act." Amended complaints added charges of violation of section 5 of the Voting Rights Act because the changes in the authority of the Commissions had not been precleared as section 5 requires. A three-judge district court was convened to hear the section 5 claims, and this is the aspect of the case that reached the Supreme Court. The other claims are still before the original district court.

A majority of the three-judge court panel ruled that changes in the authority of elected officials must be precleared pursuant to section 5 when they "effect a significant relative change in the power exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters." Applying this standard, the court ruled that only Etowah County's road supervision resolution was covered by section 5 and thus should have been precleared. The other changes (Etowah's Common Fund Resolution and Russell's unit system) the court reasoned, were not significant changes and thus not subject to section 5 preclearance.

The plaintiffs appealed, and the question before the Supreme Court was "whether a transfer of decisionmaking authority from one elected official or set of officials to another official or set of officials is a 'change with respect to voting' covered by section 5 of the Voting Rights Act of 1965...regardless of whether the transferred authority is more or less important than other duties of the office."

## Department of Justice Amicus Curiae Brief

The Department of Justice filed a friend-of-the court brief in support of the appellants, the newly elected

commissioners. The DOJ brief states:

"A change in the decisionmaking power of an elected official is a change 'with respect to voting' covered by Section 5 of the Voting Rights Act. Congress intended Section 5 to be applied broadly. In deciding whether a change is subject to preclearance, the court's inquiry is limited to whether the change has the *potential* for discrimination...Moreover, any change with respect to voting, no matter how small or minor, is subject to preclearance....

"Some reallocations of the power of elected officials affect the power of a citizen's vote. For example, eliminating all the powers of an elected body would reduce citizens' votes for members of that body to a nullity. Because such changes could have a racial purpose or effect, they have the potential for discrimination and are covered by Section 5.

"If all reallocations of authority were outside the scope of Section 5, a covered jurisdiction could negate the election of a candidate favored by minority voters simply by reallocating the successful candidate's authority to other elected or appointed officials. That would defeat the purpose of Section 5, which is to bar measures that would 'evade the remedies for voting discrimination contained in the Act itself.'... Accordingly, the lower courts and the Department of Justice consistently have recognized that some reallocations of authority are covered by Section 5."

## The Opinions

The majority opinion written by Justice Kennedy, and joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Souter, and Thomas, affirmed the district court decision but adopted "a different interpretation of section 5 as the rationale for...[its] decision."

"Our prior cases hold, and we affirm today, that every change in rules governing voting must be precleared. The legislative history we rehearsed in *South Carolina v. Katzenbach* was cited to demonstrate Congress' concern for the protection of voting rights. Neither the appellants nor the United States has pointed to anything we said there or in the statutes reenacting the Voting Rights Act to suggest that Congress meant other than what it said when it made section 5 applicable to changes 'with respect to voting' rather than, say, changes 'with respect to governance.'

"If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments. Constant minor adjustments in the allocation of power among state and local officials serve this elemental purpose.

"Covered changes must bear a direct relation to voting itself. That direct relation is absent in both cases now before us. The changes in Etowah and Russell Counties affected only the allocation of power among governmental officials. They had no impact on the substantive question whether a particular office would be elective or the procedural question how an election would be conducted. Neither change involves a new 'voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.'"

The dissent, written by Justice Stevens, with whom Justices White and Blackmun joined, states:

"In 1986, an important event occurred in each of two Alabama counties with long histories of white-dominated political processes. In Etowah County, a black commissioner was elected to the county commission for the first time in recent history, and in Russell County, two black commissioners were elected to the county commission for the first time in 'modern times.'...Because of the three resolutions at issue in this case -- two adopted in Etowah County after Commissioner Presley's election and one adopted in Russell County before the election of Commissioners Mack and Gosha -- none of the three newly-elected black commissioners was able to exercise the decisionmaking authority that had been traditionally associated with his office....

"Prior to these cases, federal courts had uniformly agreed with the Attorney General's interpretation that section 5 covered transfers of decisionmaking power that had a potential for discrimination against minority voters. On at least eight occasions since 1975, the Department of Justice has refused to preclear changes in the power of elected officials that had a potentially discriminatory impact on black voters. The Department has routinely precleared numerous other transfers of authority after determining that they had no discriminatory purpose or effect."

The dissenting opinion further argues:

"Since the decision in *Allen*, [Supreme Court decision in 1969 that section 5 was not limited to changes directly affecting the casting of a ballot] the debate on reenactment of section 5 in 1970, and the issuance of regulations by the Department of Justice, it has been recognized that the replacement of an elective office that might be won by a black candidate with an appointive office is one of the methods of maintaining a white majority's political power that section 5 was designed to forestall. As a practical matter, such a change has the same effect as a change that makes an elected official a mere figurehead by transferring his decisionmaking authority to an appointed official, or to a group of elected officials controlled by the majority. Although this type of response to burgeoning black registration may not have been prevalent during the early history of the Act, it has been an active concern of the Attorney General since 1976...In my judgment, such a change in the reallocation of decisionmaking authority in an elective office, at least in its most blatant form, is indistinguishable from, and just as unacceptable as, gerrymandering boundary lines or switching elections from a district to an at-large basis."

In the March 9, 1992 *Legal Times*, Elliot Minberg, Legal Director of People for the American Way, points out that the Court's ruling rejected Justice Department rules that were adopted in 1971 and that had been applied consistently since then. Previously, the Court had said that such Justice Department interpretations were entitled to "considerable deference." Minberg concludes that the *Presley* decision "is plainly not an example of judicial restraint; instead, it represents an activist effort to countermand a consistent agency interpretation and undermine important anti-discrimination protections."

## **SUPREME COURT RULES THAT COMPENSATORY DAMAGES ARE AVAILABLE UNDER TITLE IX**

On February 26, 1992, the Supreme Court ruled 9-0 that monetary damages are available under Title IX of the Education Amendments of 1972 to victims of sex discrimination in federally assisted educational programs, *Franklin v. Gwinnett County School District*, No. 90-918.

Although this case was brought under Title IX, the ruling will also apply to Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, which prohibit discrimination in federally assisted programs on the basis of race, color, or national origin (Title VI), disability (section 504), or age.

Marcia Greenberger, co-president of the National Women's Law Center, said of the decision:

"With this decision, girls and women finally have a powerful weapon to fight sex discrimination in education. Education institutions will receive the message loud and clear that they have to seriously address the discriminatory policies still too frequently found. Not only is the deterrent value of Title IX substantially enhanced by this victory, but all such victims of discrimination will be compensated for their injuries."

### **Background**

Title IX of the Education Amendments of 1972 states in part that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

In 1979, the Supreme Court ruled in *Cannon* that Title IX was enforceable through a private suit filed in federal courts. The administrative mechanism of filing a complaint with the federal agency through which the educational institution received the federal funds is also available. If the federal agency determines that discrimination has occurred and is not able to reach a solution that would bring the institution into compliance with the law, then the remedy of cutting off the federal funds is available.

According to the complaint, Christine Franklin, during her attendance at North Gwinnett High School was on several occasions sexually harassed by Andrew Hill, a sports coach and teacher at the school. The harassment included coerced sexual intercourse, and Hill threatened to disclose the incidents to Franklin's mother and boyfriend if she did not cooperate. In 1987 and 1988 several students including Franklin reported the harassment to school officials. During the investigation, Dr. William Prescott, the band director, attempted to persuade Franklin to drop her charges. The school initiated an investigation, and "in April 1988 the investigator concluded that the allegations against Hill were true." Hill and Prescott subsequently resigned.

Franklin filed a complaint with the Department of Education's Office for Civil Rights charging intentional discrimination on the basis of sex in violation of Title IX. OCR found a violation of Title IX, but concluded that "because Hill and Prescott had resigned and the District had agreed to implement certain grievance procedures the District had come back into compliance with Title IX." On December 29, 1988, Franklin filed suit in federal district court seeking monetary damages. The district court "dismissed the complaint on the ground that Title IX does not authorize an award of damages." Franklin appealed, the Eleventh Circuit Court of Appeals affirmed the district court decision, and Franklin appealed to the Supreme Court.

Petitioner Franklin's brief before the Supreme Court stated:

"...the *Cannon* Court concluded that (a) Title IX has 'an unmistakable focus on the benefited class,' explicitly conferring the right to be free of sex discrimination...(b) the 1972 Congress that enacted Title IX intended it to mirror Title VI, and the clear contemporaneous understanding of Title VI was that it allowed private actions -- an understanding that continued to be reflected in judicial, legislative, and executive action after 1972, for both Title VI and Title IX...(c) 'the award of individual relief to a private litigant' not only furthers the congressional purpose of protecting individuals against sex discrimination but is sometimes 'necessary' to serve that statutory purpose, because the alternative of a fund cutoff to an entire program or institution is so severe (and harmful to the intended beneficiaries of funding) that it is often inappropriate...and (d) the area of discrimination, especially by the recipients of federal funds, is not primarily a state concern but is of central federal concern..."

## The Opinions

The opinion of the Court written by Justice White, and joined by Justices Blackmun, Stevens, O'Connor, Kennedy and Souter observes:

"In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court held that Title IX is enforceable through an implied right of action [alleged victim has the right to file suit in federal court, in addition to the federal administrative remedy of filing a complaint with the appropriate federal agency]...Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action,...we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise...This principle has deep roots in our jurisprudence."

Justice White's opinion continues:

"From the earliest years of the Republic, the Court has recognized the power of the judiciary to award appropriate remedies to redress injuries actionable in federal court, although it did not always distinguish clearly between a right to bring suit and a remedy available under such a right...This principle originated in the English common law,...it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."

In response to the Department of Justice's assertion in an amicus curiae brief that Title IX remedies should be limited to equitable relief (back-pay and injunctions) against the discriminatory actions, the majority opinion states:

"In addition to diverging from our traditional approach to deciding what remedies are available for violation of a federal right, this position conflicts with sound logic. First, both remedies are equitable in nature, and it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate...Moreover, in this case the equitable remedies suggested by respondent and the Federal Government are clearly inadequate. Back pay does nothing for petitioner, because she was a student when the alleged discrimination occurred. Similarly, because Hill -- the person she claims subjected her to sexual harassment -- no longer teaches at the school and she herself no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all. The government's answer that administrative action helps other similarly-situated students in effect acknowledges that its approach would leave petitioner remediless."

A concurring opinion written by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas asserts that the Court was probably wrong in ruling in 1979 that Title IX provided for a private right of action but concurred in the result here on the basis that "it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate."

Justice Scalia's opinion states:

"In my view, when rights of action are judicially 'implied,' categorical limitations upon their remedial scope may be judicially implied as well...Although we have abandoned the expansive rights-creating approach exemplified by *Cannon*...and perhaps ought to abandon the notion of implied causes of action entirely....I nonetheless agree with the Court's disposition of this case."

But Justice Scalia found a narrow basis for permitting damages in a 1986 law enacted by Congress which abrogated the immunity that states would otherwise have from damage suits under Title IX, Title IV, and section 504 under the Eleventh Amendment. Because of this statute, Justice Scalia said:

"it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate. The Civil Rights Remedies Equalization Amendment of 1986,...must be read, in my view, not only 'as a validation of *Cannon's* holding,'...but also as an implicit acknowledgment that damages are available...remedies (including remedies both at law and in equity) are available for [violations of Title IX] to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State."

On February 27, 1992, Senator Edward Kennedy (D-MA) discussed on the Senate floor the differences that now exist between Title VII which caps the damages available (see above, Measures to Amend the Civil Rights Act of 1991 Are Pending in Congress) and other civil rights statutes. He said:

"The Court's decision in the Franklin case makes clear that unlimited damages for intentional discrimination also are available for race discrimination prohibited by title VI, disability discrimination prohibited by section 504 of the Rehabilitation Act of 1973, and age discrimination barred by the Age Discrimination Act of 1975..."

"Yesterday's decision also highlights the inequities that remain in our anti-discrimination laws. Because of the cap on damages in the Civil Rights Act of 1991, students and teachers in public schools who suffer intentional sex discrimination can be made whole, but nurses in hospitals who suffer similar discrimination cannot be made whole because of the cap."

**Editor's Note:** This anomaly results because Title IX does not cover federal assistance outside the area of education. Hence, nurses in hospitals [even those that are federally assisted] who suffer intentional discrimination could sue only under Title VII which limits damage awards.



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