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EXTENSION OF BILINGUAL PROVISION OF THE VOTING RIGHTS ACT ENACTED INTO LAW

On August 26, President Bush signed into law a measure extending and strengthening a bilingual provision of the Voting Rights Act. The House of Representatives passed the Voting Rights Language Assistance Act of 1992, H.R. 4312, on July 24 by a vote of 237-125. The Senate passed the companion bill, the Voting Rights Act Language Assistance Amendments of 1992, S. 2236, on August 7, by a vote of 74-21. The bills had been reported out of the House Judiciary Committee on June 5 by voice vote and out of the Senate Judiciary Committee on June 18 by a vote of 12-2.

The bill extends, and amends, section 203 of the Voting Rights Act (VRA) until 2007 when the other provisions of the VRA expire. Section 203 is one of the VRA's bilingual provisions that require covered jurisdictions to provide bilingual election materials and voting assistance. During consideration in the Senate, two limiting amendments by Senator Alan Simpson were defeated. The first provided for extension for five years instead of fifteen. It failed 32 to 63. The second Simpson amendment would have required the federal government to cover the cost of implementing the provision. It failed 35 to 60.

In the House a number of weakening amendments were also defeated, including one offered by Representative Gary Condit (D-CA) which would have required the federal government to pay for the costs of implementing the provision. That amendment failed 184-186.

Background

Section 203 expired on August 6. If the provision had not been reauthorized, sixty-eight jurisdictions that provide bilingual assistance would no longer be required to do so. Section 203 and two other language assistance provisions were added to the VRA in 1975 to address the exclusion of limited English proficient (LEP) 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 a congressional finding in the 1975 Act 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. In 1982 most of the VRA was extended for 25 years, but section 203 was extended for only ten.

These were bilingual election requirements of Section 203 that would have died in August 1992 without legislative action:

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

"Requirement that covered jurisdictions 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 covered language minority."

In those situations, primarily affecting Native Americans and Alaskan Natives, where a language is unwritten, the State or local government's obligation is only to provide oral assistance in the language.

Under the VRA as amended in 1982, a state, county or parish is subject to section 203's requirements if the Director of the Census has determined 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).

Impact of Section 203

During the 1992 debate, supporters of the legislation asserted that removing language and other barriers to the vote had led to a phenomenal rise in voter participation among language minority citizens. They asserted that data compiled in areas with large language minority populations and nationwide statistics reported by the Census Bureau documented growing voter registration and turnout.

"Voter registration and participation increased dramatically in precincts in Arizona and Utah which provide Navajo voters assistance under section 203. Voter registration rose 165 percent in Cococino County, Arizona, and 87 percent in Navajo County, Arizona from 1972 to 1990.

"Voter registration among Hispanic citizens in the Southwest doubled from 1976 to 1988. In Texas, where the entire state is subject to Spanish language assistance requirements under section 203 and (4)(f)(4), Hispanic registration rates jumped 125 percent from 1976 to 1988.

"The Census Bureau reports that voter registration among Hispanic citizens increased by 20 percent from 1976 to 1980, and again by 27 percent by 1984. Registration nationwide grew by only 7 percent and 11 percent, respectively, during the same periods.

"Hispanics are now the fastest growing registration and voting group in the country. The voting rate among Hispanic citizens increased five times that of the rest of the nation from 1980 to 1990.

"Hispanic voters constitute a growing percentage of the total voting population. Whereas they had constituted 2.6 percent of all voters in 1980, their share had risen to 3.6 percent in 1990."

Amendments to Section 203

In addition to extension of 203, S.2236/H.R.4312 contain additional triggers for coverage. The first of these, which civil rights advocates supported, permits a numerical threshold of 10,000 limited English-proficient persons in a covered jurisdiction in one of the protected groups to trigger coverage in lieu of the five percent trigger that has been contained in section 203.

Supporters of this amendment argued that by relying solely upon a percentage standard, Section 203 had failed to reach large concentrations of LEP voting age citizens. That is, while some jurisdictions with both numerically small general and LEP voting age populations were covered because in such jurisdictions it is not difficult to reach the 5 percent threshold, other major metropolitan areas with numerically large target populations were not covered because the surrounding general voting population is extraordinarily large.

- "Los Angeles and San Francisco Counties, California; Queens County, New York; Cook County, Illinois; and Philadelphia County, Pennsylvania have an estimated total of at least 500,000 eligible LEP Hispanic voters each, yet failed to qualify for language assistance under Section 203's five percent trigger. The LEP voter populations in these jurisdictions were submerged by the large general voting population in each of these counties.
- "No mainland Asian American community received language assistance under Section 203's five percent trigger. Although Los Angeles, San Francisco and Santa Clara Counties, California, and New York City all have large concentrations of LEP Asian American citizens, they all failed to comprise 5 percent of each county's voting age citizen population."

Second, the bill also amends section 203 to assure that Native Americans living on reservations that cross county or state lines will be entitled to bilingual assistance when five percent of the reservation voting-age population is limited-English-proficient. The new provision adds an alternative to the present coverage only in those counties where five percent of the voting age population consists of limited-English proficient Native Americans.

As Senators John McCain (R-AZ) and Daniel Inouye (D-HI) said in a July 30 letter to their colleagues:

"...S. 2236's alternative coverage standard for Native Americans is a reasonable and necessary improvement to section 203 because it identifies those who need assistance more accurately than the current standard. The new standard identifies tribes with significant percentages of limited English-proficient members that would not otherwise receive assistance under section 203's current standard because they do not constitute five percent of a county's total voting age population.

"Some affected counties will inevitably contain relatively small numbers of Native Americans, since those living on reservations and other Indian lands comprise less than one-third of one percent of the total United States population. An even smaller percentage's proficiency in English is poor enough to qualify for assistance under section 203. These reservation communities are further divided by state and county lines, making it nearly impossible for them to meet section 203's current coverage standard and justifying the enactment of an alternative standard."

In a related matter, the House postponed taking up the Voting Rights Extension Act of 1992, H.R. 5236, a bill "to amend the Voting Rights Act to clarify certain aspects of its coverage and to provide for the recovery of additional litigation expenses by litigants." The bill which was introduced by Representative Don Edwards (D-CA) and reported out of the House Judiciary Committee on June 5 by voice vote, sought to overturn the Supreme Court's 6-3 decision in *Presley v. Etowah County Commission*, No. 90-711, (1992). In *Presley*, the Court held that section 5 of the Voting Rights Act does not require covered jurisdictions to submit changes in the decision-making 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 pre-clearance. The majority asserted that "such changes have no direct relation to, or impact on, voting."

The bill would have also overturned *Rojas v. Victoria Independent School District*, Civ. Act. No. V-87-16 (S.D. Texas, Mar. 29, 1988), aff'd, 490 U.S. 1001 (1989), which also involved a change in the procedure or authority of a governing body following the election of a minority member. In that case, after the election of the first Latina member of the school board, the board voted to change its procedural rules to give the chair discretion to require two votes rather than one in order to place an item on the agenda for discussion.

Additionally, the bill would have amended the Voting Rights Act to allow a prevailing party, other than the United States, to collect "reasonable expert expenses, and other reasonable litigation expenses." This provision responded to the Supreme Court decision in *West Virginia University Hospitals v. Casey*, 499 U.S. ___, 111 S.Ct. 1138 (1991), that successful plaintiffs in civil rights cases could not recover expert fees and other necessary expenses of litigation unless Congress expressly authorized the recovery of such fees and expenses. [In the 1991 Civil Rights Act, Congress, responding to an earlier Supreme Court ruling, authorized recovery of expert fees by successful plaintiffs who sue under Title VII of the Civil Rights Act.]

As reported in the last MONITOR, the Motor Voter Registration Bill passed the House on June 16, 1992, by a vote of 268-153, and passed the Senate on May 20, by a vote of 61-38. President Bush vetoed the legislation on July 2. The bill would have allowed individuals to register when they apply for or renew their drivers' licenses or when they apply for public services such as welfare and unemployment compensation or marriage licenses or hunting permits. Twenty-seven states already have in place a system of motor-voter registration.

These issues are expected to be raised again in the next Congress.

SUPREME COURT RULES IN MISSISSIPPI HIGHER EDUCATION SCHOOL DESEGREGATION CASE

On June 26, 1992, the Supreme Court in an 8-1 ruling vacated and remanded 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...by discontinuing prior discriminatory practices and adopting and implementing good-faith, race neutral policies and procedures", *U.S. v. Fordice, Governor of Mississippi*, No. 90-1205. In remanding the case, the Supreme Court stated that in determining whether a previously segregated higher education system has met its affirmative obligation to dismantle that segregated system the courts must assess whether "policies traceable to the *de jure* system are still in force and have discriminatory effects," and if such policies still exist they must be "reformed to the extent practicable and consistent with sound educational practices."

The question before the Supreme Court was what standard should be applied in determining whether a formerly segregated higher education system has met its obligation to desegregate. Before this decision, the Court had ruled in *Bazemore* that 4-H clubs had met this obligation by simply adopting a policy allowing all club members to freely choose which club they wished to join. In *Swann* and *Green*, the Court ruled that elementary and secondary school systems had extensive affirmative obligations to dismantle the segregated system and that the ultimate test was actual desegregation. In this case the Court came down in between those two poles, but made clear that race neutrality is not sufficient, and that the vestiges of the segregated system must be eradicated.

Background

The state of Mississippi operated a segregated system of higher education consisting of eight institutions until 1962 when a Federal 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). In 1966, the first white student enrolled in one of the three historically black institutions (HBIs).

African American plaintiffs filed suit on January 28, 1975, alleging that the state of Mississippi was continuing to maintain a dual system of higher education in violation of the Constitution, sec. 1981 and sec. 1983 of the U.S. Code, and the Civil Rights Act of 1964. The Department of Justice filed suit alleging similar violations. After twelve years of attempts to reach a consensual resolution, trial began on April 27, 1987. On December 10, 1987, District Court Judge Biggers issued an opinion that the standard that should be applied in higher education desegregation cases can be satisfied by the good faith adoption of race-neutral policies and procedures.

A panel of the Fifth Circuit reversed and remanded the case. But the Fifth Circuit sitting en banc reheard the case and affirmed the district court, finding that Mississippi had met its constitutional duty by "adopt[ing] and implement[ing] race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish."

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 record in the case showed that as late as 1986 more than 99 percent of white students attended HWIs and more than 71 percent of African-Americans attended HBIs; only 60 of the 2,563 faculty employed by the HWIs were African-American; the HWIs and HBIs had different admission standards as well as different missions; the HWIs continued to duplicate programs at the HBIs; and the formulae used by the State to determine funding resulted in the HBIs receiving less state money than the three comprehensive HBIs. [For further discussion of this case, see the *CIVIL RIGHTS MONITOR*, Spring 1991, Winter 1992]

The Opinion

The opinion, written by Justice White, and joined by Chief Justice Rehnquist, and Justices Blackmun, Stevens, O'Connor, Kennedy, Souter and Thomas states:

"the primary issue in this case is whether the State has met its affirmative duty to dismantle its prior dual university system. Our decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation...

"We do not agree with the Court of Appeals or the District Court, however, that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. In a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be attributed to State policies, many can be. Thus, even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the State's prior *de jure* segregation and that continues to foster segregation. The Equal Protection Clause is offended by 'sophisticated as well as simple-minded modes of discrimination'...If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies

too must be reformed to the extent practicable and consistent with sound educational practices..."

Applying these principles, the Court went on to say that:

"Had the Court of Appeals applied the correct legal standard, it would have been apparent from the undisturbed factual findings of the District Court that there are several surviving aspects of Mississippi's prior dual system which are constitutionally suspect... Mississippi must justify these policies or eliminate them."

The opinion identifies four policies of the present system (not meant to be exhaustive) which the Court says need to be examined: the admissions standards, the widespread duplication of programs, the institutional mission classifications, and the continued operation of all eight institutions.

The Court says that the different admissions standards for the HBIs and the HWIS are "not only traceable to the *de jure* system and originally adopted for a discriminatory purpose, but they also have present discriminatory effects."

In discussing the continued operation of all eight institutions the Court states that "though certainly closure of one or more institutions would decrease the discriminatory effects of the present system...based on the present record we are unable to say whether such action is constitutionally required. Elimination of program duplication and revision of admissions criteria may make institutional closure unnecessary."

The Court also states that if the private petitioners are pushing for the upgrading of the three HBIs

"solely so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for *all* its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior *de jure* system when it perpetuates a separate, but 'more equal' one. Whether such an increase in funding is necessary to achieve a full dismantlement under the standards we have outlined, however, is a different question, and one that must be addressed on remand."

Justice Thomas, who agreed with the majority, wrote a separate opinion to "emphasize" that the Court's holding "does not compel the elimination of all observed racial imbalance [and] it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions." Justice Thomas observes that the Court does "not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges *as such*. He concludes:

"Although I agree that a State is not constitutionally *required* to maintain its historically black institutions *as such*...I do not understand our opinion to hold that a State is *forbidden* from doing so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."

Justice Scalia concurs in the judgment in part and dissents in part. Scalia writes that "today's decision places upon the State the ordinarily unsustainable burden of proving the negative proposition that *it* is not responsible for extant racial disparity in enrollment... [The decision] requires state university administrators to prove that racially identifiable schools are *not* the consequence of any practice or practices...held over from the prior *de jure* regime. This will imperil virtually any practice or program plaintiffs decide to challenge...so long as racial imbalance remains."

Scalia continues:

"In the context of higher education, a context in which students decide whether to attend school and if so where, the only unconstitutional derivations of that bygone system are those that limit access on discriminatory bases; for only they have the potential to generate the harm *Brown I* condemned, and only they have the potential to deny students equal access to the best public education a State has to offer. Legacies of the dual system that permit (or even incidentally facilitate) free choice of racially identifiable schools while still assuring each individual student the right to attend *whatever* school he wishes do not have these consequences."

SUPREME COURT RULES ON ST. PAUL MINNESOTA BIAS-MOTIVATED CRIME ORDINANCE

On June 22, 1992, the Supreme Court held by a 9-0 vote that the Minnesota Supreme Court was wrong in concluding that the St. Paul Bias-Motivated Crime Ordinance did not violate the Constitution's First Amendment right of free speech. The Minnesota Court had said the ordinance was a narrowly tailored means to protect the community against bias-motivated threats to public safety and order, *R.A.V. v. City of St. Paul, Minnesota*, No. 90-7675. The Supreme Court disagreed but was divided as to the grounds upon which the case should be decided. The majority opinion written by Justice Scalia and joined by Chief Justice Rehnquist and Justices Kennedy, Souter and Thomas states that the ordinance is "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subject the speech addresses."

The majority opinion states:

"...we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, 'arouses anger, alarm, or resentment in others,' has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to 'fighting words,' [a type of speech the Court has said in previous decisions could be barred] the remaining, unmodified terms make clear that the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects...."

"In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree."

Four Justices disagreed vehemently with the majority's reasoning. Justice White wrote for three of them as follows:

"I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there. This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment...Instead, 'find[ing] it unnecessary' to consider the questions upon which we granted review...the Court holds the ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases and is inconsistent with the plurality decision in *Burson v. Freeman*, 504 U.S. ____ (1992), which was joined by two of the five Justices in the majority in the present case."

Background

The city of St. Paul has a Bias-Motivated Crime Ordinance which states:

"Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

In June 1990 several teenagers burned a crudely-made cross on the fenced lawn of an African-American fami-

ly that lived across the street from one of the teenagers. The city charged defendant R.A.V. under the Bias ordinance and a Minnesota statute prohibiting racially motivated assaults (he did not challenge this charge). The city could also have filed charges under other Minnesota statutes prohibiting terroristic threats, arson, and criminal damage to property. R.A.V. sought dismissal of the St. Paul ordinance charge "on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content-based and therefore facially invalid under the First Amendment." The trial court granted the motion to dismiss but the Minnesota Supreme Court reversed. In rejecting the overbreadth claim the State Supreme Court reasoned that the phrase "arouses anger, alarm or resentment in others" limited the reach of the ordinance to conduct that amounts to 'fighting words,' i.e., 'conduct that itself inflicts injury or intends to incite immediate violence'... and therefore the ordinance reached only expression 'that the first amendment does not protect.'"

The First Amendment, which has long been held applicable to States and their subdivisions as well as to the national government, provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Opinions

Justice Scalia writing for the Court says:

"St. Paul has not singled out an especially offensive mode of expression it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid..."

"In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree."

Justice White in an opinion concurring in the judgment, but disagreeing with the Court's reasoning, joined by Justices Blackmun, O'Connor and Stevens, in part, writes:

"...[T]he majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. The Court announces that such content-based distinctions violate the First Amendment because 'the government may not regulate use based on hostility or favoritism towards the underlying message expressed...Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words...It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil,...but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.'"

Justice White continues:

"In a second break with precedent, the Court refuses to sustain the ordinance even though it would survive under the strict scrutiny applicable to other protected expression....Under the majority's view, a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech. This appears to be a general renunciation of strict scrutiny review, a fundamental tool of First Amendment analysis...."

"As I see it, the Court's theory does not work and will do nothing more than confuse

the law. Its selection of this case to rewrite First Amendment law is particularly inexplicable, because the whole problem could have been avoided by deciding this case under settled First Amendment principles."

Justice Blackmun is a separate opinion concurring in the judgment says:

"I regret what the Court has done in this case. The majority opinion signals one of two possibilities: it will serve as precedent for future cases, or it will not. Either result is disheartening.

"In the first instance, by deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws....

"In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence, but, instead, will be regarded as an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity,' neither of which is presented here. If this is the meaning of today's opinion, it is perhaps even more regrettable."

Justice Stevens also wrote a separate concurring opinion joined in part by Justices White and Blackmun. Stevens states that while he agrees that the ordinance is overbroad for the reasons stated by Justice White, he writes separately "to suggest how the allure of absolute principles has skewed the analysis of both the majority and concurring opinions."

"...I disagree with both the Court's and part of Justice White's analysis of the constitutionality St. Paul ordinance. Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike Justice White, I do not believe that fighting words are wholly unprotected by the First Amendment. To the contrary, I believe our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech. Applying this analysis and assuming *arguendo* (as the Court does) that the St. Paul ordinance is *not* overbroad, I conclude that such a selective, subject-matter regulation on proscribable speech is constitutional....

"In sum, the St. Paul ordinance (as construed by the Court) regulates expressive activity that is wholly proscribable and does so not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity. Taken together, these several considerations persuade me that the St. Paul ordinance is not an unconstitutional content-based regulation of speech. Thus, were the ordinance not overbroad, I would vote to uphold it."

SUPREME COURT RULES THAT ENHANCEMENT OF CONTINGENCY FEES IS NOT PERMITTED UNDER FEE-SHIFTING STATUTES AT ISSUE

A number of federal statutes, particularly civil rights and environmental statutes, include a provision giving the courts discretion to award the prevailing party reasonable attorney's fees as part of the costs. These are commonly known as fee shifting provisions. Congress' intent in enacting such provisions was to strengthen the enforcement of such laws by facilitating the ability of private citizens seeking to enforce the laws to gain competent counsel. The law as it has developed is that the prevailing plaintiff should ordinarily recover attorney's fees unless such an award would be considered unjust.

On June 24, 1992, the Supreme Court issued a 6-3 ruling reading restrictively the fee shifting provisions at issue, *City of Burlington v. Dague*, No. 91-810. The question decided in the case was whether "a court, in deter-

mining an award of reasonable attorney's fees under [the statutes involved] may enhance the fee award above the basic or 'lodestar' amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all for their services." As the concept has developed in the case law, "lodestar" is "the product of reasonable hours times reasonable rate." The decision while addressing the fee shifting provision of the Solid Waste Disposal Act and the Clean Water Act may apply as well to many of the Nation's civil rights and other environmental laws.

In this case, Mr. Dague sued the City of Burlington over the operation of a landfill near his land. He secured the representation of attorneys on a contingent-fee basis, that is, the attorneys would receive payment only if the suit were successful rather than being paid for services rendered regardless of the outcome of the case. The trial court determined that the City of Burlington had violated provisions of the Solid Waste Disposal Act and the Clean Air Act and ordered the landfill closed. The trial court also determined that the plaintiff was entitled to an award of attorney's fees under the Acts and found reasonable the figures provided by Dague's attorneys and the resulting "lodestar" fee (calculated by multiplying the hours the attorney reasonably expended by a reasonable hourly rate). Dague requested a contingency enhancement of the fee and the District Court reasoned that the "risk of not prevailing was substantial...[and] absent an opportunity for enhancement [Dague] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." The court concluded that a twenty-five percent enhancement was appropriate. The Court of Appeals affirmed in all respects.

The Opinions

Justice Scalia writes the Court's opinion, joined by Chief Justice Rehnquist and Justices White, Kennedy, Souter and Thomas. Speaking for the majority, Scalia writes, "[W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue." Scalia explains:

"We note at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so...Taking account of it again through lodestar enhancement amounts to double-counting...The first factor...is not reflected in the lodestar, but there are good reasons why it should play no part in the calculation of the award...Thus, enhancement for the contingency risk posed...would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging non meritorious claims to be brought as well. We think that an unlikely objective of the 'reasonable fees' provisions. These statutes were not designed as a form of economic relief to improve the financial lot of lawyers."

Justice O'Connor in a dissenting opinion writes:

"I continue to be of the view that in certain circumstances a 'reasonable' attorney's fee should not be computed by the purely retrospective lodestar figure, but also must incorporate a reasonable incentive to an attorney contemplating whether or not to take a case in the first place...Thus, a reasonable fee should be one that would 'attract competent counsel,'...and in some markets this must include the assurance of a contingency enhancement if the plaintiff should prevail."

Justice Blackmun in a dissenting opinion joined by Justice Stevens, disagrees with the majority at every turn.

"In language typical of most federal fee-shifting provisions, the statutes involved in this case authorize courts to award the prevailing party a 'reasonable' attorney's fee. Two principles, in my view, require the conclusion that the 'enhanced' fee awarded to respondents was reasonable. First, this Court consistently has recognized that 'a reasonable' fee is to be a 'fully compensatory fee,'...and is to be 'calculated on the basis of rates and practices prevailing in the relevant market'...Second, it is a fact of the market that an attorney who is paid only when his client prevails will tend to charge a higher fee than one who is paid regardless of outcome, and relevant professional standards long have recognized that this practice is reasonable.

"The Court does not deny these principles. It simply refuses to draw the conclusion

that follows ineluctably: If a statutory fee consistent with market practices is 'reasonable,' and if in the private market an attorney who assumes the risk of nonpayment can expect additional compensation, then it follows that a statutory fee may include additional compensation for contingency and still qualify as reasonable. The Court's decision to the contrary violates the principles we have applied consistently in prior cases and will seriously weaken the enforcement of those statutes for which Congress has authorized fee awards notably, many of our Nation's civil rights laws and environmental laws."

CARNES NOMINATION CONFIRMED BY THE SENATE

On September 9, 1992, the nomination of Edward Carnes to the U.S. Court of Appeals for the Eleventh Circuit was approved by the Senate by a vote of 62-36. The motion to invoke cloture preceded the confirmation vote and passed 66-30. As we reported in the last issue of the *CIVIL RIGHTS MONITOR*, on May 7, 1992, the Senate Judiciary Committee by a vote of 10-4 reported out the nomination to the full Senate. Mr. Carnes' nomination was opposed by the Leadership Conference on Civil Rights, the NAACP, NAACP Legal Defense and Educational Fund, Southern Christian Leadership Conference, the Alliance for Justice and other civil rights organizations on the grounds that he has shown an insensitivity to racial justice issues.

On August 7, Senator Biden (D-DE), Chair of the Judiciary Committee, who in committee voted against the nomination, offered a motion to proceed to the nomination under the agreement that the Senate floor vote would occur in September. Senator Biden said that although he continued to oppose the nomination he was supporting the motion to proceed in order to break an impasse and allow the Senate to consider as many as eighteen other judicial nominations before the Senate recessed in August. He also said that adopting the motion would allow senators time to review Carnes's record and make a "reasoned vote in September." The motion was adopted 91-0 with nine Senators not voting.

In the Summer 1992 *MONITOR* article on the Carnes nomination, we quoted a Birmingham News article that suggested that retired Judge Frank Johnson whom Carnes will succeed was supporting the nomination. The relevant quotation from Judge Johnson is: "He's good at oral argument" which should make him a "very good" choice for the appeals court. During the August 7 debate on the motion to proceed, Senator Metzenbaum (D-OH), who opposes the nomination, referred to this quotation and said:

"A few months ago, an article in an Alabama newspaper contained a brief quote from Judge Johnson on this nomination. Supporters of Mr. Carnes construed that quote as indicating Judge Johnson's support for the nominee. I called Judge Johnson about his nomination as did other members of the Judiciary Committee. He indicated that he does not support this nomination; nor does he oppose it. Judge Johnson stated that he does not believe it is appropriate for a member of the bench to comment upon a pending judicial nomination. I respect that viewpoint."

ORGANIZATIONS OPPOSE THE NOMINATION OF HUD GENERAL COUNSEL TO A U.S. COURT OF APPEALS

President Bush has nominated Francis A. Keating, II, to fill a vacancy on the U.S. Court of Appeals for the Tenth Circuit. Mr. Keating has served as General Counsel of the Department of Housing and Urban Development since 1989, and was an attorney in the Department of Justice during the Reagan Administration.

On July 22, 1992, the Senate Judiciary Committee held hearings on the nomination. Elaine Jones, Deputy Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., Lisa Mihaly, Housing and Homelessness Specialist for the Children's Defense Fund, and others testified in opposition to the nomination. The opposition was based on their organizations' determinations that during Mr. Keating's tenure as General Counsel of HUD enforcement of the Fair Housing Amendments of 1988 has been extremely lax and that Mr. Keating had shown a lack of commitment to addressing housing discrimination against families with children.

Background

The Fair Housing Amendments of 1988 made major changes in the enforcement mechanisms of the Fair Housing Act of 1968. The amendments gave HUD the authority to issue a discrimination charge where its investigation supports a reasonable cause finding. (Previously, HUD could use only the informal methods of conference, conciliation, and persuasion to bring about the compliance.) The charge is then pursued by HUD attorneys before an Administrative Law Judge (ALJ) within HUD. Relief may include compensatory damages, injunctive and other equitable relief, and civil penalties against a respondent ranging from a maximum of \$10,000 for a first-time violation to a maximum of \$50,000 for a repeat violation.

Those who complained to HUD, those charged with discrimination, or an aggrieved person on whose behalf the complaint was filed may elect to have the matter decided in a civil action in U.S. district court rather than in an administrative action within HUD. If so requested, HUD is obliged to authorize such action and the Attorney General is required to commence and maintain the civil action. The 1988 amendments also provide that at any point after the filing of a complaint, HUD may authorize the Attorney General to take judicial action to obtain injunctive relief to prevent the dwelling from being rented or sold to someone other than the complainant.

The Fair Housing Act of 1968 prohibited discrimination in the sale or rental of housing to any person because of race, color, religion, sex or national origin. The 1988 amendments added two protected classes: persons with disabilities and families with children.

The Organizations' Opposition

In testimony before the Senate Judiciary Committee, Elaine Jones of the NAACP Legal Defense Fund asserted that as HUD General Counsel, Francis Keating established a system of reviewing complaints in which the General Counsel's office never scrutinizes staff findings of non-discrimination, but in which he or a Regional Attorney always reviews staff findings of discrimination by a landlord. Ms. Jones said that "decisions against a complaining party could be made by a non-lawyer, such as a field investigator, but determinations against a landlord or vendor always had to be made by a HUD attorney."

Ms. Jones concluded that the entire system is skewed in favor of determinations that there is not reasonable cause to suspect discrimination. She cited statistics showing the sparsity of reasonable cause findings:

"In the 22 month period between March 1989 and December 1990, HUD received 7,264 charges of discrimination on the basis of race and color. HUD actually reached the merits of 49 cases in 1989, finding reasonable cause in only 6 (12%). HUD reached the merits of 325 cases in 1990, finding reasonable cause in only 15 (4.6%). A total of only 21 reasonable cause findings in 22 months is extraordinary when contrasted with the findings that underlay the 1988 Amendments. HUD itself estimates that there were 2 million instances of housing discrimination each year; the House Judiciary Committee cited numerous studies showing that minorities encountered discrimination between 25% and 90% of the time they sought a house or apartment...In all of 1990, HUD Administrative Law Judges conducted hearings in only 13 cases of any kind under the Fair Housing Act. Of these 9 were against a single mobile home park, so that only 5 alleged discriminators were the subject of administrative hearings in the entire year."

Ms. Jones also stated that Mr. Keating has failed to utilize the judicial remedy made available to HUD under the 1988 Amendments to the Fair Housing Act.

"HUD's regulations implementing the 1988 Amendments specifically gave the General Counsel the responsibility for authorizing prompt judicial action when it was necessary to carry out the purposes of the Act...For reasons that remain unexplained, HUD simply failed to utilize this remedy to which Congress properly attached considerable importance. According to the Justice Department, HUD sought prompt judicial action only *once* in all of 1990. In 1991 the Chief of the Justice Department's housing enforcement section asked private housing groups to 'notify his staff directly if they want this type of assistance,' even though the General Counsel at HUD was given the primary responsibility of determining when prompt judicial action is necessary."

Lisa Mihaly of the Children's Defense Fund offered testimony about offensive remarks Mr. Keating made during meetings she and other fair housing advocates held with him to discuss concerns about Keating's policy

guidance memoranda on occupancy standards. The first memorandum issued on February 21, 1991, stated that a landlord's occupancy standard of one person per bedroom plus one additional person was allowable under the Fair Housing Act. In a meeting with Keating, Ms. Mihaly and other fair housing advocates expressed the view that this standard would allow widespread discrimination against families with children. They made the point that under this policy a family composed of two adults and two children could be denied the rental of a two bedroom apartment, as such families would only be able to rent apartments with enough bedrooms to provide each child a separate bedroom.

Mr. Keating issued a revised directive on March 20, 1991 setting a general standard of two persons in a bedroom. However, the directive established some exceptions to this standard. For example, the directive provided that:

"If a mobile home is advertised as a 'two-bedroom' home, but one bedroom is extremely small, depending on all the facts, it could be reasonable for the park manager to limit occupancy of the home to two people."

The directive also provided that landlords have discretion to limit the age of children who may live in an apartment so as to allow an infant but not a teenager.

Ms. Mihaly told the Judiciary Committee that during the meetings with Mr. Keating when he attempted to explain the rationale behind the directives, he "said a number of things that I found highly offensive and that I believe cast serious doubt on his fitness to serve on the bench." She said:

"[Keating] opened the meeting by explaining to us that his role as HUD's General Counsel was to protect the 'private property rights of landlords.' Several times in both meetings, he referred to his responsibility to protect 'private landlords' and 'good Christian landlords' from the stain of a conviction under a fair housing charge...he mentioned the damage a 'felony conviction' would do to a 'good Christian,' though fair housing charges are civil, not criminal. He also spoke several times about the 'Christian values' that should guide fair housing cases...Keating addressed several comments to the NCLR [National Council of La Raza] representative, who is Latino, as things relevant to 'your people.' He said that he couldn't possibly want to pack families into small apartments 'like slave ships.'..."

"In discussing his proposed policy...that would allow landlords to discriminate against families based on the age of their children, Keating said that this would allow landlords to exclude 'big lummoxes' meaning teenagers from their units. I believe this violates the law, which defines a child simply as a person under age 18. When I pressed Keating, and asked whether he would consider it reasonable for a landlord to rent to a family with young children, and then evict them when the children got to a certain age, he said yes, and again expressed his view that landlords should not have to put up with 'lummoxes' in their apartments."

Both Ms. Jones and Ms. Mihaly called on the Senate Judiciary Committee to reject the nomination.

CONGRESS APPROVES FAMILY AND MEDICAL LEAVE ACT

On August 11, the Senate passed by voice vote the conference committee report on the Family and Medical Leave Act. The House passed the report on September 10, 1992, by a vote of 241-161. President Bush vetoed the bill on September 22. On September 24 the Senate overrode the veto by a vote of 68-31. As the MONITOR went to press, a House override veto was scheduled for September 30. Senator Christopher Bond (R-MO) who crafted the compromise measure contained in the conference report with Senator Christopher Dodd (D-CT) said: "I think the president is just plain wrong on this. I urge [the President] to take another look."

The bill would provide 12 weeks of unpaid, job-guaranteed leave in the event of a newborn or newly-adopted child, a seriously ill child, parent or spouse, or a serious personal illness. It covers employers with 50 or more employees, and an employee must have worked for the employer for one year with 1250 hours for the employer to be eligible to take such leave.

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