

# Leadership Conference Education Fund

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# Civil Rights Monitor

## UPDATE ON REDISTRICTING CASES

Since the last *MONITOR*, lower courts have issued decisions in several redistricting cases, and the Supreme Court is expected to address the issue during its 1994-95 term.

**Shaw v. Hunt:** On remand from the Supreme Court (*Shaw v. Reno*, decided on June 28, 1993), a three-judge panel of the U.S. District Court for the Eastern District of North Carolina ruled 2-1 that the challenged majority African-American congressional districts (the 1st and 12th) "did not violate any rights of the plaintiffs or their supporting intervenors." The plaintiffs had alleged that any redistricting plan that deliberately established districts based on race is unconstitutional regardless of the justification and that the North Carolina plan in particular was unconstitutional because its lines did not follow traditional considerations such as geographical compactness, contiguity, etc.

The three-judge panel stated that only the second claim was an issue on remand as the Supreme Court in *Shaw v. Reno* found the plaintiffs' first claim foreclosed by precedent when the purpose is to comply with the Voting Rights Act. The panel ruled that the redistricting plan was a "racial gerrymander subject to strict scrutiny" pursuant to *Shaw v. Reno*, but that it passed the scrutiny test because it was narrowly tailored to further the state's compelling interest of complying with the Voting Rights Act.

The state had challenged the plaintiffs' standing to sue, but the panel ruled against the challenge, stating that while the implications are disquieting, the Supreme Court has said that any "person who can show that a redistricting plan has assigned him to vote in a particular district at least in part because of his race has standing to challenge, even if he cannot show that it has caused any concrete injury to his political interests."

Further, the state had argued that the strict scrutiny standard should be applied to redistricting plans only if:

1. the districts are of highly irregular shapes
2. citizens of particular racial groups are concentrated in numbers disproportionate to their representation in the state's population, and
3. the shape and location of the districts cannot rationally be explained by reference to any distinguishable factor other than race.

The panel in rejecting the state's argument reasoned that the implication of the Supreme Court's opinion in *Shaw v. Reno* is that strict scrutiny of an electoral redistricting plan "is now triggered by proof -- by any means, including state concession, bizarre shape, or some combination of the various factors typically used to prove the 'intent' element of an Equal Protection claim...that racial considerations played a 'substantial' or 'motivating' role in the line-drawing process, even if they were not the only factor that influenced that process."

The panel agreed with the state's assertions, assuming that strict scrutiny applies, that

the North Carolina redistricting plan met the compelling state interest standard because:

1. it was developed in compliance with the Voting Rights Act, and
2. separate from any Voting Act requirement, its purpose was to eradicate the effects of past and present racial discrimination in North Carolina's political processes.

Finally, the panel turned to the issue of whether the plan was narrowly tailored to achieve the compelling state interest, and said that *Shaw v. Reno* held that a plan which deliberately creates majority-minority districts to comply with the Voting Rights Act is not narrowly tailored if it goes beyond what is reasonably necessary to avoid a violation of the Act.

The panel's opinion outlines five basic factors it says the Supreme Court has used to assess race-based affirmative action in other areas, and then applies each to the facts on the record here. The five factors are:

1. efficacy of alternative remedies
2. whether the program imposes a rigid racial 'quota' or just a flexible racial goal
3. planned duration of the program
4. relationship between the program's goal for minority representation in the pool of individuals ultimately selected to receive the benefit in question and the percentage of minorities in the relevant pool of applicants.
5. impact on innocent third parties.

The panel reasoned that the five factors "can be transposed fairly easily to the context of race-based redistricting," and in applying the five points to this case stated that in seeking compliance with the Voting Rights Act there is no "completely race-neutral alternative" to race-based redistricting, that the plan does not impose "rigid racial quotas," but a fair opportunity and thus can be characterized as a "flexible goal," and that the plan is inherently temporary as it must be redrawn after every decennial census. In relation to point 4 the panel reasoned that a "rough proxy" is the proportionality between the number of majority-minority districts and the number of minorities in the relevant population.

In response to point 5, the panel reviewed the plaintiffs' assertion that race-based redistricting imposes an undue burden on innocent third parties and is not "narrowly tailored" if it deviates from traditional redistricting principles "to a greater degree than is necessary to accomplish its compelling purpose." In response, the panel asserted that the plaintiffs' argument applied only to "redistricting principles that are constitutionally-mandated," e.g., one person, one vote, and not to principles such as geographical compactness and contiguity which are not constitutional mandates. The panel stated:

"Finally, and most critically, the 'narrowly tailored' inquiry suggested by plaintiffs would result in undue interference by the federal judiciary in matters that have long been thought to be the primary province of the state legislatures. From its earliest

ventures into the 'political thicket' of legislative reapportionment,...the Supreme Court has hewed fast to the view that the task of redistricting is fundamentally a political one for the state legislatures,...into which the unelected federal judiciary should not intrude any more than is absolutely necessary to protect constitutional rights...This 'hands off' approach is not some accident of history, but a deliberate recognition of the fact that the process of redistricting 'is fundamentally a political affair,'...and that the state legislatures, as the very 'fountainhead of representative government in this country,'...are the organs of government best situated to identify and strike an appropriate balance between the many different--and often conflicting--considerations that are at stake in it."

The panel concluded:

"We believe that Congress 'adequately struck th[e] balance' between the need for race-based redistricting as a remedy for past and present discrimination in the states' electoral processes and the burden that such measures impose upon innocent third parties when it enacted, and twice extended, the 'carefully conceived remedial scheme embodied in the Voting Rights Act.'...Any argument that the passage of time has thrown that balance out of kilter, or that those measures have accomplished their purpose and outlived their usefulness, is properly addressed to Congress, which has the power to call an end to the extraordinary remedial effort embodied in the Voting Rights Act, rather than to the federal courts."

The panel's decision includes a detailed discussion of the process by which the state legislature drew the redistricting map and the factors they considered in establishing the boundary lines for all the districts and in particular the majority-minority districts. These factors determined the location and shape of the districts. First, the General Assembly sought to create two majority-minority districts to comply with the Voting Rights Act as the DOJ had rejected an earlier plan that included only one majority-minority district. Secondly, they considered the demographics and the distinct history and culture of the three regions of the state: the Mountain region which is rural and sparsely populated, the Coastal Plain which is rural and agricultural and the Piedmont region which is urban and industrial. This region also includes a subsection, the Piedmont Urban Crescent, which includes the state's five largest cities, and the major institutions of higher learning. It is referred to as the "urban, economic and cultural heart and soul of the state."

One majority-minority district (1st) was located in the Coastal Plain and the second (12th) was located in the Piedmont Urban Crescent. The General Assembly sought to maintain the rural favor of the 1st district by drawing 80 percent of its population from outside cities having populations greater than 20,000. Thus, black sections of small towns scattered across the rural region were connected to create the district. Similarly, the legislature sought to maintain the urban nature of the 12th district by drawing at least 80 percent of its population from cities with populations of 20,000 or more, requiring the linking of African-American neighborhoods in the cities and towns in the Piedmont Crescent. As the legislature intended, the districts have "relatively high degrees of homogeneity of shared socio-economic -- hence political -- interests and needs among its citizens."

A third factor, the strong interest in protecting incumbents, added to the unusual shape of the districts. As the opinion states, "Many oddities of shape resulted. A great number can be laid most directly to incumbent protection." The opinion cites the drawing of

the 2nd and 3rd districts as examples of efforts to protect incumbents. These districts both include precincts with populations that are 45 percent African-American that could have easily been included in the 1st district. However, the precincts were retained in the 2nd and 3rd districts to protect their Democratic incumbents requiring that the 1st district be extended farther southward to include African-American populations in other counties. Finally, the opinion states "The irregularities of shape and lack of geographical compactness of the two districts have not demonstrably affected adversely the fair and effective representation of their citizens. The present representatives, both African-Americans, are able effectively to maintain their accessibility to constituents by the standard devices of mailings, local offices, and personal visits to their districts."

On October 11, 1994, the plaintiffs applied to the Supreme Court requesting an extension of the time to appeal the panel decision. On October 13, 1994, the Court granted the extension until November 21, 1994, No. 94-253.

**LOUISIANA v. HAYS:** As reported in the last MONITOR, the three-judge federal court threw out Louisiana's redrawn congressional plan which maintained the African-American voting age population in the 12th district (represented by Democrat William Jefferson) at 56 percent and reduced that population in the 4th district (represented by Democrat Cleo Fields) from 63 to 55 percent. The panel adopted a plan drafted by the court's appointed expert which replaced the 4th district with a district whose voting age population is 27.5 percent African-American. The state appealed to the Supreme Court for a stay of the order to allow the Fall elections to be held under the state's redrawn plan. The Court granted the stay. On September 26, 1994, the state filed an appeal, U.S. Supreme Court, No. 94-627.

**VERA v. RICHARDS:** On August 17, 1994, a three-judge panel ruled that Texas' 29th congressional district (represented by Democrat Gene Green) which is majority Hispanic and the 18th and 30th districts (represented by Democrats Craig Washington and Eddie Bernice Johnson) which are majority African-American were drawn to favor minority candidates and were unconstitutional, bearing "the odious imprint of racial apartheid." Nevertheless, on September 2, the panel ruled that the state could hold its 1994 congressional elections under the existing boundary lines. The court ordered the state legislature to submit a new congressional district map by March 15, 1995.

**JOHNSON v. MILLER:** On September 12, 1994, a federal panel ruled 2-1 that Georgia's 11th district which is majority African-American and represented by Democrat Cynthia McKinney was racially gerrymandered and thus unconstitutional. The court ordered the elections put on hold pending the court's redrawing the lines. The majority reasoned that "the assumption that the sole means of enhancing blacks' political influence is to pack them into such districts is unimaginative." The dissenting judge argued that the district was constitutional and that redistricting should be left to the states. The state appealed to the Supreme Court for a stay of the order pending appeal of the decision to allow the Fall elections to be held under the state's plan. The Supreme Court granted the stay.

**JOHNSON v. SMITH:** Involves a challenge to the 3rd Congressional District of Florida which is presently represented by Democrat Corrine Brown. DOJ entered the case as defendant/intervenor. On September 2, 1994, the three-judge panel that drew the challenged plan denied a motion to dismiss the complaint. The panel also denied a motion to enjoin the state from holding the Fall elections under the existing plan. Cross motions for summary judgement are pending.

## CIVIL RIGHTS GAINS MADE IN 103RD CONGRESS

On October 7, 1994, the 103rd Congress recessed with plans to return in late November or early December for a limited session to consider the Administration-proposed amendments to the General Agreement on Tariffs and Trade which would lower tariffs and alter international trading rules. While there have been several disappointments, the 103rd Congress will end with a good record on civil rights and social and economic justice issues. The following is a brief review of civil rights and related legislation that passed or failed in the 103rd Congress.

**FAMILY AND MEDICAL LEAVE ACT:** On February 5, 1993, President Clinton signed the Family and Medical Leave Act (FMLA) into law (PL 103-3), capping an eight year struggle to enact the bill which included two vetoes by former President George Bush in 1990 and 1992. The House passed the bill on February 3, 1993, by a vote of 265-163. On February 4, 1993, the Senate passed a different version of the bill by a vote of 71-27, and the House agreed to the Senate-passed version the same day by a vote of 247-152.

The FMLA requires covered employers to grant employees up to 12 weeks of unpaid leave in any 12 month period to care for a newborn child or for a child newly placed for adoption or foster care; to care for an employee's child, parent, or spouse with a serious health condition; or to care for an employee's own serious health condition. Perhaps most importantly, the Act requires reinstatement of an employee who takes leave under the Act.

**NATIONAL MOTOR VOTER REGISTRATION ACT:** On May 20, 1993, President Clinton signed into law the National Motor Voter Registration Act (PL 103-31), ending a five year campaign to enact the legislation. Different versions passed the House on February 4, 1993, by a vote of 259-160, and the Senate on March 17, 1993, by a vote of 62-37. The conference report passed the House on May 5, 1993, by a vote of 259-164, and the Senate on May 11, 1993, by a vote of 62-36.

The bill requires a state to establish a mail-in registration procedure and to allow citizens to register to vote when they apply for or renew their drivers' licenses or obtain certain other licenses, and at state welfare offices.

**RELIGIOUS FREEDOM RESTORATION ACT:** On November 16, 1993, President Clinton signed into law the Religious Freedom Restoration Act (PL 103-141) to overturn the Supreme Court 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." The new law provides in part:

"Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except...if [the government] 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."

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.

**VIOLENCE AGAINST WOMEN ACT:** The conference report on the Violent Control and Law Enforcement Act of 1994 which passed the Senate on August 25, 1994, by a vote of 61-38 and the House on August 21, 1994 by a vote of 235-195 included the Senate version of the Violence Against Women Act. The enacted bill authorizes \$1.8 million for enforcement of new federal penalties and grant programs to reduce domestic violence and other crimes against women. The bill makes a crime motivated by gender a federal civil rights violation.

**GUN CONTROL:** On November 30, 1993, President Clinton signed into law the Brady Bill which requires a five-day waiting period for the purchase of a hand gun to provide a "cooling off" period and to allow local law enforcement officials to conduct a background check on the would-be purchaser. The bill also increased licensing fees for gun dealers and requires that police be notified of multiple gun purchases. The waiting period is to phased out within five years and be replaced with a national "instant check" computer system of criminal records. Different versions passed the House on November 10, 1993, by a vote of 238-189, and the Senate on November 20, 1993, by a vote of 63-36. The conference report passed the House on November 23 by a vote of 238-187 and the Senate on November 24 by voice vote.

The conference report on the Violent Control and Law Enforcement Act of 1994 which passed the Senate on August 25, 1994, by a vote of 61-38 and the House on August 21, 1994, by a vote of 235-195 included a ten-year ban on the manufacture, sale, and future possession of 19 semiautomatic assault weapons and "copycat" guns.

**ELEMENTARY AND SECONDARY EDUCATION ACT:** On October 5, 1994, after voting 75-24 to limit debate on the bill, the Senate passed the conference report on the Elementary and Secondary Education Act by a vote of 77-20. The House passed the report on September 30, 1994, by a vote of 262-132. Different versions of the bill were initially passed by the Senate on August 2, 1994, by a vote of 94-6, and by the House on March 24, 1994, by a vote of 289-128.

The bill reauthorizes the federal government's major financial education aid program for five years. Chapter 1, the major component of the bill, provides grants to state and local school districts for educationally disadvantaged students. Under the current formula, Chapter 1 funds go to all 50 states and more than 90 percent of the nation's 15,000 school districts. In an effort to target money to poorer school districts, beginning in fiscal year 1996, funds above the fiscal 1995 appropriation level of \$6.6 billion will be targeted to poorer districts. A separate state-grants provision authorized at \$200 million will be allocated based on states' efforts to equalize spending across their school districts. The legislation makes important changes in the operation of Chapter 1 calling on states to set high standards for all students, providing for new methods of assessing student achievement, holding school districts accountable for student progress and devoting more resources to training and development programs for teachers.

Civil rights and women's rights advocates were successful in their efforts to get

conferees to drop a provision in the Senate version that would have waived Title IX (prohibits sex discrimination) of the Education Amendments of 1972 to allow ten schools to experiment with single-sex education for low-income, educationally disadvantaged students. The provision was sponsored by Senator John Danforth (R-MO).

**GENDER EQUITY IN EDUCATION ACT:** The Act was passed as part of the Elementary and Secondary Education Act to address sex discrimination in education. Provisions include: professional teacher development including "strategies for identifying and eliminating gender bias in education methods, techniques and practices," programs to increase the number of female math and science teachers, programs to address potential drop-outs including pregnant teenagers and teen mothers, programs to promote safe and drug free schools including schools free of sexual harassment and abuse; authorization of \$5 million for the Women's Educational Equity Act, full disclosure by colleges and universities of the funds spent on college sports programs to assist with the enforcement of Title IX (sex discrimination) of the Education Amendments of 1972.

**RACIAL JUSTICE ACT:** The Racial Justice Act was deleted from the Omnibus Crime Bill by the House and the Senate conference committee. On April 21, 1994, the House had approved the Racial Justice Act as part of the Violent Crime Control and Law Enforcement Act of 1994. An amendment offered the previous day by Representative Bill McCollum (R-FL) to strike the Racial Justice Act failed on a tie vote. The Senate version did not include the RJA.

The Racial Justice Act would have prohibited imposition of the death penalty if a criminal defendant in a state or federal case could show racial discrimination in capital sentences based on the race of the defendant or the race of the victim. Racial discrimination would have been proven when the defendant showed through statistical evidence racial disparities in the pattern of capital sentences and the state was not able to demonstrate by a preponderance of evidence that the apparent racial disparity was explained by non-racial factors.

**EMPLOYMENT NON-DISCRIMINATION ACT:** This bill which would prohibit employment discrimination on the basis of an individual's sexual orientation was introduced in the House and Senate on June 23, 1994. The bill has 31 Senate and 137 House cosponsors. Hearings were held on the bill in both the House and Senate.

**JUSTICE FOR WARDS COVE WORKERS ACT:** On September 15, 1994, the Senate Labor and Human Resources Committee reported the bill out of committee by a vote of 10-7. On March 17, 1993, the House Judiciary Subcommittee on Civil and Constitutional Rights reported the bill to the Judiciary Committee by a unanimous voice vote, but no further action was taken in that body.

The bill would eliminate an exemption in the 1991 Civil Rights Act which prevents the Act's application to the Wards Cove case.



**NEW COLUMBIA ADMISSION ACT:** On November 16, 1993, the House rejected the New Columbia Admission Act by a vote of 153-277 but supporters of D.C. statehood heralded the vote as a strategic victory in that it exceeded all congressional vote estimates and provided a solid foundation for future efforts in the House and Senate. The bill would make the District of Columbia the 51st state. The vote was the first House vote on the issue although D.C. statehood bills have been introduced there since 1965. The Senate bill was referred to the Governmental Affairs Committee, where there was a committee hearing on August 4, 1994, regarding D.C. voting representation.

**HEALTH CARE ANTI-DISCRIMINATION PROVISIONS:** Although Congress failed to pass Health Care Reform Legislation, anti-discrimination provisions were included in the legislation reported out of three congressional committees and in the bills sponsored by the House and Senate Majority Leaders. The anti-discrimination provisions would have prohibited the actors in the health care system from discriminating on the basis of race, national origin, sex, language, income, age, sexual orientation, disability, health status, or anticipated need for health services, and included strong enforcement mechanisms.

**ANTI-REDLINING LEGISLATION:** The House passed the Anti-Redlining In Insurance Disclosure Act by voice vote on July 20, 1994. Similar legislation was introduced in the Senate and referred to the Senate Banking Committee. No further action was taken.

The legislation would have required property and casualty insurance companies to provide information on their activities in designated metropolitan areas, in order to facilitate the discovery of insurance discrimination in minority and low-income communities.

**EQUAL REMEDIES ACT:** The bill was introduced in the House by Representative Barbara Kennelly (D-CT) on January 5, 1993, and in the Senate by Senator Edward Kennedy (D-MA) on January 21, 1993. 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 was 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. Racial minorities and members of certain other religious groups may obtain damages under 42 U.S. Code, section 1981 which does not limit the amount of damages).

**OFFICE OF ENVIRONMENTAL JUSTICE IN THE DEPARTMENT OF ENVIRONMENT ACT 1993:** Legislation to elevate the Environmental Protection Agency to become the 15th Cabinet level federal government agency, introduced on January 21, 1993, 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, 1993, by Representative Sherwood Boehlert (R-NY), would also 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, 1993, by a vote of 79-15. On February 2, 1994, the House rejected by a vote of 191-227, the proposed rule to govern floor debate on the bill. Opponents of the bill had campaigned to defeat the rule because the bill did not include a provision which would have required the new department to consider the economic costs and benefits of any environmental regulations. No further action was taken.

**VOTING RIGHTS EXTENSION ACT OF 1993:** On January 5, 1993, Representative Don Edwards (D-CA) introduced a bill to amend the Voting Rights Act of 1965 "to clarify certain aspects of its coverage and to provide for the recovery of additional litigation expenses by litigants." The bill sought to overturn the Supreme Court decision in 1992 in Presley v. Etowah County Commission that section 5 of the Voting Rights Act does not require covered jurisdictions to submit changes in the decision-making authority or allocation of power among state and local officials to the Department of Justice or to the U.S. District Court for the District of Columbia for preclearance. The bill would also have overturned the Supreme Court's affirmance in Rojas v. Victoria Independent School District which also involved a change in the procedure or authority of a governing body following the election of a minority member.

A hearing on the bill was held before the House Subcommittee on Civil and Constitutional Rights on March 18, 1993. No further action was taken.

The 103rd Congress was also successful in defeating regressive legislation including: the **Balanced Budget Amendment**, **Mandatory Retirement for Firefighters and Police Officers**, and **Unfunded Mandate Legislative Measures**.

## **SUPREME COURT GRANTS REVIEW OF SCHOOL DESEGREGATION AND FEDERAL GOVERNMENT MINORITY CONTRACTING PROGRAM**

The Supreme Court has granted review of two cases that address aspects of affirmative action and school desegregation. The school desegregation case, Missouri v. Jenkins, No. 93-1823, challenges an Eighth Circuit Court of Appeals decision affirming district court decisions requiring the continuation of state-funded educational improvement programs and approving a salary increase for teachers and other staff as a part of a remedy for unlawful school segregation.

The second case takes up a 10th Circuit Court decision holding that a federal program that allows for racial preference in the awarding of government contracts is constitutional, Adarand Constructors v. Pena, No. 93-1841.

Review was granted in both cases on September 26, 1994, and oral arguments will be heard in January 1995.

## **ADARAND CONSTRUCTORS v. PENA**

Questions petitioner put to the Court are:

- (1) Whether a congressional race-based set-aside program for awarding highway construction contracts survives an applied constitutional challenge when that program seeks to remedy alleged broad-based societal discrimination, rather than clearly identifiable discrimination perpetuated by the governmental entity seeking to remedy discrimination?
- (2) Whether 'strict scrutiny,' as opposed to 'a lenient standard, resembling intermediate scrutiny,' is the proper standard of review for determining constitutionality of a race-based program adopted by Congress?

### **Background**

Adarand Constructors, Inc. is appealing a February 16, 1994, decision of the U.S. Court of Appeals for the Tenth Circuit affirming a district court order of April 21, 1992. The district court upheld the constitutionality of the U.S. Small Business Act, which authorizes federal agencies to establish specific goals to encourage government contractors to use disadvantaged small businesses as subcontractors (race-conscious subcontracting clause, known as the SCC program).

Adarand Constructors challenged a Department of Transportation program that encourages prime contractors to subcontract with disadvantaged business enterprises (DBEs), through financial incentives, i.e., up to 1.5 percent of the original contract amount for utilization of one DBE or up to two percent for using two or more DBEs. The contractors can accept or reject the option. Members of certain minority racial and ethnic groups and women are presumed socially and economically disadvantaged unless it is established that they are not so. Small non-minority owned businesses could be included in the program if they could establish that they were socially and economically disadvantaged.

In challenging the program, Adarand argued that the validity of the program should be judged by the tough legal standard of the *City of Richmond v. Croson*, 488 U.S. 469 (1989), case. In *Croson*, the Supreme Court ruled that state and local laws enacted to address discrimination against minorities are to be judged by the strict scrutiny test based on the Equal Protection Clause of the 14th Amendment which requires that official actions that are race-based must be narrowly tailored to meet a compelling state interest. Adarand also argued that there must be specific findings of past discrimination to justify the program under *Croson*. The district court applied and the court of appeals affirmed a more relaxed standard for evaluating race-based programs mandated by Congress (rather than state and localities). Using the Supreme Court decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as the standard, the lower courts here found the DOT program permissible as a narrowly tailored remedial program to address the effects of past discrimination found by Congress in authorizing the program.

The appeals court decision states:

"[W]e are asked to determine the proper constitutional test for a race-conscious program implemented pursuant to a congressional mandate...resolution of this appeal turns on the question of whether the district court erred in applying the

Fullilove standard, rather than the Croson test, to the facts of this case...Fullilove controls.

"In Fullilove...the Supreme Court approved the use of a 10 percent minority business enterprise (MBE) set-aside mandated by Congress. In rejecting a facial challenge to the constitutionality of the statute authorizing the MBE program, the Court found that Congress acts within its unique and broad powers under the Commerce Clause and section 5 of the Fourteenth Amendment when it imposes an affirmative action program to remedy nationwide discrimination in the construction industry. Under Fullilove, if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny in assessing the program's constitutionality."

The opinion continues:

"Adarand cites no authority, nor do we know of any, to support the proposition that a federal agency must make independent findings to justify the use of a benign race-conscious program implemented in accordance with federal requirements. In contrast to the situation in Croson, no state procurement or minority business policy is implicated by Adarand's claims. If particularized findings to justify implementation of a federal remedial program are not required of a state...they clearly are not required of a federal agency which Adarand concedes is obligated to administer the remedial program.

"The lesson that we glean from Fullilove and Croson is that the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities."

In assessing whether the program was narrowly tailored, the opinion states:

"We hold that the SCC program is constitutional because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small disadvantaged business enterprises, as required under section 502 of the Small Business Act. The qualifying criteria of the SCC program is not limited to members of racial minority groups. Because eligibility is based on economic disadvantage, non-minority-owned businesses also are eligible to participate. The SCC program is not overinclusive since minority businesses that do not satisfy the economic criteria cannot qualify for DBE status. Furthermore, the SCC program is 'appropriately limited in extent and duration' because federal procurement and construction contracting practices are subject to regular 'reassessment and reevaluation by Congress'...

#### JENKINS v. MISSOURI

Questions petitioner put to the Court are:

- (1). Whether a remedial educational desegregation program providing greater educational opportunities to victims of past de jure segregation than provided

anywhere in the country nonetheless fail to satisfy the Fourteenth Amendment (thus precluding a finding of partial unitary status) solely because student achievement in the district, as measured by results on standardized test scores, has not risen to some unspecified level?

- (2). Whether a federal court order granting salary increases to virtually every employee of school district -- including non-instructional personnel -- as part of a school desegregation remedy conflict with applicable decisions of this court which require that remedial components must directly address and relate to constitutional violations and be tailored to cure condition that offends Constitution?

## Background

The appeals to the Supreme Court case are the latest actions in an ongoing school desegregation case that has been before the federal courts since 1977 and that found the state of Missouri in part responsible for the segregation of the Kansas City, Missouri school district (KSMSD). The district court found that actions of the state and the KSMSD had caused a systemwide reduction of achievement. In 1985, the district court fashioned a far-reaching school desegregation plan that included high-quality educational programs designed to carryout the mandate of the Supreme Court's decision in *Milliken II* in 1977 which held that physical desegregation alone was not sufficient to correct the harm done by enforced segregation and that other improvement efforts were needed to eliminate the educational vestiges of segregation. A secondary consideration was "to attract majority students to KCMSD schools in order to provide minority students with a multiracial educational experience."

The remedy included the development of magnet schools and other quality educational programs to improve the students achievement levels as measured by national achievement tests, and a salary scale to increase the pay of teachers, administrators, "to aid in the recruitment and retention of staff at all levels and areas of responsibility."

In its appeal to the Eighth Circuit, the state argued that it had complied fully with the court order requiring the establishment of quality educational programs. The programs, the state asserted, had been fully implemented and funded by the state for seven years thus achieving the goals set for them and would be entitled to unitary status pursuant to the Supreme Court's decision in *Freeman v. Pitts*. The state also appealed from the district court's order that it pay the latest salary increases for teachers and other staff. In *Freeman* the Supreme Court ruled that "a district court is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan. A district court, [the Court said] need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system."

The district court ruled, and the Eighth Circuit affirmed, that the quality educational programs were a means for achieving the goals of eliminating the vestiges of segregation including the low achievement levels of students and reversing white flight, and while there had been improvements in these areas "the school district was far from reaching its maximum potential because KCMSD is still at or below national norms [on student achievement tests] at many grade levels." The Eighth Circuit opinion states:

"The district court correctly observed that implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable. The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. It will take time to remedy the system-wide reduction in student achievement in the KCMSD schools, and the orders of the district court reflect that it is aware of this fact."

The state's position is that the Court of Appeals erred in saying that educational outcomes are relevant. The state argues that there are too many non-school factors that influence outcomes.

In addressing the challenge to the salary increases, the Eighth Circuit referred to the district court's finding that the school district's difficulty in hiring and retaining qualified personnel adversely affected the desegregation plans. "High quality personnel are necessary not only to implement specialized desegregation programs intended to 'improve educational opportunities and reduce racial isolation' but also to 'ensure that there is not diminution in the quality of its regular academic programs.'" The Eighth Circuit concluded: "The record provides ample support for the district court's findings, and we conclude that it did not abuse its discretion in approving the salary increases."

## DEPARTMENT OF JUSTICE CHANGES POSITION IN PISCATAWAY DISCRIMINATION CASE

On September 6, 1994, in an employment discrimination case before the U.S. Court of Appeals for the Third Circuit, the Department of Justice withdrew as a party plaintiff and filed an amicus curiae brief reversing the position it had argued before the district court. DOJ had argued that a race-conscious, voluntary affirmative action plan is permissible under Title VII only as a remedy for past discrimination or to address "a manifest imbalance in traditionally segregated job categories."

In its September 6 brief, the Department stated that upon review it has determined that its position was "too limited a view of the permissible scope of lawful affirmative action under Title VII," and argued that the school district's goal of creating a racially diverse faculty "is an appropriate justification for affirmative action under Title VII."

As stated in the Department of Justice's brief, the limited issue before the court of appeals is:

"Whether the Piscataway School Board's discretionary consideration of race under a voluntary affirmative action plan, as a factor in deciding whom to retain between two teachers identical in seniority and equal in qualifications and performance, was permissible under Title VII of the Civil Rights Act of 1964...where necessary to ensure faculty diversity by retaining the only minority teacher employed in the high school's business education department."

### Background

On September 1, 1980, the Piscataway school board hired two teachers to teach business education, a white female, Ms. Taxman, and an African-American female, Ms. Williams, and both teachers received tenure status in Fall 1983. In 1989, because of a decline in the number of students enrolled in business education, the board decided to eliminate one position. Ms. Williams was the only African-American teacher in the department, and she and Ms. Taxman were the least senior members of the department and equal in seniority as they had been hired on the same day. In making the lay-off decision, the board considered the qualifications of the teachers, i.e., work performance, evaluations over time, and other school-related criteria, and found the two teachers equal in all respects.

The board then turned to its affirmative action plan which states that when employees are tied in seniority, the superintendent will recommend to the board that the employee meeting the criteria of the affirmative action plan be retained. The board is not required to adopt the recommendation but in this case it accepted the recommendation, noting that Ms. Williams was the only minority teacher in the business education department and "had been the only minority teacher in that department as far as school officials could recall."

In January 1992, the DOJ, pursuant to a referral from the U.S. Equal Employment Opportunity Commission, filed a lawsuit in U.S. District Court against the Piscataway School Board, alleging that the consideration of race in a layoff decision was in violation of Title VII. DOJ's position was that the board's affirmative action plan "was unlawful because it was not intended to remedy the effects of past discrimination, or to eliminate any manifest racial imbalance in the teacher workforce." In April 1992, the district court granted Ms. Taxman's motion to intervene in the case alleging violation of Title VII and the New Jersey Law Against Discrimination. On February 14, 1994, the district court entered a final order granting the DOJ and Ms. Taxman partial summary judgment and awarding Ms. Taxman backpay in the amount of \$123,240.57 and \$10,000 for emotional pain, suffering and humiliation.

The district court reasoned that the board's consideration of race violated both prongs of the two-part test established by the Supreme Court in *Weber* and *Johnson*. In *Weber* the Court found a voluntary affirmative action program lawful because it was designed to remedy past discrimination and it did not unnecessarily trammel the rights of non-minorities. *Johnson* upheld a plan to address "a manifest imbalance in the female composition of the workforce" that similarly did not unnecessarily trammel the rights of men.

The School Board filed a notice of appeal on February 22, 1994. The DOJ then filed a motion stating "on further review, the United States believes that the district court announced an unduly narrow interpretation of the permissible basis for affirmative action under Title VII, and that the court's opinion conflicts with the Supreme Court's decisions" in cases addressing the legality of affirmative action. On September 6, the DOJ filed its brief seeking leave to withdraw as a party plaintiff and to support the school board's position.

#### DOJ Brief

The Department's brief presents an argument narrowly tailored to the facts of the case. The brief states in a footnote "[T]his case does not present, and we express no opinion on, the question whether Title VII permits an employer's interest in a racially diverse work force, without more, to determine the outcome of a layoff decision in circumstances where the candidates are not identical in seniority and equal in qualifications and performance."

DOJ argues that the district court applied "an unduly narrow interpretation of *Johnson* and *Weber*." DOJ reasons that nothing in the majority opinions in those cases rules or necessarily requires states that only affirmative action plans that remedy past discrimination or a manifest imbalance are permissible under Title VII. The brief states:

"[T]he Court stated in *Weber*... 'We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans.' Justice Stevens, in his concurring opinion in *Johnson*, stated that 'the [majority opinion] does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups' and that 'in many cases the employer will find it more appropriate to consider other legitimate reasons to give preference to members of underrepresented groups.'"

The brief contends that the district court's conclusion that faculty diversity is an insufficient basis to justify affirmative action under Title VII failed to give adequate weight to "the Supreme Court's numerous pronouncements favoring racial diversity, especially in the context of education." In addressing the issue whether the rights of nonminorities were unnecessarily trammelled, the brief argues that "A voluntary affirmative action plan that is invoked once in twenty years only to break a tie between two equally qualified individuals does not 'trammel' the rights of nonminorities." Further, the brief observes that the plan was evaluated regularly, changes were made as needed, and race was considered only after other race-neutral measures were considered to break the tie.

The Justice Department's change of position has attracted wide comment. Some critics have termed the layoff of Ms. Taxman unfair without addressing the question of whether a layoff of Ms. Williams would have been unfair. At least one critic has argued for a coin-toss, stating that such a process would have given Ms. Taxman an equal chance of retaining her job.

## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION NOMINEES CONFIRMED AND EEOC WORKPLACE HARASSMENT GUIDELINES WITHDRAWN**

On September 29, 1994, by voice vote the Senate confirmed President Clinton's nominations of Gilbert Casellas, General Counsel of the Air Force, to fill the long-vacant position of chair of the Equal Employment Opportunity Commission, Paul Igasaki, Executive Director of the Asian Law Caucus, to serve as Vice-Chair and Paul Miller, Deputy Director of the U.S. Office of Consumer Affairs and White House liaison to the disability community, to serve as a Commissioner.

The nominations were reported favorably out of the Senate Committee on Labor and Human Resources on August 3, 1994, by voice vote. A hold was placed on the nominations by Senator Hank Brown (R-CO) to allow him to submit questions to the nominees about their views on the religious component of the EEOC's proposed guidelines on harassment in the workplace. The nominees responded on September 27 to Senator Brown's letter of September 23 and the hold was lifted.



Mr. Casellas' response, with which Mr. Igasaki and Mr. Miller expressed "full and complete agreement" in their letters to Senator Brown, stated in part:

"...the EEOC operates as a five-member deliberative body. Accordingly, it is not within the power of any single Commissioner to guarantee that the EEOC will or will not take a particular course of action. Moreover, because of the deliberative nature of the decision-making process, it would be inappropriate for me to make any binding commitment on this or any question before I have had the opportunity to review the vast public record that has been made, (including the over one hundred thousand comments that have been received by the agency) and to be thoroughly advised on the full range of legal issues...

I recognize, however, that the proposed guidelines recently withdrawn by the EEOC created confusion, at the very least, about whether the Commission was seeking to move beyond existing law in the area of religious harassment. If the EEOC were to promulgate new regulations in this area, it would be critical for such guidelines to be fully consistent with existing law, including the Religious Freedom Restoration Act, and carefully avoid any such confusion."

### **EEOC Guidelines**

In October, 1993, the EEOC proposed consolidated guidelines to cover harassment based on race, color, gender, national origin, age, disability, or religion. The Commission issued the guidelines to emphasize that such harassment is prohibited by Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act.

The proposed guidelines met with considerable opposition from conservative Christian groups who opposed the inclusion of religion, asserting that religious harassment is not a real problem, and that the guidelines would force employers to make their workplaces "religious-free zones." In June 1994, the Leadership Conference On Civil Rights adopted a declaration in support of the inclusion of religion in the EEOC Guidelines, stating that "it would be legally and morally wrong for the EEOC to entirely exclude religion from its workplace harassment guidelines."

In response to the controversy, the Senate adopted by a vote of 94-0, an amendment offered by Senators Brown and Howell Heflin (D-AL) to the Airport and Airways Improvement Act, which called for the EEOC to withdraw the category of religion from the proposed guidelines, hold public hearings on "amended" proposed guidelines which should clearly state that "symbols or expressions of religious belief consistent with the First Amendment and the Religious Freedom Restoration Act are not to be restricted and do not constitute proof of harassment." The House passed, by a vote of 366-37, an related amendment to the Commerce, State, Judiciary, and Related Agencies Appropriations Act for 1995 prohibiting the EEOC from using any funds to enforce the religious component of the proposed guidelines.

On September 19, 1994, the EEOC withdrew the proposed guidelines. Michael Lieberman of the Anti-Defamation League said that EEOC's decision to withdraw the

guidelines in their entirety rather than delete the religious provisions as mandated by Congress suggests "that the Commission views religious harassment as an integral component of the guidelines" and that "ADL will urge the Commission to expeditiously republish [the] guidelines, with appropriate revisions to ensure protection from religious discrimination without restricting free expression."

For further discussion of the issue, see **CIVIL RIGHTS MONITOR**, volume 7, no. 4, 1994.

## **HUD AND THE MORTGAGE BANKERS ASSOCIATION TO ADDRESS MORTGAGE DISCRIMINATION**

On September 14, 1994, Henry G. Cisneros, Secretary of Housing and Urban Development, and Stephen B. Ashley, President of the Mortgage Bankers Association, signed an agreement pledging that their organizations will work together during the next three years to eliminate lending discrimination and expand homeownership opportunities. In announcing the agreement Secretary Cisneros said:

"This agreement underscores our conviction that in the long run, we can accomplish a great deal through dialogue and cooperation, without resort to litigation. There are limits to what can be accomplished through statutory requirements and their enforcement, which is reactive, time-consuming, costly, and often narrowly confined to specific cases. Proactive, voluntary agreements like this one draw on the creativity of the private sector. They engage its commitment and they cast a wide net of real and immediate opportunity."

In signing the agreement, the Mortgage Bankers Association is committed for the next three years to:

- Develop standardized protocols to be used by member companies who want to systematically monitor their own lending practices to ensure they are fair;
- Work with community colleges, technical schools and member institutions to increase minority training, recruitment, and hiring in the mortgage banking industry;
- Provide training on fair lending issues for mortgage banking company employees;
- Work with third-party organizations and member companies to develop and apply appraisal and underwriting standards that broaden credit opportunities for traditionally underserved groups;
- Encourage and promote stronger relationships between mortgage bankers and mortgage brokers, real estate agents, developers, builders and groups active in minority and urban neighborhoods and census tracts.

In addition, the agreement includes a "model best practices" provision which outlines actions and policies to improve its members performance in fair lending. The MBA will encourage its members to sign individual "best practices" agreements modeled after the HUD-MBA agreement but tailored to the particular circumstances of the company. The principles behind the best practices model are: 1) a commitment to strive to increase lending to minorities and low-income borrowers; and 2) a commitment to discrimination-free actions and practices. The consumer education and outreach will be provided in a format that is accessible to persons with disabilities and to non-English speaking persons. Members are also encouraged to end the practice of a minimum loan size and to treat all customers fairly "regardless of the loan size, location of the property, income or race of the borrower."

Some civil rights advocates expressed skepticism about the agreement. John Relman of the Washington Office of the Lawyers Committee for Civil Rights Under Law said: "Instead of the government deciding to sue them or investigating them, they're giving them publicity." But, Assistant Secretary Roberta Achtenburg in testimony before the House Subcommittee on Civil and Constitutional Rights on September 28, said of the agreement:

"Beyond effective enforcement, the Department believes much can be done to harness the energy of industry and government to work together voluntarily to make the dream of homeownership a reality for more people. Through voluntary agreements, we forge a new standard for incorporating affirmative fair lending policies and practices into the everyday practice of mortgage lending companies. We also create a structure to review changing industry practices to ensure that homeownership opportunities are extended broadly and without discrimination, without compromising safety and soundness."

At the same hearing, Ms. Achtenburg said that HUD has established a new mortgage lending unit within the Office of Fair Housing and Equal Opportunity whose first major task is to develop substantive regulations on fair lending. The regulations will detail lending practices and procedures prohibited under the Fair Housing Act, list factors lenders should consider in mortgage lending, the evidence needed to prove discrimination, and appropriate remedies. A series of public hearings will be held around the country to get input on what the regulations should include. The goal is to issue a proposed regulation by the end of 1995.

The Assistant Secretary said she has also established a special office to address insurance discrimination. The office is working closely with the Departments of Justice and Commerce and the White House to develop regulations.

## RELATED ISSUES

Secretary Cisneros recently announced that HUD will issue proposed regulations to enforce a 14 year-old law that denies housing assistance to illegal immigrants. Households with both illegal aliens and citizens (usually children born in the U.S.) would be entitled to household that includes at least one citizen or legal immigrant."

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The Ninth Circuit Court of Appeals recently ruled that pursuant to the Fair Housing

Act, landlords may be required to waive normal fees if they have the effect of discriminating against disabled persons. The case was initiated by the mother of a disabled child who filed a complaint with HUD alleging that the daily parking fees she was required to pay for her daughter's therapist violated the Fair Housing Act's requirement that owners and managers make reasonable accommodation to the needs of disabled persons. The child suffers from a respiratory illness that requires daily therapy sessions, the managers of the mobile home community refused to waive the visitors' parking fees and the therapist required reimbursement from the patient. HUD referred the case to the Department of Justice and DOJ filed suit in district court, but did not appeal the district court's dismissal of the suit. The mother appealed the dismissal arguing that the Fair Housing Act may require more than equal treatment to make reasonable accommodation of the needs of the disabled, and that a failure to waive the fees could result in the need to institutionalize her child. The Ninth Circuit reversed the district court and remanded the case for an assessment of whether "the fees in this case were improperly assessed" or whether their waiver would impose an undue burden on the manager. The appeals court opinion stated that it would be a clear violation for a landlord not to waive a no pets rule for a renter who uses a seeing eye dog.

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