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SUPREME COURT RULES IN VOTING RIGHTS CASE

On June 28, 1993, the Supreme Court in a 5-4 decision concluded that the plaintiffs had "stated a claim upon which relief can be granted under the Equal Protection Clause [of the 14th Amendment of the Constitution]." The case, *Shaw v. Reno*, No. 92-357, involves a claim by five white citizens of North Carolina that the state legislature's creation of majority-minority congressional districts "constitutes an unconstitutional racial gerrymander." The majority further stated that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." The Court reversed the lower court's dismissal of the case and remanded the case to the district court. The district court is to determine whether the districting constitutes a racial gerrymander and, if so, whether the plans meet the strict scrutiny test [which requires that official actions of a race conscious nature be narrowly tailored to address a compelling state interest].

Justice White in a dissenting opinion argues that there is no cognizable claim because there is no cognizable harm. He stated:

"...the notion that North Carolina's plan under which whites remain a voting majority in a disproportionate number of congressional districts, and pursuant to which the State has sent its *first* black representatives since Reconstruction to the United States Congress, might have violated appellants' constitutional rights is both a fiction and a departure from settled equal protection principles."

Background

As the result of reapportionment after the 1990 Census, North Carolina gained one congressional seat for a total of twelve. The state legislature adopted a congressional redistricting plan in late 1991 which created one majority African-American congressional district in the northeast portion of the state (District 1). Pursuant to Section 5 of the Voting Rights Act, the plan was submitted to the Department of Justice for preclearance. The Department of Justice rejected the plan on December 18, 1991, stating that the state legislature could have drawn a second majority African-American district in the southcentral to southeast portion of the state.

On January 14, 1992, the state legislature adopted a revised congressional map with a second majority African-American district in the northcentral portion of the state along Interstate 85 (District 12). The revised plan was approved by the Department of Justice on February 6, 1992.

The two majority African-American districts have roughly the same proportion African-American population, 57 percent of the total population and 53 percent of the voting-age population. The 1st district, located in the rural eastern portion of the state, is represented in the 103rd Congress by Eva Clayton. The 12th district, which is the focus of this case, stretches 175 miles between Charlotte and Durham along I 85, and is represented by Melvin Watt.

The plaintiffs challenged the creation of the 12th district on the grounds that it constituted an unconstitutional racial gerrymander and "that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process." A three-judge district court panel dismissed the case, ruling 2-1 that the appellants had failed to state an equal protection claim. Citing the Supreme Court's decision in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) the majority held that North Carolina's reapportionment plan could violate white voters' rights only if it was "adopted with the purpose and effect of discriminating against white voters...on account of their race." Creating majority-minority districts to comply with the Voting Rights Act would be constitutionally impermissible only if the districts unfairly diluted white voting strength, the majority reasoned.

UJO involved a constitutional challenge to New York State's effort to comply with section 5 of the Voting Rights Act by increasing the nonwhite majorities in several districts to enhance the opportunity for election of nonwhite representatives from those districts. The reapportionment plan was challenged by members of a Hasidic Jewish community that had previously been located in one community but had been split in two districts as part of the effort to create nonwhite majorities.

While there was no majority opinion of the Court in *UJO*, Justice White, joined by Justices Brennan, Blackmun and Stevens, held that "the Constitution does not prevent a state subject to the Voting Rights Act from

deliberately creating or preserving black majorities in particular districts" to ensure compliance with Section 5. Justice Stevens and Powell concurred on grounds that New York's purpose to comply with the Justice Department's interpretation of the Voting Rights Act foreclosed any finding that "it acted with the invidious purpose of discriminating against white voters."

The Majority Opinion

The majority opinion was written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. After a brief discussion of the history of racial discrimination in voting, the majority focuses on the claim that North Carolina engaged in unconstitutional racial gerrymandering and the majority stated that the claim "strikes a powerful historical chord: It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past."

The majority reasoned that laws that on their face distinguish between races are prohibited by the equal protection clause of the 14th amendment, that state legislation that expressly distinguishes among citizens because of their race must be narrowly tailored to further compelling government interests, and that voting rights precedents demand close scrutiny of redistricting legislation "that is so bizarre on its face that it is 'unexplainable on grounds other than race.'"

The majority opinion states:

"...[W]e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes."

A considerable portion of the majority opinion is devoted to a discussion of the shape of the district, and distinguishes this case from *UJO* in part because the New York legislature adhered to "traditional districting principles". The majority concludes that "*UJO*'s framework simply does not apply where, as here, a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality."

The majority opinion also concludes that a state's adoption of a plan to comply with Section 5 of the Voting Rights Act does not preclude it being held unconstitutional.

The Dissents

Justice White filed a dissenting opinion, joined by Justices Blackmun and Stevens. Justices Blackmun, Stevens and Souter filed separate dissenting opinions.

Justice White argues that this case mirrors *UJO* and that the majority while not overruling *UJO* sidesteps it by concentrating on the shape of the district and creating a new cause of action. Justice White states that the Court has recognized only two voting rights actions that give rise to a constitutional claim, i.e., actions that interfere outright with citizens' right to vote, e.g., poll taxes, and practices that dilute the voting strength of groups. In the latter case, Justice White contends that the Court has "insisted that the challenged action have the intent and effect of unduly diminishing their influence on the political process."

"...[I]t strains credulity to suggest that North Carolina's purpose in creating a second majority-minority district was to discriminate against members of the majority group by 'impairing or burden[ing] their] opportunity...to participate in the political process'...The State has made no mystery of its intent, which was to respond to the Attorney General's objections...by improving the minority group's prospects of electing a candidate of its choice. I doubt that this constitutes a discriminatory purpose as defined in the Court's equal protection cases -- i.e., an intent to aggravate the 'unequal distribution of electoral power.'...But even assuming that it does, there is no question that appellants have not alleged the requisite discriminatory effects. Whites constitute roughly 76 percent of the total population in North Carolina. Yet, under the State's plan, they still constitute a voting majority in 10 (or 83 percent) of the 12 congressional districts. Though they might be dissatisfied at the prospect of casting a vote for a losing

candidate -- a lot shared by many, including a disproportionate number of minority voters -- surely they cannot complain of discriminatory treatment."

Justice White also discusses the level of scrutiny required in such Equal Protection cases and urges that a State's compliance with the Voting Rights Act clearly constitutes a compelling interest and that North Carolina's efforts were "narrowly tailored" to comply with the Voting Rights Act.

Justice White ended thus:

"To the extent that no other racial group is injured, remedying a Voting Rights Act violation does not involve preferential treatment...It involves, instead, an attempt to *equalize* treatment, and to provide minority voters with an effective voice in the political process."

Justice Blackmun dissented briefly:

"It is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this 'analytically distinct' constitutional claim...is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction. I dissent."

In Justice Stevens' view the critical fact in this case, which the majority "devotes most of its opinion to proving", was that the shape of the district is so irregular that it must have been drawn to assist in the election of a second African-American representative. This Stevens wrote gives rise to three questions, all of which he would answer in the negative:

"Does the Constitution impose a requirement of contiguity or compactness on how the States may draw their electoral districts? Does the Equal Protection Clause prevent a State from drawing district boundaries for the purpose of facilitating the election of a member of an identifiable group of voters? And, finally, if the answer to the second question is generally 'No,' should it be different when the favored group is defined by race?"

Finally, Justice Souter in his dissent writes:

"In my view there is no justification for the Court's determination to depart from our prior decisions by carving out this new narrow group of cases for strict scrutiny in place of the review customarily applied in cases dealing with discrimination in electoral districting on the basis of race....As long as members of racial groups have the commonality of interest implicit in our ability to talk about concepts like 'minority voting strength' and 'dilution of minority votes,'...and as long as racial bloc voting takes place, legislators will have to take race into account in order to avoid dilution of minority voting strength in the districting plans they adopt. One need look no further than the Voting Rights Act to understand that this may be required, and we have held that race may constitutionally be taken into account in order to comply with that Act."

Reaction

Advocates for minority voting rights expressed deep concern about the Court's decision. Barbara Arnwine, Executive Director of the Lawyers' Committee for Civil Rights Under Law said the case should have been dismissed because there was no injury. Dayna Cunningham with the NAACP Legal Defense and Educational Fund said that the Court's "notion of color blindness is pure fiction; it doesn't exist; and what it says is we're going to ignore racism and racial prejudice; we're going to ignore the discriminatory impact of various so-called neutral practices; see no evil. And who gets hurt by that?"

Professor Frank Parker, former voting rights director of the Lawyers' Committee, in a memorandum analyzing the decision writes:

"This decision is very damaging to minority voting rights. It creates an additional barrier to further progress in creating new majority minority districts to give minority voters an equal opportunity to elect candidates of their choice and creates the risk that some of the 26 newly-created majority black and Hispanic congressional districts drawn after the 1990 Census may be jeopardized. Further, the decision is not limited to

congressional redistricting and could jeopardize newly-created districts at the state legislative and local levels as well.

"In addition to its serious adverse impact on the creation of majority minority districts, the decision also does serious damage to the legal concepts that have provided the framework for advances in minority voting rights. The decision is a bizarre and illogical decision for a number of reasons. The Court holds that white plaintiffs can state a valid racial gerrymandering claim even though they do not allege that they as individuals or that any racial group has been discriminated against or had their voting strength diluted; invents an entirely new and bizarre 'unexplainable on grounds other than race' constitutional concept in redistricting; elevates the desire for aesthetically-pleasing districts over the rights of minority voters--protected both by the Constitution and the Voting Rights Act--to districts in which they have an equal opportunity to elect candidates of their choice; disregards the legal impact of the Justice Department's Section 5 objection; and disregards the Supreme Court's prior decision in *United Jewish Organizations v. Carey*, which is directly contrary to the decision in this case."

The Congressional Black Caucus held a press conference on June 29 to express its outrage about the decision. Chair Kweisi Mfume (D-MD) said:

"Today's ruling casts a chilling pall across the face of electoral politics at a time when this nation has just begun to realize the full potential of minority participation in the political process. The landmark Voting Rights Act of 1965 established an immutable right to fairness and equity for those minority Americans who had suffered the relentless assault of racism and discrimination by de facto, if not de jure, policies which reflected intractable resistance to the election of minorities.

"The requirement of approval by the Justice Department of redistricting plans has served to balance the interest of the Constitution against the oppression of 'state's rights' proponents. By ignoring the legal standards applied as the necessary tests for a finding of discriminatory intent and cognizable injury, the highest Court in the land has plunged into disarray the standing precedent and legal criteria used in determining the efficacy of existing districts configurations. It further encourages the pursuit of litigation across the nation and particularly, throughout the South and Southwest where African Americans and Hispanics have been excluded from electoral participation by virtue of their minority status in the population."

Impact

On June 28, one day after the Court's ruling in *Shaw v. Reno*, a panel of three federal judges in Shreveport, Louisiana ordered parties in a suit filed in July 1992 to submit briefs on the impact of the *Shaw* decision on their respective positions. The case, *Hays v. Louisiana*, was filed by three whites and one African-American alleging that the state's creation of majority African-American districts contributed to racial bloc voting and disenfranchised the racial minority in each of the state's seven districts.

The case was argued in August but no ruling had been issued. The Lawyers' Committee for Civil Rights Under Law filed a motion to intervene in the case. That motion was denied and an evidentiary hearing on the case was held on August 19 in the U.S. District Court in Shreveport, Louisiana "limited to an opportunity for the parties to show whether the existing plan was 'narrowly tailored to further a compelling governmental interest'."

On July 13, a three-judge federal panel in South Carolina overturned the state's redistricting plan that created a majority African-American district (6th) which is represented by Democrat James E. Clyburn, the first African-American to represent the state in Congress since Reconstruction.

Representative Clyburn said that the shape of his district is due in part to efforts to protect South Carolina's "economic interests." He added that the shape of the district has nothing to do with race but with the desire to include military facilities in the districts of prominent Armed Services Committee members. "You would have a nice neat pear-shaped district in the middle of the state that would be majority-black if you didn't cut those counties up", Clyburn said.

VOTING RIGHTS CASES BEFORE THE SUPREME COURT

The Supreme has accepted for hearing during its 1993-1994 term voting rights cases from Georgia and Florida.

Georgia Case

Holder v. Hall, No. 91-2012, on appeal from the federal court of appeals for the 11th Circuit will review a decision that upheld a challenge by black voters in a rural Georgia county under Section 2 of the Voting Rights Act to the county's system under which a commission that holds all county legislative and executive power consists of a single member elected at-large by majority vote.

The present system dates to the county's creation in 1912. At present, the county voting age population is 19 percent black and 80 percent white. No black has ever run for county commissioner. The election for county commissioner is held in a single polling place, which is a building belonging to an all-white civic club. The trial court had found that the *Gingles* analysis was appropriate to this dilution claim, and that the first *Gingles* prerequisite had been met, but it found against the plaintiffs on the remaining two prerequisites and concluded that no violation of Section 2 was established.

The *Gingles* prerequisites to a Voting Rights Act Section 2 dilution violation are: (1) that the minority group be sufficiently large and geographically compact to constitute a majority in a single-member district, (2) that the group be politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

The court of appeals ruled that the trial court had misunderstood the law (the requirements of *Gingles* and how they might be proved) and therefore erred in critical findings of fact. The appellate court held, as it had in a previous *Gingles* case, that the *Gingles* analysis applies, that the three *Gingles* prerequisites were met here, and that on the totality of the circumstances the county's at-large commission election system violated Section 2 of the Voting Rights Act. The appellate court therefore reversed the lower court's dismissal order and remanded the case "for the imposition of a remedy." The remand did not, however, occur because the county sought Supreme Court review.

In its petition, the county argued that it was the appellate court that had misapprehended the law, that the appellate court's decision would require all the Georgia counties with a single-commissioner form of government (about 18 in number) to revise their structures to provide "proportional representation" to blacks, and that the appellate finding of racially polarized voting in the county was without support. At bottom, the county's claim is that Section 2 may not be used to challenge at-large elected sole commissioner local government.

The original plaintiffs, opposing Supreme Court review, pointed out that the county had not raised this issue in either of the lower courts. "In both lower courts Bleckley County conceded that Section 2 and the analysis in *Thornburgh v. Gingles*...applied to challenges against the single commissioner form of government."

The opponents of Supreme Court review also argued that even if this question were properly raised here, the appellate court's answer was correct and was based on the circumstances in this county, and that the appellate court did not itself impose a remedy nor had the district court yet done so. The opponents also discussed at length the basis for the appellate court's finding of racially polarized voting, a matter on which the petitioners and the opponents are wholly at odds.

The appellate court's order became final in late May, 1992, and the petition for Supreme Court review was filed in mid June of that year. Opponents responded in mid-July. In mid-October the Supreme Court requested the views of the United States, and on January 19, 1993, as he prepared to leave office, the former Solicitor General filed an amicus brief for the United States. The New York Times reported (Pear, R., Jan. 20, 1993,A-18) that this was one of two redistricting cases in which the briefs filed differed from the recommendations of the Justice Department's Civil Rights Division.

The amicus brief filed by the Bush Administration recommended that the Court not take the case. But before reaching that conclusion, the brief embarks on an extensive argument as to why "the [VRA] Sec. 2 results test is not violated by a well-settled practice of electing only one official to an office in a particular geographical area." The brief states that "it is inherent in the very nature of our majoritarian democratic political system

that numerical minorities lose elections." Yet, in the end, despite its espousal of the proposition that at least this branch of Section 2 is not offended by the practice that the court below found had indeed embodied such a violation, the brief filed by the Bush Administration advocated denial of review of the decision below.

On May 20, 1993, the Clinton Administration filed a new amicus curiae brief for the United States arguing that the position that a small minority group's inability to elect candidates of its choice is not in violation of the Voting Rights Act "is at odds with the theory of the Voting Rights Act." The brief states that if an alternative structure exists, the challenge should not be dismissed on the theory that the minority population is too small. The brief states:

"In any vote-dilution challenge to an existing election system it could be said that the minority's small size, rather than the system itself, is the source of the minority's electoral failure. Thus, the issue of vote dilution must be measured against a proposed alternative voting arrangement that is reasonable in the legal and factual context of a particular case."

Oral argument is scheduled for Monday, October 4, 1993 at 11:00 a.m.

Florida Cases

The three Florida appeals that the Court consolidated all stem from rulings by a single three-judge federal court on aspects of three cases that it consolidated. Those cases -- filed by (1) the United States -- challenged various aspects of Florida's redistricting, both congressional and the upper and lower state legislative bodies (2) a Hispanic member of the Florida House and other registered voters, and (3) the Florida State Conference of NAACP Branches and individual African-American voters. No Florida state body adopted a redistricting plan for the congressional districts. The Florida legislature did, however, adopt a state legislative redistricting plan which included both the state House and the state Senate. Federal court orders called for redistricting the congressional seats (increased in consequence of the 1990 census from 19 to 23). Subsequent court orders dealt with a state legislative redistricting plan adopted by the state legislature.

These appeals all challenge aspects of the federal court's rulings with respect to the state legislative districts, raising both substantive questions concerning the legality of the state's plan for the state Senate and House and questions concerning the appropriateness of the court's remedy. Listed below are the questions that the three appeals assert are presented. It should be kept in mind that in noting probable jurisdiction and thus accepting these appeals, the Supreme Court limited oral argument before it to one hour in toto. Oral argument is scheduled for Monday, October 4, at 1:00 p.m.

1) United States v. Florida, No. 92-7:

The district court's judgment of July 2, 1992, ordering, in part, that the 1992 state senatorial elections be held in accordance with the 1992 Florida Senate Plan, states:

"The state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan do not violate Section 2 of the Voting Rights Act of 1965, as amended."

However, in its opinion issued on July 12, 1992, the court stated:

"We held in our orders imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights Act of 1965, as amended... This language should be read as holding that the Florida Senate plan does not violate Section 2 such that a different remedy must be imposed. In other words, although the Florida Senate plan violates Section 2 of the voting rights act, it nevertheless is the best remedy to balance the competing minority interests in Dade County and the South Florida area."

The questions presented in this appeal by the federal government are:

"1. Whether the district court abused its discretion when it refused to conduct remedial proceedings concerning the possibility of providing complete relief for the Section 2 violations it had found, and instead summarily adopted as a permanent remedy the very plan it had found violated Section 2.

"2. Whether the district court abused its discretion in failing to provide complete relief

to Hispanic voters for Section 2 violations because doing so might result in the loss of an African-American influence district.”

2) Wetherell v. DeGrandy, No. 92-519:

“1. Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class’s proportion of the population?

“2. When determining minority voting strength under the test of *Thornburgh v. Gingles*, 478 U.S. 30 (1986), may a plaintiff’s case rest on estimates of voting age population that include substantial numbers of noncitizens who are ineligible to vote, or must the plaintiff demonstrate voting strength on the basis of eligible voters, at least where the defendant has demonstrated that a substantial percentage of the plaintiff class are not citizens?

“3. May a federal court impose a reapportionment plan as a remedy for a Voting Rights Act violation without affording the State any opportunity to devise an acceptable remedial plan, especially when the court-ordered plan unnecessarily trenches on fundamental state policy choices?

“4. Do core principles of comity and federalism require a federal court to abstain from adjudicating Voting Rights Act claims when the plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of identical claims in an ongoing state court proceeding?”

3) DeGrandy v. Wetherell, No. 92-593:

“1. Upon a finding of a violation of Section 2 of the Voting Rights Act, can a district court decline to provide for a complete remedy of that violation?

“2. Upon establishing liability under Section 2 of the Voting Rights Act, what remedial procedure and standards should a district court employ to insure Fourteenth and Fifteenth Amendment guarantees are not eviscerated by deference to state redistricting policies?”

SUPREME COURT RULES IN TITLE VII EMPLOYMENT DISCRIMINATION CASE

On June 25, 1993, in a 5-4 decision in *St. Mary’s Honor Center v. Hicks*, the U.S. Supreme Court held that to prove intentional racial discrimination an employee plaintiff must do more than show that the non-discriminatory reasons the defendant offered to explain the alleged discrimination are false. The ruling reversed the decision of the U.S. Court of Appeals for the Eighth Circuit which had held that “once the [employee] proved all of the [employer’s] proffered reasons for the adverse employment actions to be pretextual, [the employee] was entitled to judgment as a matter of law.” The majority opinion written by Justice Scalia states:

“[R]ejection of the defendant’s proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, ‘no additional proof of discrimination is *required*’... But the Court of Appeals’ holding that rejection of the defendant’s proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 [of the Federal Rules of Evidence] that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the ‘ultimate burden of persuasion.’”

The dissenting opinion asserts that the majority opinion disregards the standard established to evaluate Title

VII intentional discrimination cases twenty years ago in a unanimous Supreme Court decision in *McDonnell Douglas Corp. v. Green*, a decision that has been "repeatedly reaffirmed and refined...most notably in *Texas Dept. of Community Affairs v. Burdine*", also a unanimous decision. The dissent continues:

"...[T]oday, after two decades of stable law in this Court and only relatively recent disruption in some of the Circuits...the Court abandons this practical framework together with its central purpose, which is 'to sharpen the inquiry into the elusive factual question of intentional discrimination'... Ignoring language to the contrary in both *McDonnell Douglas* and *Burdine*, the Court holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a prima facie showing of discrimination, the fact finder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove. Because the majority departs from settled precedent in substituting a scheme of proof for disparate-treatment action that promises to be unfair and unworkable, I respectfully dissent."

Background

Melvin Hicks, an African-American, was employed as a correctional officer in 1978 by St. Mary's Honor Center, a halfway house operated by the Missouri Department of Corrections and Human Resources. Hicks had a satisfactory employment record. An investigation of the administration of St. Mary's resulted in supervisory personnel changes in 1984. Following these changes Hicks experienced "increasingly severe, disciplinary actions" that culminated in his dismissal on June 7, 1984 for threatening his supervisor.

Hicks filed suit in the U.S. District Court for the Eastern District of Missouri alleging that he was demoted and ultimately fired because of his race in violation of Title VII. A trial was held and the District Court found that Hicks had failed to prove that race was the reason for his dismissal. The District Court found that while the plaintiff had shown that there was a crusade to get rid of him, he failed to prove that the crusade was motivated by race rather than for personal reasons.

The Court of Appeals for the Eighth Circuit reversed reasoning that:

"Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of race."

The Supreme Court granted review and reversed.

McDonnell Douglas established a three step process for courts to evaluate Title VII intentional employment discrimination cases. The plaintiff must first establish a prima facie [true, valid, or sufficient at first impression] case by showing, in this case, that he is a member of a protected class, i.e., African-American, that he was qualified for the job, that he was harmed, and that the position remained open and was ultimately filled by a qualified applicant. [It is interesting that the majority opinion in discussing the prima facie case states that the job was ultimately filled by a white male, but the dissent observes in a footnote that the Supreme Court "has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material and that issue is not before us today."] Establishment of a prima facie case creates a presumption of discrimination. The defendant then has the opportunity to present non-discriminatory reasons for the treatment that if believed by the trier of fact would vindicate the defendant. The plaintiff then has the opportunity to present evidence to show that the reasons presented by the defendant were not the real reasons for the employment action.

Burdine in 1981 clearly summarized the *McDonnell Douglas* framework:

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

Majority Opinion

The majority opinion was written by Justice Scalia and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy and Thomas. In the majority's view even if the plaintiff establishes a prima facie case and demonstrates that the nondiscriminatory reasons offered by the defendant were not the reasons for the employment action, the plaintiff may not have won the case. The majority argues that once the defendant presented non-discriminatory reasons for the employment action, the prima facie case was rebutted. Therefore, in addition to demonstrating that the proffered reasons were false, the plaintiff must still persuade the court that discrimination was the reason [which may be done through argument alone and does not necessarily require the plaintiff to put in additional evidence.]

Justice Scalia concedes that the case would be over if the defendant offered no reasons, because the court would have no option but to find discrimination. [At this point the plaintiff would have presented enough evidence to demonstrate discrimination, and if the defendant offers, in effect, no defense, the plaintiff wins.] But, Scalia goes on to say that the defendant who offered reasons even if they turn out not to be accurate is in "a better position than if s/he had remained silent." Thus, Justice Scalia argues that the plaintiff's showing that the proffered reasons were false does not *compel* judgment for the plaintiff as the Court of Appeals for the Eighth Circuit ruled.

The majority continues:

"...rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, [n]o additional proof of discrimination is *required*,... But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principles of Rule 301 [Federal Rules of Evidence] that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'"

In his critique of the dissenting opinion, written by Justice Souter, Justice Scalia says that the dissent's suggestion that the majority has side-stepped "settled precedent" is not reason for alarm as "the dissent's version of 'settled precedent' cannot remotely be considered the 'prevailing view.'" Further, Scalia argues that it is utterly implausible that the Court "would ever have held what the dissent says we held."

Justice Scalia continues:

"[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable."

In discussing the dissent's reliance on *Burdine*, Justice Scalia accepts that some statements in *Burdine* can be interpreted in a manner consistent with the dissent but insists that all but one of the statements bear an interpretation consistent with the majority opinion.

For example, *Burdine* reads "...should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." The majority argues that "a reason cannot be proved to be a pretext *for discrimination* unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." The dissent, the majority states, "takes this to mean that if the plaintiff proves the asserted reasons to be *false*, the plaintiff wins."

The relevant statements in *Burdine* further state:

"[The plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. [The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence..."

The majority agrees with the dissent that "the words [of the last sentence] bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgement for the plaintiff." However, the

majority states that this sentence is contradicted by numerous other *Burdine* statements.

Dissenting Opinion

The dissenting opinion written by Justice Souter and joined by Justices White, Blackmun, and Stevens states that in *McDonnell Douglas* the Court unanimously adopted a "sensible, orderly way to evaluate the evidence" in Title VII disparate treatment cases which the majority has chosen to abandon.

In discussing the *McDonnell Douglas* framework, the dissent argues that in proving a prima facie case of discrimination the plaintiff has proven his/her case, and that "proof of a prima facie case not only raises an inference of discrimination; in the absence of further evidence, it also creates a mandatory presumption in favor of the plaintiff."

Justice Souter concurs with the majority's assertion that once the employer meets the burden of producing non-discriminatory reasons for the employment decision the presumption of discrimination "drops from the case."

Justice Souter continues:

"[B]ut the obligation [of production] also serves an important function neglected by the majority, in requiring the employer 'to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.' [quoting *Burdine*]... The employer, in other words, has a 'burden of production' that gives it the right to choose the scope of the factual issues to be resolved by the factfinder... Once the employer chooses this battleground in this manner, 'the factual inquiry proceeds to a new level of specificity'... During this final, more specific inquiry, the employer has no burden to prove that its proffered reasons are true; rather, the plaintiff must prove by a preponderance of the evidence that the proffered reasons are pretextual."

Justice Souter agrees with the majority that once the plaintiff shows pretext the plaintiff wins. He continues that the majority has abandoned this framework and has held that "the further inquiry is wide open, not limited at all by the scope of the employer's proffered explanation."

Justice Souter continues:

"This 'pretext-plus' approach would turn *Burdine* on its head... and it would result in summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence."

Justice Souter also insists that the majority opinion includes contradictory statements about the meaning of its holding. In support of this assertion, Justice Souter says that the majority opinion states that the establishment of pretext "without more" may "permit the tier of fact to infer the ultimate fact of intentional discrimination." But, in another statement, the majority seems to say that proof of pretext is not sufficient and that the plaintiff must show "both that the reason was false, *and* that discrimination was the real reason." In another statement, the majority opinion asserts: "it is not enough... to disbelieve the employer."

Justice Souter concludes:

"Because I see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent, I respectfully dissent."

Reaction

Civil rights attorneys expressed dismay about the Supreme Court's decision and pointed to a need once again for legislation to overturn Supreme Court decisions that interpret civil rights statutes in a "stingy, cramped manner." [In 1991, the Congress passed the Civil Rights Act of 1991 to overturn several Supreme Court decisions that similarly narrowed the reach of employment discrimination laws.] An analysis of the *Hicks* decision by attorneys for the NAACP Legal Defense and Educational Fund states:

"Justice Scalia's majority opinion in *Hicks* abandons a 'sensible, orderly way to

evaluate the evidence' which has worked well for years [citing *Furnco Construction Corp v. Waters*, 438 U.S. 567 (1978)]. Indeed, [the majority] limits civil rights protections even more than William Bradford Reynolds was willing to do when he was Assistant Attorney General for Civil Rights in the Reagan Administration... [T]he holding in *Hicks* is contrary to the positions taken in court by the Reagan Administration, the Bush Administration, and the Clinton Administration. Moreover, evidence that *Hicks* reverses what had been considered settled law can be found in the Justices' own prior opinion. Four of the five Justices who voted in the majority in *Hicks* strongly endorsed the *opposite* view in a case decided only four years ago. The fifth Justice, Clarence Thomas, also endorsed the opposite view during his tenure as Chairman of the EEOC."

The Lawyers Committee for Civil Rights Under Law asserts in its CIVIL RIGHTS ACT AND EEO NEWS:

"There is no getting around the fact that the *Hicks* decision removes the employer's downside risk from perjury, and makes it easier for unscrupulous employers to take a flier on lying. The incidence of untruthful 'nondiscriminatory reasons' will increase dramatically and, because it is hard to prove pretext, many plaintiffs with good claims will lose because of the lies the Court has encouraged. Plaintiffs will have to focus, more intensely than ever before, on discovery to pierce such lies."

On July 28, 1993, Representative David Mann (D-OH) introduced the Employment Discrimination Evidentiary Amendment of 1993, H.R. 2787, which attempts to codify the standards established in *McDonnell* and *Burdine*. Senator Howard Metzenbaum (D-OH) has indicated he will introduce legislation to overturn the *Hicks* decision in the early fall.

SUPREME COURT DENIES REVIEW OF FAIR HOUSING CASE

On May 17, 1993, the Supreme Court without comment denied review of a lower court decision that the Fair Housing Act prohibits discrimination in the sale of homeowners insurance. The decision in *National Association for the Advancement of Colored People (NAACP) v. American Family Mutual Insurance Co.*, will allow a suit against American Family Mutual Insurance Co. by the NAACP and eight African-Americans in Milwaukee, Wisconsin to proceed to trial. American Family Mutual Insurance is the largest homeowner insurer in Milwaukee.

American Family had argued that a federal law (the McCarran-Ferguson Act) generally precluding federal regulation of insurance companies barred application of the Federal Fair Housing Act to prohibit racial discrimination in the sale of homeowner's insurance. The U.S. Court of Appeals for the Seventh Circuit rejected the claim.

Background

The Milwaukee branch of the NAACP and eight African-American homeowners residing in Milwaukee filed suit on July 27, 1990, alleging that American Family Mutual Insurance Company discriminated in the sale of homeowner's insurance on the basis of race in violation of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), the Civil Rights Acts of 1870 and 1866, Wisconsin's Fair Housing Law, the Wisconsin Insurance Code and the Wisconsin Administrative Code.

American Family denied the allegations and sought dismissal of the Fair Housing Act claim on the grounds that the Act's prohibitions against discrimination in housing did not apply to the sale of homeowner's insurance. The district court granted the motion to dismiss the Fair Housing Act claim. That court in its decision relied on *Mackey v. Nationwide Insurance Co.*, 724 F.2d 419 (4th Cir. 1984) which held that the Fair Housing Act did not cover insurance sales because "there is no mention in the Fair Housing Act of insurance."

The district court also ruled that the state insurance code did not provide for private citizens to challenge homeowner's insurance. Rather, such claims were to be pursued with the appropriate state agency.

The plaintiffs appealed to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the dismissal of the state claim but reversed the dismissal of the Fair Housing Act claim.

The Fair Housing Act of 1968, as amended, prohibits discrimination in the sale or rental of housing to any person because of race, color, religion, sex, national origin, disability or familial status. Section 3604(a) and (b) of the Fair Housing Act, which the Seventh Circuit relied upon in its decision, provides:

“...it shall be unlawful

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, sex, familial status, or national origin.”

HUD's regulations include among the activities prohibited by section 3604, “Refusing to provide...property or hazard insurance for dwellings or providing such...insurance differently because of race.”

On appeal the U.S. Department of Justice filed a friend-of-the-court brief in support of the NAACP's position.

The Seventh Circuit Opinion

The opinion first addressed the question whether the McCarran-Ferguson Act prohibits the application of the Fair Housing Act to insurance sales. The McCarran-Ferguson Act provides in part:

“ No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance...unless such Act specifically relates to the business of insurance.”

The court concluded that “the Fair Housing Act is an ‘Act of Congress’ that does not ‘specifically relate to the business of insurance.’ It therefore does not ‘invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.’” Further, the court reasoned that for McCarran-Ferguson to prohibit the application of the Fair Housing Act, American Family would have to show that the Fair Housing Act conflicts with state law, not that it is merely duplicative.

“No official of Wisconsin has appeared in this litigation to say that a federal remedy under the Fair Housing Act would frustrate any state policy. Although the McCarran-Ferguson Act gives states the final word on the regulation of insurance unless Congress specifically overrides their choices, Wisconsin's word is consistent with the Fair Housing Act.”

On the question whether the Fair Housing Act covers insurance, the court in referring to section 3604 and the phrases “or otherwise make unavailable” and “or in the provision of services” and “in connection therewith” states:

“Plaintiffs...contend that by refusing to write policies (or setting a price too dear) an insurer ‘make[s] a dwelling] unavailable’ to the potential buyer. Lenders require their borrowers to secure property insurance. No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable...Plaintiffs also submit that property insurance is a ‘service’ rendered ‘in connection’ with the sale of the dwelling. If the world of commerce is divided between ‘goods’ and ‘services,’ then insurers supply a ‘services’ ‘[I]n connection’ may be read broadly, and should be (plaintiffs contend) to carry out the national goal of removing obstacles to minorities’ ownership of housing. There you have it.

“Nothing in the text of the statute permits us to reject these proposed readings. The Fair Housing Act does not define key terms such as ‘services’ and ‘make unavailable’. By writing its statute in the passive voice - banning an outcome while not saying who

the actor is, or how such actors bring about the forbidden consequence - Congress created ambiguity.”

The opinion briefly discusses the judicial and legislative history of this issue noting that:

- In 1980, a district court in *Dunn v. Midwestern Indemnity Mid-American Fire and Casualty Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979) found that the Fair Housing Act covered property insurance.
- Some members of Congress sought to amend the FairHousing Act to establish that *Dunn* correctly interpreted Congress’ intent. Such efforts failed.
- In 1984, the 4th circuit in *Mackey* held that the Fair Housing Act did not cover insurance sales and inferred in its opinion that Congress’ failed efforts to enact statutory language consistent with *Dunn* showed Congress disapproval of *Dunn*

On this last point, the Seventh Circuit states:

“Proposed legislation can fail for many reasons. Some members of Congress may oppose the proposal on the merits; others may think it unnecessary and therefore not worth the political capital needed to write the ‘clarification’ into the statute over opposition; still others may be indifferent, or seek to use the bill as a vehicle for some unrelated change. Congress may run out of time, as a noncontroversial bill sits in a queue while a contentious proposal is debated. No surprise, therefore, that the Supreme Court repeatedly reminds us that unsuccessful proposals to amend a law, in the years following its passage, carry no significance... Were it otherwise, one House of Congress could change the meaning of a law by refusing to approve a change in the text. Yet Congress may change the law only by bicameral action...which implies that the refusal of one chamber to assent to a proposed amendment cannot alter the meaning of the law on which both chambers agreed in prior years.”

Finally, the appeals court noted that it is assuming that the plaintiffs can establish discrimination based on disparate treatment and not disparate impact. The court observed that the Supreme Court has not yet ruled as to whether practices having a disparate impact violate the Fair Housing Act and that this distinction is important because “insurance works best when the risks in the pool have similar characteristics.” “Risk discrimination is not race discrimination,” the opinion states.

Reaction

The civil rights community responded very positively to the Supreme Court’s refusal of cert. John Relman, an attorney with the National Fair Housing Alliance, a group of 75 nonprofit housing advocacy organizations said:

“This is such a high-profile issue of such importance to the insurance industry, which has been waiting to see whether they are covered or not that I do not think the Supreme Court [refused the case] lightly. It sends a signal that this is the direction interpretations should properly go in.”

The penalties available under the Fair Housing Act are higher than under state laws. NAACP assistant general counsel Willie Abrams said: “the state laws do not carry sufficient monetary or punitive damages to send a [strong] message.” Abrams also said he is confident the plaintiffs will prevail as the case proceeds:

“We have internal written memos by supervisors telling agents they are selling to too many blacks. The company cannot claim it is assessing risk and acting accordingly because it decided to treat all blacks the same regardless of individual characteristics.”

SUPREME COURT TO EXAMINE IF JURORS CAN BE BARRED ON THE BASIS OF GENDER

On May 17, 1993, the Supreme Court agreed to review whether the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which the Court has ruled bars the exclusion of jurors on the basis of race, applies as well to the exclusion of jurors based on gender. The case is *J.E.B. v. T.B.*, No. 92-1239.

The question before the Court is "whether a male defendant in a civil action brought by the State of Alabama, has the right, under the Equal Protection Clause of the 14th Amendment to the United States Constitution, to challenge the State's use of its peremptory jury strikes to deliberately exclude males from the jury panel."

Background

In October 1991, trial began in the Circuit Court of Jackson City, Alabama on T.B.'s allegation that J.E.B. was the father of a child born to T.B. During the jury selection process, the state which represented T.B., used nine of its ten peremptory strikes to eliminate all males from the jury panel. The attorney for the defendant challenged the state's strikes, stating "the state strikes with the exception of one were males. Virtually none of them answered any questions whatsoever which would show prejudice or bias in any way, and I submit to the Court that they were basically struck solely upon gender." He requested a hearing in line with procedures established by the Supreme Court in *Batson v. Kentucky*. The Court denied his motion, and the case went to trial with a jury panel of twelve women who found J.E.B. to be the father.

The case was appealed to the Alabama Court of Civil Appeals and to the Alabama Supreme Court. The defendant filed a petition in the U.S. Supreme Court and review was granted.

In 1986, the Supreme Court ruled in *Batson v. Kentucky* that the prosecutor's striking of African-Americans from a jury panel in a criminal case because of their race violated the Equal Protection clause of the 14th Amendment. Since then in a series of decisions, the Court has applied this principle to civil as well as criminal cases and to the defense as well as the prosecution.

The Petitioner's Brief

The petitioner argues that although the legal test of heightened scrutiny in gender discrimination is not as demanding as the strict scrutiny test in race cases such as *Batson* the result should be the same.

"The 14th Amendment to the Constitution of the United States guarantees against governmental action which differentiates between persons because of their inclusion in certain groups. In order to survive the heightened scrutiny accorded to the classification of individuals based upon their gender, the state must show that the classification is substantially related to an important governmental interest. The use of peremptory jury strikes to exclude jurors from the jury panel solely because of their gender violates the equal protection rights of both the excluded juror and the nonstriking party. Further, such a discriminatory action within the Court system casts a disparaging shadow upon the entire judicial process. The protection previously extended to jurors based upon race should, upon the equal protection principles of the 14th Amendment, be applied to jurors who are excluded from the jury process solely by the accident of birth."

UPDATE ON CIVIL RIGHTS LEGISLATION PENDING BEFORE CONGRESS

The Justice for Wards Cove Workers Act, S. 1037, H.R. 1172, was introduced in the House on March 2, 1993 by Congressman Jim McDermott (D-WA) and in the Senate on May 27 by Senator Patty Murray (D-WA). On March 17 the House Judiciary Subcommittee on Civil and Constitutional Rights, reported H. R. 1172 to the full Judiciary Committee by a unanimous voice vote.

The bill would eliminate an exemption in the 1991 Civil Rights Act which prevents application to the *Wards*

Cove case of the broader fair employment protections provided by the Act.

The Equal Remedies Act, S.17, H.R.224, was introduced in the House by Representative Barbara Kennelly (D-CT) on January 5, 1993, and in the Senate on January 21, 1993, by Senator Edward Kennedy (D-MA). The bills were referred to the House Committees on Education and Labor, and Judiciary, and to the Senate Committee on Labor and Human Resources. No further action has been taken.

The bill would remove the cap on monetary damages available under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act which as a practical matter applies only to women, persons with disabilities, and certain religious groups who are victims of intentional discrimination, because racial minorities and members of certain religious groups may obtain damages under section 1981 which does not limit the amount.

The New Columbia Admission Act, H.R. 51, was introduced on January 5, 1993 by Congresswoman Eleanor Holmes Norton (D-D.C.) The House Judiciary and Education Subcommittee of the District of Columbia Committee held a hearing on the bill on July 29, 1992. On August 5, the Subcommittee approved the bill for full committee consideration. A companion bill of the same title was introduced in the Senate on May 5 by Senator Kennedy (D-MA), and referred to the Governmental Affairs Committee. The House of Representatives is expected to vote on H.R. 51 sometime in the Fall of 1993.

The bill would grant full statehood to the District of Columbia. Supporters of the bill argue that statehood is necessary because:

"Without statehood, the residents of the District of Columbia are denied fundamental rights. They are politically disenfranchised. Every law duly passed by District legislators is subject to the whims and political winds of Congress. Every cent raised exclusively in the District can be allocated as the Congress sees fit. District residents must fulfill all the obligations of citizenship, including paying of taxes and dying in wars, yet they have no decisive Congressional vote. Yet the District of Columbia has nearly as many or more people than six states, each of which has two senators.

"In the U.S., the District of Columbia is the only entity that is taxed without having full voting representation, despite the fact that District residents pay more in federal taxes than eight states, and more per capita than 48 of the 50 states -- a billion dollars in taxes -- to the federal treasury."

The Department of Environment Act 1993 (S. 171, H.R. 109) would elevate the Environmental Protection Agency to become the 15th Cabinet level federal government agency. The Senate bill, introduced on January 21 by Senator John Glenn (D-OH), would also create an Office of Environmental Justice to document the extent of environmental problems in poor and minority neighborhoods. The House bill, introduced on January 5 by Representative Sherwood Boehlert (R-NY), would establish an Office of Environmental Justice to ensure that regulations are applied equally to all races and to evaluate the extent of help given to minorities and poor people who are affected by toxic dumps and other pollution. The bill passed the Senate on May 4 by a vote of 79-15. The House bill is before the Government Operations Committee.

PRESIDENT CLINTON ISSUES POLICY ON HOMOSEXUALS IN THE MILITARY

On July 19, 1993, ending a six month debate about his campaign promise to end the military's ban on homosexuals, President Clinton announced a policy that in effect reaffirms the Pentagon's strict prohibition of homosexual conduct both on and off the military base, but will bar the Pentagon from asking recruits and military personnel about their sexual orientation. In announcing the policy, Clinton said:

"As President of all the American people, I am pledged to protect and promote individual rights. As commander in chief, I am pledged to protect and advance our society. In this policy, I believe we have come close to meeting both objectives."

Popularly referred to as the *Don't ask, Don't tell and Don't touch* policy, the President's choice seemed to please no one. In a hearing before the Senate Armed Service Committee on July 20, Secretary of Defense Les Aspin said: "Homosexual members will have to play by the rules. If a person is homosexual, they would be

much more comfortable pursuing a different profession." Representative Barney Frank (D-MA) who is openly gay said that the plan "carves out some zone of privacy for people who are ready to be quiet about their sexual orientation, but it doesn't go far enough... Any expression, essentially, of your sexual orientation, anywhere, anytime, any place, kicks you out." Tim McFeeley, executive director of the Human Rights Campaign Fund said: "We elected a leader and got a barometer. Great presidents, like Roosevelt, Truman, and Kennedy alter political reality, rather than use it as a reason to avoid the challenge of change."

The policy provides in part:

"Applicants for military service will not be asked or required to reveal their sexual orientation. Applicants will be informed of accession and separation policy.

"Servicemembers will be separated for homosexual conduct.

"Commanders and investigation agencies will not initiate inquiries or investigations solely to determine a member's sexual orientation. Servicemembers will not be asked or required to reveal their sexual orientation. However, commanders will continue to initiate inquiries or investigations, as appropriate, when there is credible information that a basis for discharge or disciplinary action exists....

"Homosexual conduct is a homosexual act, a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

"A statement by a servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts or has a propensity or intent to do so....

"A homosexual act includes any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires or any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts. Sexual orientation is a sexual attraction to individuals of a particular sex...."

Litigation

In the first week of August the Lambda Legal Defense and Education Fund and the American Civil Liberties Union filed suit in federal court in Washington, D.C. arguing that the new policy is unconstitutional because it violates gay soldiers' rights of free speech and equal protection.

Legislation

On July 23, the Senate Armed Services Committee added language to the Department of Defense Authorization Bill that would codify a strong denunciation of "the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts." It further states that such persons "would create an unacceptable risk to the high standards of moral, good order, and discipline and unit cohesion that are the essence of military capability."

The next week the House Armed Services Committee also included the language in its 1994 Defense Appropriation Bill. On September 9, the Senate defeated an amendment by Senator Barbara Boxer (D-CA) to strike the language from the authorization bill. Senator Boxer's amendment would have left the policy up to the President and his advisors.

The Congressional provision will not prevent President Clinton's policy from going into effect in October.

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