Leadership Conference Education Fund

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Civil Rights Monitor

U.S. DISTRICT COURT JUDGE RULES MINORITY SCHOLARSHIP PROGRAM CONSTITUTIONAL

On November 18, 1993, U.S. District Court Judge J. Frederick Motz ruled that the University of Maryland College Park's (UMCP) Benjamin Banneker scholarship program for African-American students was narrowly tailored to meet a compelling state interest and thus was constitutional, *Podberesky v. Kirwan*, Civil No. JFM-90-1685. The 59 page opinion provides a summary of the history of discrimination against African-Americans by the state's higher education system, and a review of the UMCP Decision and Report which identifies four present-day effects of the University's past discrimination and documents those effects. The opinion concludes that the University's findings are supported by strong evidence:

> "...UMCP's April 1993 *Decision and Report* (the 'D&R') concluded the Banneker Program should be continued. The D&R first identified four effects of the University's past discrimination which persist into the present: (1) a poor reputation of the university in the African-American community, particularly among parents and high school counselors who influence students' college choices; (2) underrepresentation of African-Americans in the student population; (3) low retention and graduation rates of African-Americans; and (4) perceptions of a campus climate that is hostile to African-Americans. The D&R next found that the Banneker Program has been successful in helping to overcome these vestiges of discrimination and that alternative remedies, specifically race-neutral scholarships or expanded need-based financial aid, would not be similarly efficacious. Finally, the D&R required that the Banneker Program be reviewed and evaluated at least once every three years to determine whether its goals have been achieved and whether it should be continued."

In conclusion, Judge Motz wrote:

> "Few issues are more philosophically divisive than the question of affirmative action. It strikes at our very souls as individuals and as a nation. It lays bare the conflict between our ideals and our history. The answers that we give to it today cannot be cast in stone, but must stand exposed, in all of their fragility, to the tests of time and experience. All that we can ask of those entrusted with the responsibility of running our institutions both public and private, is that they approach the issue intelligently, sensitively and self-critically, without bias, self-interest or cant. This, the University of Maryland at College Park has done in adopting and resolving to continue the Banneker Program, and its judgement withstands the scrutiny to which the Constitution properly subjects it."

Background

The state of Maryland operated a dual system of higher education for many years that restricted African-American students to attendance at four historically black institutions: Bowie State, Coppin State, Morgan State and the University of Maryland Eastern Shore, that as Judge Motz's opinion states "were segregated, vastly underfunded and consistently neglected". In 1969 the federal Department of Health, Education and Welfare (now the Department of Education (DOE)) notified the state that the state was in violation of Title VI of the Civil Rights Act of 1964 for failing to dismantle its dual system of higher education. From 1969 to 1985, the state and DOE struggled to develop an acceptable plan for the desegregation of the system. At one point, Maryland's Governor invited DOE to sue the state. In 1985 Maryland and DOE finally agreed on a desegregation plan that included affirmative steps to desegregate the dual system including race-based student financial aid.

Between 1985 and 1989, approximately eight million was provided to students to attend schools in which their race was in the minority, including $800,000 for the Banneker Scholarship program. In 1990, the University spent $43 million on student financial aid of which $488,000 was awarded to Banneker scholars. Recipients of the scholarships must be African-American, have at least a 3.0 high school grade point average (GPA) and an SAT score of 900. They do not need to show financial need.

In 1990, Daniel Podberesky, who is Hispanic, challenged the constitutionality of the Banneker program when he was told that he could not apply for a Banneker scholarship because he is not African-American. Podberesky, who had a high school GPA of 4.0 and an SAT score of more than 1300, asserted that a number of the

Banneker recipients that year had lower GPAs and SAT scores.

The U.S. District Court for the District of Maryland dismissed the suit in 1991 stating that the Banneker plan was constitutional as it was designed to address past discrimination at the University of Maryland's main campus. On appeal, the U.S. Court of Appeals for the Fourth Circuit "vacated and remanded for a determination as to whether there is a factual basis for finding that, at the time plaintiff applied for a Banneker scholarship, there were present effects of the former dual system of higher education which justified the race conscious program...."

When the case returned to the District Court, both parties entered motions for summary judgment. A hearing on the question was held in U.S. District Court on October 22, 1993.

The state of Maryland asserted at that hearing that the effects of past discrimination remained a part of the present system. Evelyn Cannon, Maryland's Assistant Attorney General, who represented the University, asserted that "a black child going to college now has parents or high school counselors who remember all too well that they were unwelcome at College Park. That's measured in three criteria: enrollment, retention, and graduation. In each of those areas, blacks are underrepresented."

She continued:

> "The Banneker Program has a tremendous impact on integrating the campus. Banneker students are role models for their black peers and also for white peers. They help white students be around black students and ameliorate racial stereotypes. But the fact of the matter is we can't get them without the program." (New York Times, 10/27/93)

On November 18, Judge Motz granted the defendant's motion for summary judgment and entered judgment in favor of the defendant.

Department of Education's Amicus Curiae Brief

On behalf of the DOE, the Department of Justice had filed an amicus curiae brief in the case supporting the position of the University of Maryland. The brief stated that Mr. Podberesky's claim could succeed only if he was able to demonstrate that the "vestiges of Maryland's dual system have been eradicated." While DOE agreed in its brief with Mr. Podberesky's statement that the UMCP exceeded its goal for recruiting African-American students in the 1989 freshman class and came close to meeting its goal for the retention of African-American undergraduates, DOE asserted that the state-wide system did not meet its goal and that until the UMCP freshmen moved through the system it was not possible to assess whether they were being retained and graduated. The brief further asserted that compliance should occur over a reasonable period of time before the plan is dismantled: "To require the cessation of all affirmative action measures at the very moment of achieving compliance would promote the revival of the effects of past discrimination."

In conclusion, the brief stated:

> "Maryland had failed to eradicate its former dual system as of 1985, when it adopted the *Plan* accepted by OCR [Office for Civil Rights, DOE] as a valid plan for disestablishing the former dual system of higher education; the UMCP's institutional other-race recruitment plan, including the Banneker Program, was an integral element of the approved statewide *Plan*. Until the State demonstrates that it has fully eliminated all vestiges of its former *de jure* segregated system of higher education, Maryland has a continuing legal duty to take affirmative action to eradicate its former dual system. Because the goals of the *Plan* are interrelated, it is inappropriate to isolate a single aspect of the Plan, as implemented at one institution, for equal protection analysis devoid of consideration of the Plan as a whole. Even so isolated, however, the Banneker Program is narrowly tailored to remedy continuing vestiges of the former dual system of higher education both at UMCP and in the state system. Accordingly, defendants' motions for summary judgment should be granted and the instant challenge to the Banneker Program should be dismissed with prejudice."

Reaction to DOE Involvement

The Administration's position in this case, as well as a letter Secretary Richard W. Riley sent to college and university presidents in March, 1993, are viewed as indications that the Administration will be more suppor-

tive of minority scholarships than were the Reagan or Bush Administrations.

On December 4, 1990, Michael Williams, then Assistant Secretary for Civil Rights in the Department of Education, in a letter to organizers of the Fiesta Bowl, a college football game, who planned to give the schools competing in the Bowl $100,000 each for minority scholarships, wrote that Title VI of the Civil Rights Act of 1964 "generally prohibits race-exclusive scholarships...unless they are subject to a desegregation plan that mandates such scholarships." (For additional information, see MONITOR, Winter 1991).

In December 1991, the DOE published in the Federal Register proposed policy on the applicability of Title VI to student financial aid that is awarded, at least in part, on the basis of race or national origin. The policy stated, in part, that a college may consider race as one factor among several when awarding scholarships to help create diversity on campuses and that race-based scholarships may be awarded to overcome past discrimination. The higher education community for the most part viewed the proposed policy with alarm and asserted that the policy would prohibit race-based scholarships in all but limited circumstances. The policy was never made final. In June 1992, the DOE agreed to a request from some members of Congress to postpone issuing final policy to allow the General Accounting Office to complete a study of the issue.

On March 4, 1993, Secretary of Education Richard W. Riley in a letter to College and University Presidents nationwide wrote:

> "I am writing because I want to reassure you that I am committed to ending the confusion which seems to have been generated on the issue of race-based scholarships. As many of you are aware, the Department has been in the process of developing policy guidance concerning these scholarships. The Department will give this issue the careful study and attention that it deserves, and bring our review to a conclusion so that we can issue final policy guidance....
>
> "There is no need to make any changes to your student financial aid programs in anticipation of the Department final policy. If any changes are needed after final policy guidance is issued, we will work with you to bring about those changes in a reasonable manner.
>
> "In the meantime, I want to share my conviction that it is critically important for postsecondary institutions to make significant efforts to provide access to higher education for a diverse population of Americans. I believe race-based scholarships can be a valuable tool for providing equal opportunity and for enhancing a diverse educational environment for the benefit of all students."

UPDATE ON AWARD OF DAMAGES IN AMERICANS WITH DISABILITIES ACT CASE

In the Spring 1993 MONITOR, we reported that on March 19, 1993, in the U.S. District Court in Chicago, Illinois, a jury returned a $572,000 verdict in the first case brought by the Equal Employment Opportunity Commission under the Americans with Disabilities Act, *EEOC v. AIC Security Investigations*. The Chicago firm of AIC Security Investigations, Ltd., and its owner Ruth Vrdolyak, were found liable for discrimination for discharging the firm's Executive Director, Charles H. Wessel, because he had terminal lung cancer.

The jury award included $22,000 in back pay, $50,000 in compensatory damages and $250,000 each against AIC and owner Ruth Vrdolyak in punitive damages.

Subsequent to the Spring 1993 Monitor, the judge considered motions on the issue whether there are limits to the compensatory and punitive damages that can be awarded under the ADA. Based on the statutory requirements of the Civil Rights Act of 1991, he limited the award to $50,000 in compensatory damages, and $150,000 in punitive damages, $75,000 each against Ms. Vrdolyak and AIC. The back pay award remained at $22,000. The defendant filed a motion for a new trial which the judge denied on October 20. The defendant then filed a notice of appeal to the U.S. Court of Appeals for the Seventh Circuit.

SUPREME COURT RULES IN SEXUAL HARASSMENT CASE

On November 9, less than a month after the oral argument, the Supreme Court ruled unanimously, in *Harris v. Forklift Systems*, No. 92-1168, that to prevail in a sexual harassment case brought under Title VII of the Civil Rights Act of 1964, the plaintiff does not need to prove that she suffered severe psychological harm. (For a discussion of the facts in this case, see *MONITOR*, Spring 1993).

The question the Supreme Court accepted was "whether conduct, to be actionable as 'abusive work environment' harassment...must 'seriously affect an employee's psychological well being' or lead the plaintiff to 'suffer injury.'" But in oral argument, the two sides agreed that it is not necessary to prove psychological injury in order to prevail in a sexual harassment case. The oral argument centered around whether the conduct had to interfere with the employee's work performance or only make it more difficult to do the job even if one's work performance did not decline. Or, as Judge Ginsburg questioned, "Is it enough that one sex has to put up with something that the other sex doesn't?"

The Opinions

Judge O'Connor wrote the opinion for the unanimous Court. Judges Scalia and Ginsburg wrote separate concurring opinions.

The Court's opinion states that the Court made clear in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that an unlawful employment practice is not limited to "economic " or "tangible" discrimination, [Court established that sexual harassment can be a violation of Title VII.] The opinion continues that while psychological harm as well as an employee's work performance, the frequency and severity of the abuse, whether it was physically threatening or humiliating, may be factors in determining the abusiveness of the work environment, the determination of unlawful sexual harassment can only be made by examining all the circumstances and no one factor is required.

The opinion explains:

> "...Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."

Judge Scalia wrote in concurring:

> "Today's opinion elaborates that the challenged conduct must be severe or pervasive enough 'to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive'.... 'Abusive'...does not seem to me a very clear standard - and I do not think clarity is at all increased by adding the adverb 'objectively' or by appealing to a 'reasonable person's' notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness..., but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude....
>
> "Be that as it may, I know of no alternative to the course the Court today has taken...I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts. For these reasons, I join the opinion of the Court."

Judge Ginsburg wrote in concurring:

> "...the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment...It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered

working conditions as to 'make it more difficult to do the job.'"

Donna Lenhoff, General Counsel of the Women's Legal Defense Fund, issued the following statement about the decision:

> "This is an enormous and meaningful victory for women. Today's ruling will protect women from the degrading and demoralizing behavior that Teresa Harris and millions of American women have faced. The Supreme Court unequivocally reaffirmed that sexual harassment is illegal job discrimination -- that women have the right to go to work without being sexually harassed. The court made clear that women do not have to choose between their paychecks and their dignity. The speed with which the Supreme Court issued this unanimous ruling sends a message to employers that sexual harassment will not be tolerated. Because of this ruling, it will be easier for women to prove they are victims of illegal behavior. A woman who finds herself in a sexually abusive environment will not also have to prove severe psychological damage or that her work performance was adversely affected."

SUPREME COURT HEARS ORAL ARGUMENT IN GENDER-BASED PEREMPTORY CHALLENGES CASE

On November 2, 1993, the Supreme Court heard oral argument on the question whether the Equal Protection Clause of the Fourteenth Amendment 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, *J.E.B. v. T.B.*, No. 92-1239.

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

In reviewing governmental action that treats whites differently from minorities, the courts have applied the so-called strict scrutiny standard. This standard, based on the Equal Protection Clause, requires that official actions of a race-conscious nature be narrowly tailored to address a compelling state interest. The courts have applied a lesser standard or "heightened" scrutiny test to gender classifications. Also based on the Equal Protection Clause, that test requires the state to show that the classification is substantially related to an important governmental interest.

In this case, 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*. 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 the Alabama Supreme Court. The defendant filed a petition in the U.S. Supreme Court and review was granted.

Oral Argument

Attorney John Porter, III, of Scottsboro, Alabama, who argued for the plaintiff began by saying that his client is seeking a determination that gender-based peremptory strikes are prohibited by the 14th Amendment. He argued that the same principle that prohibits the exclusion of women from serving on juries should be applied to peremptory strikes, i.e., that the heightened scrutiny standard is applicable; and that the harm to petitioner, to society and to the community is substantially similar to the harm caused when jurors are struck based on their race.

Justice Scalia questioned whether this was warranted stereotyping or unwarranted stereotyping and continued by saying that in a rape case it may be worse for the defendant to have women on the jury - is that warranted

or unwarranted stereotyping? Porter answered that it was unwarranted because men and women have the same ability to be unbiased. Scalia replied that jurors can fight against stereotyping as we all must do, but that individuals come to situations from different places. Is it unreasonable for an attorney to consider this, Scalia asked. Porter said that it was unwarranted for men or women to be excluded just on the basis of gender. To which Justice Scalia replied so you're saying that there's something to stereotyping but you can't use it in the selection of jurors.

Justice Souter joined the discussion, asking, but haven't we said that certain stereotypes should not be recognized under the Equal Protection Clause regardless of the basis of the stereotype. Porter responded in the affirmative.

Justice Ginsburg said so if you want the race precedent applied to sex, what about age, religion, and national origin? Porter answered that this case reaches sex but that he thought it reasonable to apply the standard to religion and national origin. Justice Ginsburg continued but aren't race and sex different in that you can tell from looking at a person what their race or sex is and with the others you would have to ask, which she said was a disturbing thought.

Chief Justice Rehnquist asked Porter, but if your view prevails, any peremptory strike is running a risk -- a strike has to be of a man or a woman so you could make the argument that the person was struck because of gender every time. Porter said that you have to be able to make the argument that gender alone was used as the basis for the strike.

Michael R. Dreeben, Assistant to the Solicitor General, argued on behalf of the Department of Justice. He began by saying that for two decades the Court has applied the heightened scrutiny standard to gender discrimination cases and it should be applied in this case to find peremptory challenges based on gender unconstitutional. Justice Scalia asked are you saying that you know better than the defense attorney - he wants to protect his client, he has some hunches about the jury - why not let him play them. Justice O'Connor raised the question Justice Ginsburg had asked Porter, if you prevail, then aren't we talking about not only gender based, but ethnicity based, religion based, what is left? Dreeben said that peremptory challenges based on occupations and other classifications have not been elevated to heightened scrutiny.

Justice O'Connor asked how would it work practically, since each strike could presumably be a strike based on gender. Dreeben responded that as in *Batson* hearings, the trial judge would have discretion and that numbers do not necessarily establish a prima facie case. Justice O'Connor said but numbers alone might establish a prima facie case. Dreeben agreed and went on to say that in that case the party striking a juror would have the opportunity to present gender neutral reasons for the strike. The procedure has worked well in *Batson* hearings, he said.

Justice O'Connor asserted that with race the pool is much smaller and thus it is easier to establish misuse. In gender challenges the numbers would be much larger, she said, and it would be more difficult to administer. Justice Ginsburg added that the *Batson* rule has been applied to gender in the Ninth Circuit Court of Appeals and in New York and California and questioned whether there was any indication that it was cumbersome. No affirmative response was forthcoming. Finally, Dreeben asserted that the application of *Batson* to gender should be applied to pending cases.

Lois N. Brasfield, Assistant Attorney General of Alabama, arguing for the state, asserted that the petitioner's solution causes more problems than it fixes and that it can not be said that the defendant, the jurors or the community were harmed. She argued that the *Batson* decision is unique to race and said that when *Batson* was decided blacks were still being kept out of the system and not allowed to serve on juries. In Alabama, women have been serving on juries since 1966, Brasfield said. [Justice Ginsburg later corrected her and said that women did not serve until 1967 although the case challenging their exclusion was brought in 1966.]

Justice Ginsburg stated that women and blacks were the only groups that had been excluded from jury duty by law.

Justice Scalia said if we say that every citizen has the right not to be struck for race and sex then the argument could go that there is also the right not to be struck for any erroneous reason - I struck him because I didn't like the look in his eyes. Chief Justice Rehnquist responded that we have drawn the line as to the equal protection clause and strict or heightened scrutiny - we have not said the same about people who have a certain look in their eyes.

Brasfield said that was certainly true and that under *Batson* if you explained your peremptory strike by saying I didn't like the look in his eyes that would be considered a sham - you have to give an acceptable reason. Jus-

tice Ginsburg asked was there any indication that in the jurisdictions where *Batson* had been applied to gender there had been any practical problems. Brasfield said she was not aware of any, and Chief Justice Rehnquist said that the Ninth Circuit had applied it to gender only in 1992 so there has not been enough time to assess the impact.

Brasfield went on to say that in Alabama they were struggling with *Batson* and that Alabama is not unique in this regard and it would be more difficult in regard to gender. In Alabama, she said, if you reduce the racial ratio re: from the venire (larger panel from which the jury is selected) to the jury that can be a prima facie case. You are going to have to have a proportional jury or be able to explain the reason why not, she said.

A decision is expected in the Spring.

UPDATE ON JACKSONVILLE, FLORIDA SET-ASIDE PROGRAM

In the Winter 1993 MONITOR, we reported that on October 5, 1992, the Supreme Court granted review of the decision of the U.S. Court of Appeals for the Eleventh Circuit in *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*, No.91-1721. The Eleventh Circuit had ruled that the Northeastern Florida Chapter of the Associated General Contractors of America (AGC) lacked standing to challenge Jacksonville, Florida's Minority Business Enterprise Program because it had not established that but for the city's minority contract program any member of that organization would have been the successful bidder for a government contract. The question presented to the Supreme Court for review was:

> "Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are precluded from bidding on certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the set-aside provisions?"

On June 14, 1993, in a 7-2 decision, the Supreme Court ruled that to have standing to challenge the set-aside program, the association did not have to demonstrate that one of its members would have received a contract absent the ordinance. The minority found the issue moot given changes in the contracting ordinance and did not address the question of standing.

Background

On October 5, 1992, when the Supreme Court accepted the case, the city's minority contract program required that 10 percent of the amount budgeted for city contracts be awarded to minority contractors. The city defined a minority business as one that was at least 51 percent owned by minorities or women. Minorities were defined in the ordinance as "black, Spanish-speaking American, Oriental, Indian, Eskimo, Aleut, and Handicapped persons."

On October 22, 1992, the city repealed its minority set-aside program and replaced the program with the African-American and Women's Business Enterprise Participation Ordinance which applies only to women and African-Americans. The new program establishes participation goals of 5 to 16 percent rather than a 10 percent set-aside; and provides five alternative mechanisms for reaching the goals which are chosen on a case-by-case basis. The new ordinance is based upon the findings of an independent study and numerous public hearings held by the city council on discrimination in city contracting.

On November 18, 1993, citing the adoption of the new ordinance, the city filed a motion in the Supreme Court to dismiss the case as moot. The Supreme Court denied the motion on December 14, 1993, and the case was argued on February 22, 1993.

The Opinions

The majority opinion, written by Justice Clarence Thomas, cites Supreme Court decisions on standing and concludes:

> "Singly and collectively, these cases stand for the following proposition: When the

> government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit... And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract."

In a dissenting opinion, Justice O'Connor, joined by Justice Blackmun, wrote: "when a challenged statute expires or is repealed or significantly amended pending review, and the only relief sought is prospective, the Court's practice has been to dismiss the case as moot. Today the Court abandons that practice... I believe this case...resembles those cases in which we have found mootness.... Accordingly, I would not reach the standing question decided by the majority."

The case is presently back before the original panel of the Eleventh Circuit.

The decision on standing maybe of benefit to minorities who have had their cases dismissed because of a restrictive view of standing.

THE RELIGIOUS FREEDOM RESTORATION ACT IS ENACTED INTO LAW

On November 16, 1993, President Clinton signed into law the Religious Freedom Restoration Act to overturn the Supreme Court's decision in *Employment Division of Oregon v. Smith* in which the Court held that the state of Oregon was free "to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."

Rabbi David Saperstein, Director/Counsel, Religious Action Center of Reform Judaism, issued a statement applauding the enactment of the legislation:

> "Today, President Clinton signed an historic and vitally important religious liberty bill: the Religious Freedom Restoration Act (RFRA). RFRA is nothing less than the most important religious freedom bill of our lifetimes -- indeed the most important religious freedom bill since the Constitution was written. For never before the *Smith* decision -- the effect of which RFRA overturns -- had the Supreme Court of the United States simply abandoned one of our fundamental First Amendment rights. As a result of RFRA, the free exercise of every American is vastly safer today than it has been for the past three and a half years....
>
> "More than 60 cases have been decided against religious claimants since *Smith*. Orthodox Jews have been subjected to autopsies in violation of their families' religious faith; unpopular churches have not been allowed to meet even in commercial areas; Catholic hospitals have lost their accreditation for refusing to provide abortion services. With RFRA signed into law today, such free exercise of religion is no longer in danger."

Background

The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...". This clause was applied to states through the Fourteenth Amendment.

Prior to the Supreme Court's decision in *Smith*, the legal standard the Court applied to test the constitutionality of a state statute challenged as in conflict with the free exercise of religion was whether the state statute was "justified by a compelling interest that cannot be served by less restrictive means." In the *Smith* decision, the majority held that this standard did not apply to state statutes that do not target religious prac-

tices but are general prohibitions, and that the "compelling interest test [is] inapplicable to challenges to general criminal prohibitions."

The plaintiffs in the case were fired from their jobs with a drug rehabilitation center because of their use of peyote as part of a religious ceremony at their Native American Church. They were denied unemployment compensation because "they had been discharged for work-related misconduct." The Oregon Court of Appeals found the state Employment Division's determination of ineligibility in violation of the First Amendment's Free Exercise Clause. On appeal, the Oregon Supreme Court upheld the decision of the Oregon Court of Appeals.

The Supreme Court granted review and in its opinion asserts that the Court's decisions "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" The opinion, written by Justice Scalia and joined by Chief Justice Rehnquist, and Justices White, Stevens, and Kennedy states:

> "Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered since *Reynolds* [an 1879 opinion] plainly controls."

Judge Scalia cites *Reynolds v. United States* in which the Court said: "Laws...are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Justice Scalia goes on to state that the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1969), i.e., governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest, has never been used by the Court to invalidate any government action except the denial of unemployment compensation and that "even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field we would not apply it to require exemptions from a generally applicable criminal law."

Justice O'Connor while concurring in the judgment of the Court did not join in its opinion. She wrote separately, including the following:

> "....The critical question in this case is whether exempting respondents from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest'.... Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is 'essential to accomplish',.... its overriding interest in preventing the physical harm caused by the use of a...controlled substance."

Of her disagreement with the majority opinion, Justice O'Connor wrote:

> "The Court today extracts from our long history of free exercise precedents the single categorical rule that 'if prohibiting the exercise of religion...is...merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended'... Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply... To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct."

Justice O'Connor argues that the Free Exercise Clause does not make a distinction between "laws that are generally applicable and laws that target particular religious practices". She continues that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such," and that the Supreme Court has respected the First Amendment freedom of religion and the state's need to regulate conduct by requiring that regulations of such conduct in a religious context be justified "by a compelling state in-

terest and by means narrowly tailored to achieve that interest."

Justice Blackmun wrote a dissenting opinion which was joined by Justices Brennan and Marshall. He wrote:

> "This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.
>
> "Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a 'constitutional anomaly'... As carefully detailed in Justice O'Connor's concurring opinion...the majority is able to arrive at this view only by mischaracterizing this Court's precedents."

The Bill

Senators Edward M. Kennedy (D-MA) and Orrin Hatch (R-UT) sponsored the bill in the Senate. On October 27, 1993, the Senate passed the bill by a vote of 97 to 3. The House passed the bill by voice vote in May, 1993. Representatives Charles E. Schumer (D-NY) and Christopher C. Cox (R-CA) introduced the bill in the House.

The bill codifies the compelling interest test by providing:

> "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except...Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -- is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."

In the Senate, supporters of the bill had to contend with an amendment offered by Senator Harry Reid (D-NV) to exempt prisons from the provisions of the bill. Supporters of the amendment including a number of state attorneys general asserted that RFRA would allow for fraudulent religious claims by prisoners, would result in more prison litigation and would make it more difficult to protect important penological interests. Opponents of the amendment were able to argue successfully that as in prior litigation under the compelling state interest standard "inmates' First Amendment claims often fail[ed]...because of the uniquely compelling state interest in the prison context." In addition, language added to the Senate committee report and statements made from the Senate floor acknowledged the special needs of prisons to maintain order and security. The amendment was defeated 48 to 41.

HOUSE VOTES ON D.C. STATEHOOD BILL

On November 21, the House rejected H.R. 51, the New Columbia Admission Act, by a vote of 153-277. The bill would have made the District of Columbia the nation's 51st state -- New Columbia. Although the bill was defeated, supporters hailed the vote as a strategic victory, as it exceeded all congressional vote estimates and it provided a solid foundation for future efforts in the House and in the Senate. Delegate Eleanor Holmes Norton (D-D.C.) said the vote surpassed her greatest expectations, and asserted that the floor debate will help to focus the Nation's attention on the principal statehood issues, namely, 600,000 residents who pay taxes, serve in the armed forces and bear other responsibilities and obligations of citizenship; but who do not have all the rights and privileges of citizenship, including full voting representation. This was the first House vote on the issue although D.C. statehood bills have been introduced in the House since 1965. Supporters plan to use the roll call vote as a baseline in their grassroots lobbying.

President Clinton supports D.C. Statehood and in a letter to Delegate Norton wrote: "Justice demands that the people of the District at long last be accorded full political equality." A companion bill was introduced in the Senate by Senator Edward Kennedy on May 5, 1993, and referred to the Governmental Affairs Committee. Supporters of the bill say they will push for Senate action in the second session of the 103rd Congress.

CRIME BILL MOVES THROUGH CONGRESS

On November 19, the Senate passed an Omnibus Anti-Crime Bill which authorizes $22.3 billion for prison construction, expands the death penalty to some 50 federal crimes, provides that juveniles who commit certain crimes will be treated as adults, and provides monies for 100,000 additional police officers. The House has not considered an omnibus crime bill but did pass a number of smaller anti-crime bills including a bill to ban minors from possessing handguns, a bill to encourage states to toughen their laws against domestic violence, and a bill to help communities hire additional police officers.

On November 10, the House also passed the so-called Brady Bill to establish a five business day waiting period for purchasing a handgun. The Senate passed a similar bill on the same day. A conference report was adopted by the House on November 23 and by the Senate on November 24. President Clinton signed the bill into law on November 30, 1993.

On October 19, 1993, Representative Craig Washington (D-TX) introduced an alternative crime bill, the Crime Prevention and Criminal Justice Reform Act, H.R. 3315. The comprehensive bill "is designed to provide immediate short term relief from violent crime and long term strategies for reducing crime and to reform the criminal justice system to make it more fair." Representative Washington said he wants to refocus the crime debate on ways to prevent crimes, and at the same time address the immediate needs of communities plagued by violence.

Title I of Representative Washington's bill, "Strategies to Assist State and Local Governments in Providing an Immediate Response to Crime", includes grants to assist state and local governments to assist in the development of "effective law enforcement and prosecution strategies to combat violent crimes"; and to help local governments and community groups "to expand cooperative efforts between police and a community for an increased police presence in the community." Title II provides for the compensation of victims of crime. Title III addresses the issue of crime prevention and includes grants to local educational agencies for anti-crime and safety measures, and to local governmental agencies and non-profit organizations to establish midnight sports leagues for men, women, children and young adults.

Title IV provides strategies to combat recidivism including funding for "demonstration projects designed to alleviate the harm to children and primary caretaker parents caused by separation due to incarceration of such parents, [and] to promote development of policies to assign prisoners whenever possible to correctional facilities for which they qualify closest to their family homes...." Title V calls for the creation of a National Commission on Crime, Drugs and Violence "to examine the impact of the criminal justice policy on the African-American, Hispanic, Asian, and Native American communities, and address criticism that the...system functions in a racially disparate manner; [to examine] the root causes of violent crime and make recommendations for the creation of a national public education strategy on violence; [to examine] the root causes of the demand for drugs in the United States, and [to provide] evaluation of the efficacy of current Federal drug policy.

Title VI includes the Racial Justice Act to address the well-documented pattern of racial discrimination in death penalty sentencing. Title VII provides that "the Congressional Budget Office shall prepare a criminal justice impact assessment for any bill, joint resolution, amendment, motion, or conference report that could increase or decrease the number of persons incarcerated in State or Federal penal institutions. Title VIII seeks to preserve the rights of prisoners in state capital cases to have their claims of constitutional violations heard in federal courts and provides that states are "to appoint competent, adequately paid lawyers for defendants facing the death penalty."

As the MONITOR went to press, it was not clear what action the Congress would take next on the crime bills. Diann Rust-Tierney, Chief Legislative Counsel/Associate Director of the ACLU Washington Office, said "There are several options: 1) The House and Senate could go to conference on the measures passed by both Houses, and there would probably be considerable pressure for the House conference members to adopt the more controversial measures passed by the Senate; 2) a conference could be held only on the similar measures passed by both bodies; 3) as some members of the House have requested, the Senate bill could be referred to the House Judiciary Committee for hearings; or 4) a combination of 2 and 3, a conference on the similar measures passed by both Houses and hearings on the Senate passed measures that the House has not yet considered."

EDUCATION AND CIVIL RIGHTS GROUPS SUPPORT CHANGES IN CHAPTER I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT

Education and civil rights organizations including the Leadership Conference on Civil Rights, the NAACP Legal Defense Fund and MALDEF, are supporting changes in Chapter I of the Elementary and Secondary Education Act (ESEA) designed to assure that minority and low income children have access to resources that are critical to their educational success. The Elementary and Secondary Education Act must be reauthorized by Congress in 1994.

The groups have endorsed a number of legislative initiatives recommended by The Commission on Chapter 1, a body of 28 advocates, researchers, and other concerned individuals who came together in 1990 to conduct "a thorough reexamination of the [Chapter 1] program because of growing evidence that, whatever its contributions in the past, Chapter 1 in its current form is inadequate to meet the challenges of the 1990's and beyond." The Commission is chaired by David W. Hornbeck, former state Superintendent of Schools in Maryland, and William L. Taylor, a civil rights and children's rights attorney, serves as counsel.

The legislative initiatives are:

- *Level the Playing Field*: An expansion of the definition in 'comparability' in Chapter 1 to require states to assure that children in different school districts are provided comparable services for comparable needs within the state. Comparability would not apply to all educational services but only to those deemed 'essential.' Local school districts would be free to determine their own levels of expenditure with respect to other educational services. This provision attempts to address the inequities in public school financing that exists in large part because of the wide disparities in the property wealth of school districts within some states.

- *Opportunity to Learn Standards*: School districts and schools would be called upon to meet new content and performance standards premised on the belief that all children can learn. Once these standards are articulated, schools serving large numbers of low-income children will be provided sufficient resources (e.g. up-to-date texts and materials) to meet their responsibilities.

- *Target Chapter 1 Dollars*: Chapter 1 money should be targeted to schools and school districts most in need of assistance: those in communities with very high concentrations of poverty.

- *Amend Chapter 1 Eligibility Requirements*: Support changes in the law to guarantee that low income children with limited English proficiency will no longer be excluded from Chapter 1 on grounds that their needs are met by other programs; to provide more flexibility in the use of Chapter 1 money at the building level to better meet the needs of children; to eliminate the need only to serve low-achievers by requiring school to boost the achievement of all students, including low income children with mediocre records who could do better; and to permit broader use of 'schoolwide projects' to encourage innovation and effective teaching approaches.

Background

Chapter 1 of ESEA was enacted in 1965 to provide federal financial assistance to local school districts with concentrations of children from low-income families to assist in meeting the educational needs of those children. Since 1965, more than $70 billion has been provided to local school districts through Chapter 1. In 1992, Congress appropriated $6.1 billion for Chapter 1 programs which reach more than 5 million children.

The Commission on Chapter 1's report, *Making Schools Work for Children in Poverty* recognizes the considerable progress that poor and minority students have made during the last 25 year primarily with the assistance of Chapter 1.

> "In the 1960's,...[poor and minority students] dropped out of school at alarming rates; most didn't even master very basic skills. Today virtually all poor and minority children master rudimentary skills, and graduation rates have increased dramatically for all but Latino students."

The report goes on to say that Chapter 1 has continued to provide basic remedial instruction primarily by taking students out of their classroom for 20 to 25 minutes of Chapter 1 instruction a day when in addition to learning the basics students need to be taught "to think, to analyze and to communicate complex ideas." The report says:

> "Basic skills no longer count for as much as they once did. To find a secure place in the increasingly competitive and technological international economy, young people must be able to think, to analyze, and to communicate complex ideas...
>
> "Most Chapter 1 employees -- indeed most educators -- believed that the 'basics' had to be learned prior to the 'big ideas' and concepts, even though research findings clearly say such learning should be simultaneous.... Rather than experiencing the joy of wrestling with ideas, these children are more likely to spend their time circling m's and p's on dittos."

The Commission concludes that the Chapter 1 program needs an "overhaul from top to bottom."

Administration's Chapter 1 Proposal

The following discussion borrows heavily from a memorandum prepared by the Steering Committee of the Commission on Chapter 1. The memorandum is an Analysis of the Administration's Draft Bill on Chapter 1 Reauthorization (analysis).

The Clinton Administration's Chapter 1 Proposal includes a number of changes supported by the Commission:

Administration's Chapter 1 Proposal

- allocation of dollars to schools on the basis of poverty, not low achievement -- a step necessary to eliminate provisions in the law that reduce funding when achievement improves
- concentration grant provisions that will direct substantial new resources to places where the need is greatest - in schools and districts with the highest concentrations of poverty
- discouragement of remedial drill and practice
- requirement that states, districts and schools set high standards for *all* children and develop new tools for assessing student progress
- a move to hold schools and districts accountable for making measurable progress in moving children to high levels of proficiency
- removal of the biggest impediment to the inclusion of children with limited English proficiency in Chapter 1
- provisions calling upon schools to play an appropriate role in assuring that children receive needed health and social services

However, the Commission analysis outlines a number of "critical problems" that aren't adequately addressed by the Administration's bill including the need for more accountability standards that are adequate and clear, and the need for schools serving poor children to have "guaranteed funding to support the high quality professional and organizational development" needed to get their students to high standards. The Commission's analysis also criticizes the Administration for not taking "even minimal steps to encourage states to level the playing field to assure that the federal contribution is indeed supplementary." The analysis states that the proposal:

> "does not provide for state opportunity-to-learn standards, including those that would

> assure that state financing systems furnish the minimum resources that each district should have (e.g.,in the form of experienced teachers, up-to-date texts and materials) to enable the district and its schools to meet high standards. Nor is there any requirement that states deal with the vast disparities among school districts within the state by providing some form of comparability in the provision of services and resources vital to the educational success of children...

Also missing, the analysis states is a:

> "general mechanism to force attention to quality problems in schools serving poor children. In a majority of all Chapter 1 schools, Chapter 1 will remain simply an add-on program, and even in the remaining schools, it will be easier to stay in the present program mode than to take on whole school improvement. This is being proposed when we know that even the best add-on programs cannot compensate for poor-quality instruction the rest of the day."

Equal Educational Opportunity Act

A member of Congress has drafted a bill to attempt to level the playing field among school districts within a state so that funds districts receive through Chapter 1 can be used to address the special needs of disadvantaged students instead of being used by poorer districts to provide basic services. For example, because of wide disparities in the property wealth of school districts within some states, in New Jersey in 1992-93 the per pupil expenditure in districts ranged from a low of $4,035 to a high of $11,096. Similarly, in Texas in 1991, the poorest school district spent $2,150 per pupil and the wealthiest district spent $14,514. The corresponding figures in Ohio were $3,114 and $22,625 respectively.

The draft legislation would require that by June of 1998 each State agency would assure that all public school children in the state were receiving from non-federal sources comparable essential services and resources for comparable needs. Essential educational services and resources are defined as including "preschool child development programs, programs to assure the development of reading skills in the early grades, pupil-teacher ratios in the classrooms that permit adequate attention to the educational needs of individual children, counseling, health and social services, teachers who are experienced and hold certifications...a broad and comprehensive curriculum that includes appropriate courses at each grade level designed to teach advanced skills and knowledge in all core subjects with appropriate instructional materials and equipment, and services for students with limited-English proficiency."

The House Education and Labor Committee is expected to mark-up Reauthorization of Chapter 1 in February. However, the Administration's proposal for concentrating funding where the need is the greatest appears to be in trouble, and supporters of the proposal assert that the Democratic leadership on the Committee has not strongly supported the Administration's proposal.

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