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The CCCR released its latest report on federal enforcement of civil rights praising the performance of the Administration, while calling for leadership from the President and Congress in enforcing federal guarantees of equal opportunity.25

SUPREME COURT RULES IN AGE DISCRIMINATION CASE

On January 23, 1995, the Supreme Court ruled unanimously that an employer can not use so called "after-acquired evidence" to avoid liability for discrimination, McKennon v. National Banner Publishing Co., No. 93-1543. The question before the Court was "whether an employee who was discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA) is barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds."

Background

Christine McKennon worked for the Nashville Banner Publishing Company for thirty years and consistently received excellent job performance ratings. She was dismissed at the age of 62, as part of what her employer called a work force reduction because of budget considerations. Ms. McKennon thought she was dismissed due to her age.

Ms. McKennon filed suit in the U.S. District Court for the Middle District of Tennessee alleging age discrimination under the ADEA. During the Nashville Banner's deposition of Ms. McKennon, more than a year after her termination, she admitted that during her last year of employment she had copied and taken home several confidential documents to which she had access as part of her job. The Banner claimed that Ms. McKennon's dismissal was justified after the fact by her copying and removing confidential documents, and for purposes of summary judgment, the Banner admitted that it had discriminated against the plaintiff.

The district court threw out Ms. McKennon's age discrimination suit "holding that Ms. McKennon's misconduct was grounds for her termination and that neither backpay nor any other remedy was available to her under the ADEA." The Court of Appeals for the Sixth Circuit affirmed the decision asserting that the misconduct made it "irrelevant whether or not [McKennon] was discriminated against."

The Age Discrimination in Employment Act prohibits employment discrimination in the workplace based on age, and it in part mirrors Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment based on race, color, religion, national origin and sex.

The Opinion

Justice Kennedy opens the unanimous decision with a discussion of the history of the case, and outlines two assumptions upon which the decision is based: that the only reason for the plaintiff's dismissal was her age, and that her misconduct (copying and removing confidential documents) was so severe that she would have been discharged immediately once the company learned of it.

The opinion reads:

"The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions....When confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees...The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace'Deterrence is one object of these statutes. Compensation for injuries caused by the prohibited discrimination is another....It would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act."

The Court then discusses the extent to which the after-acquired evidence of wrongdoing by the employee has a bearing on the appropriate relief. The opinion states:

"Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered. In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party. An absolute rule barring any recovery of backpay, however, would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination.

"Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."

The Supreme Court sent the case back to the Court of Appeals for further consideration consistent with this opinion.

Reaction

Judith L. Lichtman, President, Women's Legal Defense Fund, said of the decision:

"The unanimous Court unequivocally debunked the 'after-acquired evidence' doctrine that had allowed employers to avoid responsibility for their own discriminatory conduct. No longer will employers be allowed to use this loophole to escape antidiscrimination laws. Because of this ruling, a woman who believes she is the victim of employment discrimination need not fear that the employer can win merely by digging up dirt after the fact to justify its

discriminatory behavior. And women and men already hurt by discrimination need no longer fear losing their case due to a modern-day witch hunt."

SUPREME COURT HEARS ORAL ARGUMENTS IN TWO CIVIL RIGHTS CASES

On January 11, 1995, the Supreme Court heard oral argument in *Missouri v. Jenkins*, No. 93-1823, a challenge to 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 school district teachers and other staff as a part of a remedy for unlawful school segregation. The second case, *Adarand v. Peña*, No. 93-1841, which reviews a 10th Circuit Court decision holding that a federal program that allows federal agencies to establish goals to encourage contractors to use disadvantaged small businesses as subcontractors is constitutional, was heard on January 17, 1995.

Missouri v. Jenkins

Background

The appeal to the Supreme Court is the latest action in an ongoing school desegregation case that has been before the federal courts since 1977 and that held the state of Missouri in part responsible for the segregation of the Kansas City, Missouri school district (KCMSD). The district court found that action of the state and the KCMSD 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 remedy the education harm the court found was caused by segregation. The plan was an application 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 1985 remedy included the development of magnet schools and other high 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 and administrators "to aid in the recruitment and retention of staff at all levels and areas of responsibility."

The state argues that it has complied fully with the court order requiring the establishment of high quality educational programs. The programs, the state asserts, have been fully implemented and funded by the state since 1989, thus achieving the goals set for them and the state should be relieved of any further obligation to provide funds. The state is also appealing from the district court's order that it pay the latest salary increases for teachers

and other staff. In Freeman v. Pitts, the Supreme Court ruled in 1992 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 and the Court of Appeals found that while academic progress had been made, achievement level disparities indicated that vestiges of segregation had not been eliminated. The state claimed educational results were irrelevant.

Oral Argument

John R. Munich, Assistant Attorney General for the State of Missouri, who argued the case for the petitioner began by saying that the 17 year old remedy in this case is of unprecedented breadth and cost. The lower courts' goals in this case, he said, were to increase the attractiveness of the schools and to make the system comparable to the suburban districts. He asserted that the lower courts' requirement that the state show that the educational programs established under the desegregation plan have achieved educational improvements as measured by test scores is beyond the clear mandate of desegregation law. That mandate, he stated, is the elimination of racially identifiable schools, i.e., that resources be allocated and students be assigned in a race neutral way to the extent practical.

Justice Souter asked if counsel were saying that the measure of a student's achievement was irrelevant. Munich responded that it was the state's position that student achievement outcomes were irrelevant, and the Green factors should be the focus [the factors established in Green v. County School Board of New Kent County are student assignment, faculty, staff, transportation, extra-curricular activities, and facilities]. Souter responded that the Green factors were not exclusive. Munich said they might not be exclusive but that the focus should be on the equitable allocation of resources not on educational results. Justice Souter said that resources may be the focus but questioned why it is irrelevant to look at whether educational elements are having an effect on student achievement. Munich responded that whether a student achieves is "filtered through" other factors such as students' individual abilities.

Justice Ginsburg questioned whether the state was saying that even if there were remarkable improvement, that would be irrelevant to whether the school system should be released from the court's supervision. Munich responded in the affirmative.

Justice Ginsburg asked if the district court opinion said that improvement in test scores was "a" factor. Munich answered that the opinion is ambiguous as to whether achievement scores are to be considered a factor or a controlling factor. Either way, Munich maintained, student achievement should not be considered in determining unitary status; the allocation of resources should be the focus.

Justice Souter challenged Munich's statement and said that Munich seemed to be retreating from his earlier statement to Justice Souter that factors other than Green can be considered. Munich responded that there may be factors other than the six Green factors, but suggested that they had to do only with resources, such as textbooks, computers, per capita

expenditures etc. Justice Souter asked are we blinding ourselves, not seeing the forest for the trees -- the ultimate goal is the elimination of de jure segregation, the elimination of its vestiges, i.e., the poor quality of the education. Munich repeated that the focus should be on the elimination of inequities in the allocation of resources.

Justice Scalia interjected: "Isn't the responsibility in remedying segregation to improve the teachers, the books, and then over a period of time the students in the system will not have been subjected to an inferior education and low achievement could not at that point be a vestige of unequal educational input." Munich agreed with Justice Scalia's statement and went on to say that Kansas City had a voluntary student transfer program prior to the court-ordered plan and under the voluntary plan 16,000 of 41,000 students transferred to schools other than their assigned schools.

Justice Ginsburg asked whether the Federal Government's brief was incorrect in saying that in 1985 the state joined in asking for improved educational inputs? Munich explained that after liability was established the court ordered the parties to come forward with a plan that included improving student achievement and the state did so. Justice Ginsburg then asked Munich if he were suggesting that everything was up to snuff in 1985? Munich said that his point was not that the system was fully equalized in 1985 but that there were desegregation programs before 1985 and that in 1985 the more expansive desegregation program was put in place. Justice Scalia said: "But in 1985 the district was not trying to simply equalize but, trying to make this district (KCMSD) better than the ones around it to attract non-minority students." Munich concurred.

In response to another question from Justice Ginsburg, Munich said the state was asking the Court to instruct the lower court that interdistrict comparability and attractiveness are beyond the scope of the violation, that the remedial programs must be limited to victims of segregation, and that achievement outcomes are not relevant to desegregation. Justice Scalia said Munich's response was too broad, and that all the state needed was a ruling that student achievement levels are not a basis for determining unitary status because the courts have no power to require this district to do better than surrounding districts. "That is all you need and that is all you will get from me," Justice Scalia said. [laughter]

Justice O'Connor asked if any Missouri school districts were challenging the state's financial support of the Kansas City school district because they were receiving less financial support, and Munich responded in the negative. Chief Justice Rehnquist asked what the per capita expenditure was across districts in the state. Munich responded that it was \$3,000 to 4,000 per student. Justice Stevens asked when did the state first take the position before the district court that student achievement was irrelevant. Munich responded that they raised the issue before the appellate court to which Stevens responded, "but in the district court you had accepted this assumption, right?" Justice Stevens said: "So you never asked the District Court one way or another," and Munich said that was correct.

Justice Breyer posited that if there were a segregated school district and those discriminated against could not read and the district is now desegregated why is it not relevant to look at whether the students can read. Munich said the question is whether the state has done what it could, has put in place the programs that experts said would work and

funded them. He continued that it is inherently impractical to look at outcomes: "If the outcomes are flat, that may mean you have done all you can do or it can mean that you can do more." Justice Souter said that segregation often has an effect on attitudes and expectations, students' expectations and this is passed on. "Do you deny that this is a fact and a relevant consideration?" Justice Souter asked. Munich responded that it was not a proper consideration. Justice Souter asked if Munich accepted that it is a fact. Munich said it was possible. Justice Souter repeated: "Expectations of what can be achieved in schools and those attitudes are passed on." Munich said it may be a fact but asserted that it was irrelevant because it was beyond the capacity of schools to deal with.

Theodore Shaw, assistant director-counsel, NAACP Legal Defense and Educational Fund, began his argument by stating that the principal issue is whether the school district can be declared partially unitary, and asserting that the state of Missouri can not meet the standards established by the Supreme Court in *Freeman*, i.e., that the vestiges of discrimination need to be eliminated to the extent practical, and to this end full and complete compliance with the remedy is needed. Justice Scalia asked if the vestiges included Justice Souter's idea of attitudes and their effect. Shaw responded that they do, dependent on a district court finding that such exists. Justice Scalia asked whether the state is required to prove that there are no vestiges or nothing further it can do? Shaw said that *Swann* controls and the scope of the remedy is determined by the violation: "If there are findings of discrimination they must be remedied. "The issue raised by Justice Souter is beyond the scope of this appeal, but the remedy in each case must be full and complete."

Chief Justice Rehnquist asked are attitudes a vestige in this case? Shaw repeated that there was no such finding in this case, and that the findings in this case were very specific as to the effects of segregation.

Justice O'Connor asked who has management authority for the schools, and Shaw responded that it was the local school board. Justice O'Connor then asked whether there was a difference between what is required of the state and the school board given the school board's management authority? Shaw responded that the state violated the Constitution, and therefore has the responsibility to see that the effects of segregation are remedied. Shaw added that there may be a difference [in responsibilities] as to what is practical. Justice O'Connor said the state may have a responsibility as to the facilities but not the day-to-day teaching. Shaw said that the question of what is practical by the state has been foreclosed by the district court.

Shaw said that unitary status is not dependent on particular test results, but that the district court has to have flexibility in fashioning a remedy and can consider test scores as one of many factors. In response to a question from Justice O'Connor, Shaw repeated that no particular level of achievement is the sole determinant of unitary status. Justice Scalia questioned why different levels of achievement were relevant, and said that the test scores of minority students might reflect vestiges of discrimination but questioned how relevant the test scores of the entire student body could be. Shaw responded that the school district had experienced an overall reduction in achievement under segregation and thus the achievement level of the entire student population was relevant.

In answer to further questions from Justice Scalia, Shaw said that the need for investment in the city schools did not stem from a finding of a metropolitan or interdistrict violation but rather from the finding that the Kansas City school system had been allowed to deteriorate and that new resources were needed to attract students back and to desegregate the system.

Justice Kennedy asked whether it would be practical to end the court's supervision. Shaw responded that the court has asked the parties for plans that address a phase-out of the court's supervision.

Justice Ginsburg asked Shaw to be more specific about the phase out plans: "Why did the court ask for 3-5-7-10 year plans?" Shaw said that the court is attempting to get an array of plans to determine the best alternative and has stressed that after the transition the Kansas City school district will be totally responsible for funding the system -- thus the need for long range plans. Chief Justice Rehnquist asked if the school district were walking toward a cliff and questioned how the school district could make up for the funding provided by the state. Shaw responded that that is exactly the problem and why the district court is considering an array of plans. He continued that if the plan in place continues to attract white students back to the school system, thus eliminating the stigma and lack of local support, local funding may increase. Shaw added that it may not be necessary to continue all of the programs.

Justice Kennedy said the state's involvement seems more intrusive and more justification for continuing the court's supervision when it should be the other way around -- "this is contrary to *Freeman*." Shaw responded that there is no doubt there will be an end to the court's supervision. There will be different questions during the transition period once unitary status is achieved, all the answers are not here, but they are not needed now; the court is beginning to talk about transition and is considering a panoply of plans, Shaw said.

Justice O'Connor asked if the respondents supported the district court's order increasing salaries for non-teaching staff. Shaw said that they did, and that it was a question of the court's discretion. Justice O'Connor said she thought it might be an abuse of discretion as it had nothing to do with student achievement. Shaw said that salaries were related to the day-to-day operation of the school district, and the findings showed that as the result of segregation the schools were totally neglected in all aspects. Justice Kennedy questioned why the school district was not able to address this and why court supervision was needed. Shaw said that court supervision was needed because of the school district's limited resources and its limited ability to remedy the deficiencies.

Paul Bender, Deputy Solicitor General, argued for the Federal Government that the court of appeals decision was correct and that while there was no power in the court to require the school district to reach a certain level of achievement, there was power to require the school district to remove the lingering effects of segregation. He continued that in 1992, there were still students who had spent several years in a segregated system; students in the 10th grade who spent their first 4-5 years in a segregated system, the basic skills are lacking and achievement cannot be expected to be where it should be.

Justice Scalia asked: "Then why isn't the funding focused on the upper grades, why aren't the funds targeted, why are the funds going to the whole system?" Bender responded that the state could ask the district court to allow it to target the funds. The state is required to show that it has implemented the remedies in good faith and that the remedies have eliminated the vestiges to the extent practical, Bender said.

Justice Ginsburg asked how the state could show that, and Bender responded that test scores are one way, attendance rates, drop-out rates, showing whether the 10th grade students test scores are comparable to students in other cities that have not suffered from segregation. Justice Kennedy said that sounds like a fascinating sociological experiment, but it is not practical for the courts. Bender said it would not be too difficult to compare Kansas City with for example New York or Philadelphia.

Justice Scalia asked what consideration should be given to the amount of money spent. Bender said that a lot of the money was spent on facilities which is a one time expense, but that the amount of money spent should be considered.

Justice Kennedy asked about the Government's position on teacher salaries and Bender said that the Government had not taken a position on this issue but that to the extent they are relevant, the state would have to show that the lowering of salaries would not have a negative impact on desegregation.

Adarand Constructors, Inc. v. Pena

Background

Adarand Constructors, Inc. is appealing a decision of the U.S. Court of Appeals for the Tenth Circuit affirming a district court order that 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). Specifically, Adarand is challenging 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 prime 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 businesses that are not minority or female-owned can be included in the program if they can establish that they are socially and economically disadvantaged.

In challenging the program, Adarand argues that the validity of the program should be judged by the legal standard that the Court established in City of Richmond v. Croson. In Croson, the Supreme Court ruled that state and local laws that use race conscious remedies 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 be narrowly tailored to meet a compelling state interest. Adarand also argues that under Croson there must be specific findings of past discrimination to justify the program. The district court applied and the court of appeals affirmed a less stringent standard for evaluating race-based programs mandated by Congress (rather than state and localities). Using the Supreme Court decision in Fullilove v. Klutznick, as the standard, the lower courts here found the DOT program permissible as a narrowly tailored remedial program reasonably designed to address the effects of past discrimination found by Congress in authorizing the program.

Oral Argument

William Perry Pendley who argued the case for the petitioner began by describing Adarand as a small family-owned company whose average annual gross receipts over the last few years were \$900,000 with an average annual net profit of approximately \$30,000. The company specializes in guard rails for highways and work as a subcontractor is its main business. In this case, Pendley explained, Adarand submitted the lowest bid for a subcontract that was then awarded to a minority firm. The statute we are challenging assumes that all minority-owned businesses are disadvantaged, he said.

Justice Scalia asked if Pendley knew that the reason Adarand was rejected was because of the minority subcontracting provision, and Pendley responded in the affirmative. Justice Souter questioned whether that fact was clearly established and Pendley responded that Adarand was told by the prime contractor that the reason for using the successful Gonzalez company was the minority subcontract provision. Justice Souter followed up by asking whether the judge made that a finding -- "is it an undisputed fact?" Pendley said there were no disputed findings of facts.

Justice O'Connor asked if the plaintiff were suing for damages or backward relief. Pendley said no, he was seeking forward relief of a just and fair process. Justice O'Connor asked what was the injury to the plaintiff in the future? In response, Pendley said that Adarand cannot compete on an equal footing and the company bids on every guard rail contract in Colorado, mainly subcontract work.

In response to a question from Justice O'Connor about the Government's argument that the plaintiff lacks standing as it has not been proven that the subcontractor was chosen because of the company's minority status, Pendley asserted that the evidence below provides clear evidence that the company was chosen because of its DBE certification.

Justice Souter asked whether the complaint specified the presumption of disadvantaged status for minority companies as being the flaw in the statute, and Pendley said the flaw is the presumption. Souter asked whether that argument had been asserted in the complaint, and Pendley said I believe we did. Justice O'Connor asked if Pendley were arguing that there was a lack of adequate evidence as to the discrimination suffered by the DBEs. Pendley responded there is a dearth of findings, and no analysis of the extent of Congress' findings.

Justice O'Connor said Fullilove found that Congress' findings were adequate. Pendley said that in Fullilove there was a facial challenge and Chief Justice Burger assumed the

program was narrowly applied only to minorities who were disadvantaged. Justice O'Connor said that Pendley's point went to tailoring, not to the findings. Pendley asserted that there were not adequate findings of disadvantage here, and the problems cited as showing disadvantage and needing redress are those of small businesses generally not just minority firms.

Justice Souter said that his understanding of the statute was that group membership was necessary but not sufficient to be classified as disadvantaged. Pendley asserted that, to the contrary, under the statute minority status is sufficient. Justice O'Connor asked if each participant had to demonstrate harm [disadvantage] to be certified? Pendley answered that they do not. Justice O'Connor then queried whether if each individual had to show disadvantaged status that would meet the plaintiff's challenge. Pendley responded that such a requirement goes much farther than what is required by this statute. Justice O'Connor responded that she thought the regulations could be read to require just that. Pendley asserted that the regulations did not so require.

Justice Scalia interjected: "Actually personal harm from discrimination is necessary but it is presumed to exist under the statute." Pendley agreed. Justice Scalia continued: "The Government says that is good enough and you have the opportunity to challenge the presumption." Pendley said that the ability to challenge is not consistent with the real world, that in rebutting the presumption you are challenging the ability of African-Americans to do the work, and that Adarand does not have the information needed to rebut the presumption.

Justice Breyer said: "But in the rebuttal you are not saying that blacks can't do the work, you are challenging whether they have been subjected to prejudice or cultural bias. Is that a reasonable assumption as a matter of fact or is there something in the law that forbids it, I assume you are saying the latter." Pendley said that the assumption of disadvantage is a racial stereotype. Justice Breyer said: "It is certainly rational as a matter of fact to accept that blacks have suffered prejudice, but what in the law and particularly Supreme Court cases would forbid this; what is your legal argument? Is it necessary to overturn Supreme Court cases to reach your argument?" Pendley responded that the Court did not need to overturn any Supreme Court cases to reach Adarand's argument.

Justice Breyer questioned whether the Court would have to overrule Fullilove to decide this case in Adarand's favor. Pendley said no, that there was more evidence in this case than in Fullilove that the program was not working, and that the facts of the two cases were distinguishable. Justice Breyer observed that Fullilove was a set-aside, and this program is more flexible. Justice Ginsburg also questioned how the Court could decide for the plaintiff and not overrule Fullilove which was an absolute 10 percent set-aside. Pendley said that in Fullilove there were waivers available and ceilings. Justice Ginsburg pointed out that here the prime contractor doesn't have to have anything to do with a DBE. Pendley replied that the prime contractor is economically compelled. Justice Ginsburg said but isn't the financial incentive cost compensation for the principal contractor to take on the minority contractor.

Justice Souter said that the challenge here is to economic advantage. Pendley said that the burden to show economic disadvantage is on the wrong party. Justice O'Connor asked if the standard were strict scrutiny? Pendley responded in the affirmative.

Solicitor General Drew Days argued on behalf of the defendant, the U.S. Department of Transportation. He said the subcontracting clause is a means of effectuating a national policy to ensure that federal programs do not compound discrimination but address the impact of discrimination. The program is neither overly inclusive nor under inclusive as it allows for challenges to minority contractors and allows for certification of non-minority contractors who can show disadvantage, Days said. Chief Justice Rehnquist asked why a presumption was necessary: "Why not provide that if a minority contractor can show disadvantage it is included." Days said that the program could have been certified that way, but that Congress' review of the extent to which contracting dollars were awarded in a discriminatory manner led Congress to fashion the program in the way it did. Chief Justice Rehnquist asked: "Isn't it an administrative convenience?" Days repeated that Congress had made the determination that if the results they wanted to have occur were to occur this was the way to do it. Chief Justice Rehnquist asked: "So if some nondisadvantaged people get the advantage Congress was not concerned with that?" Days responded that Congress was concerned with this possibility and included a procedure to address that concern.

Justice O'Connor asked how a third person challenges the process as a practical matter? Days answered that one brings the challenge to the attention of the contracting officer or an SBA officer, and asserts that the company that received the subcontract is not a DBE because of the number of contracts and dollar amount of the work the company does -- that the company is not economically disadvantaged." Justice Scalia asked how a third party would know that the company who won the contract has DBE status -- "Is it posted somewhere." Days responded in the affirmative and said the companies are listed by state. Justice O'Connor asked how a contractor would know that a particular DBE was applying for a particular contract. Days said that the contractor would have to seek out the information. Justice O'Connor queried: "There is no mechanism to let the petitioner know...," and then asked if a third party has ever successfully challenged awards to DBEs. Days said "yes," and cited the case of a Native American firm that was denied DBE status because of the amount of its contracts.

Justice Scalia asked who made the challenge in the case cited by Days: "Was it a third party or did the agency make that determination on its own?" Days said it was not clear from the information he had who made the challenge. Justice Scalia then asked if Days knew of any company in Adarand's position who had successfully challenged. Days said it was difficult to determine how the challenge was initiated. Justice Scalia responded: "You don't know of any." Days said that Justice Scalia's assertion was correct but added that the program was open to challenges from any source. Justice Scalia said the challenge process was not practical, asserting that there is not enough time and that people who challenge are identified as litigious and "no one wants to hire someone who is litigious."

Days responded that there have been a number of successful challenges although it is not clear who initiated the challenge. Justice Breyer said: "The procurement officer would be notified by an unsuccessful bidder and the officer makes the challenge, it's not left up to the company that initiates the challenge." Justice Kennedy interjected that it is up to the outside challenger to prove the challenge. Days said that the challenger had to demonstrate that the DBE's economic condition takes the company out of the disadvantaged classification.

Justice Kennedy asked if one could challenge whether a DBE has suffered discrimination. Days responded that the challenge is not to whether the company is in fact minority owned but whether the company is disadvantaged economically.

Justice Scalia asked whether there was a limit to the Government's ability to use race? Justice Scalia continued: "What if in a very important space program where you can't make any mistakes, and because whites on average have better grades, the presumption were made that whites would be better bidders, but minorities could challenge the presumption and show that they were bright." Days responded that the situation outlined by Justice Scalia was different and that the Adarand case addressed the question whether Congress can enact a race-conscious law for remedial purposes.

Chief Justice Rehnquist said but section 5 [of the 14th Amendment] requires that standards for race-conscious remedies be more stringent, not less stringent as you are suggesting. Days said that the Supreme Court has said Congress possesses a unique and powerful authority to remedy racial discrimination. Justice Scalia asked: "Can Congress do that by adopting race-based remedies." Days responded in the affirmative and said that Fullilove involved a public works program that designated certain groups as disadvantaged and created a 10 percent set-aside. Justice Scalia asserted that Congress had said 10 percent was an adequate remedy, but didn't set a particular number. Days said that the program under review did not require the prime contractor to use a DBE, the contractor would not lose the contract if it didn't use the DBE, and the financial incentive was limited, i.e., a company would not receive the bonus beyond the third DBE.

Justice Stevens asked if the regulations require the federal agency to review the DBE status of companies. Days responded in the affirmative and explained that there is an annual review of DBE status by agencies and that the SBA has its own review process. Chief Justice Rehnquist asked what states examine in the review process. Days said in effect they are determining whether DBEs are still disadvantaged. Justice Scalia asked if the review was only of whether the companies were still minority-owned. Days said the inquiry was whether they still qualified as disadvantaged. Justice Stevens asked if a subcontractor got preferential treatment and increased its contracts to a certain level would it lose its DBE status. Days responded in the affirmative and Chief Justice Rehnquist asked where the process is outlined. Days provided citations for both the rebuttal process by a third party and the Government's annual review, and said there were 25 bases for DBE termination.

Justice Scalia then raised the issue of Adarand's legal standing to make the challenge and questioned why the Government did not raise the issue during consideration of jurisdiction but only in its brief on the merits. Days said it was a part of the record, and the issue was one of redressability as there was no showing that Adarand lost this contract because of the DBE provision.

SUPREME COURT WILL HEAR TWO REDISTRICTING CASES, REVIEW OF THIRD IS EXPECTED

On December 12, 1994, the Supreme Court noted probable jurisdiction (tentatively accepted review of the case and directed the parties to file briefs on the merits) in Louisiana v. Hays, No. 94-627, and consolidated it with U.S. v Hays, No. 94-558. The appellants' briefs on the merits were due in late January and the appellees' brief will be due in late February.

On January 6, 1995, probable jurisdiction was also noted in Miller v. Johnson, No. 94-631, and it was consolidated with Abrams v. Johnson, No. 94-797, and U.S. v. Johnson, No. 94-929. Briefs on the merits are due in mid February and mid March.

Oral arguments are scheduled for April 19, 1995 at 10:00 a.m. and 11:00 a.m.

An appeal of a third redistricting case, Shaw v. Hunt, No. 94-923, is also before the court. The appellants' jurisdictional statement was filed on November 21, 1994, the appellees' motion to affirm was filed on December 27, 1994, and the appellants' brief in opposition was filed on January 9, 1995.

Shaw v. Hunt

This case was before the Supreme Court as Shaw v. Reno, and was decided on June 28, 1993. The Supreme Court ruled that white voters could challenge a reapportionment statute on grounds that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification. In sending the case back to the trial court, the Court noted that it "express[ed] no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim."

On remand, on August 1, 1994, the three-judge district court, ruled 2-1 that the challenged North Carolina redistricting plan was a "racial gerrymander subject to strict scrutiny" pursuant to Shaw v. Reno, but that it passed the test because it was narrowly tailored to further the state's compelling interest of complying with the Voting Rights Act and thus "did not violate any rights of the plaintiffs or their supporting intervenors."

For a detailed discussion of the case, see CIVIL RIGHTS MONITOR, Volume 7, nos. 3 & 4, 1994.

Louisiana v. Hays

This case involves a challenge to the State of Louisiana's congressional redistricting plan. In 1992, a three-judge federal district court in the Western District of Louisiana, after

holding an evidentiary hearing ruled for the state defendants.

Following the Supreme Court's decision in Shaw v. Reno, and after an additional hearing, the court on December 28, 1993, concluded that "the [Louisiana congressional redistricting] Plan in general and Louisiana's [black majority] Congressional District 4 in particular are products of racial gerrymandering and are not narrowly tailored to further any compelling governmental interest." Thus the court determined that the plaintiffs' Equal Protection rights had been violated. The court thereupon declared the redistricting act unconstitutional, the plan null and void, and enjoined the State from holding any future congressional elections based on the Plan.

- March 28, 1994, state of Louisiana appealed the December 28, 1993, decision of the district court to the Supreme Court.
- April 25, 1994, Department of Justice (DOJ) filed an amicus curiae brief urging the Court to grant review of the decision.
- April 1994, Louisiana state legislature adopted a new redistricting plan and submitted it to the DOJ for preclearance.
- May 10, 1994, state asked the Supreme Court to defer action on the appeal until the DOJ has acted and if the DOJ preclears the plan to vacate the appeal as moot and remand the case to the district court.
- June 3, 1994, DOJ precleared the redrawn map.
- June 27, 1994, the Supreme Court vacated the lower court's judgment and remanded the case to the District Court for further consideration in light of the redrawn plan.
- July 25, 1994, the district court threw out the redrawn map and adopted a plan drafted by the court's appointed expert.
- July 27, 1994, 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.
- August 11, 1994, the Court granted the stay.
- September 26, 1994, the state and Department of Justice filed jurisdictional statements with the Supreme Court.
- October 28, 1994, the appellees' motion to affirm is filed with the Court.
- November 18, 1994, motions in opposition to affirm are filed.
- December 12, 1994, the Supreme Court notes probable jurisdiction.

Miller v. Johnson

This is an appeal from a 2-1 ruling of a three-judge federal district court that Georgia's 11th district which is majority African-American was racially gerrymandered and thus unconstitutional. The majority reasoned that "the assumption that the sole means of enhancing blacks' political influence is to pack them into such districts is unimaginative."

- January 13, 1994, complaint filed challenging Georgia's congressional
- reapportionment as an illegal racial gerrymander in violation of the 14th Amendment.
- July 21-28, 1994, trial on the merits.
- September 12, 1994, district court panel ruled that the majority African-American district was unconstitutional.
- September 15, 1994, state filed an application for a stay with the Supreme Court.
- September 23, 1994, Supreme Court granted the stay.
- October 6, 1994, state filed jurisdictional statement with the Supreme Court.
- December 21, 1994, motion to affirm filed with the Supreme Court by the appellees.
- January 6, 1995, Supreme Court notes probable jurisdiction.

U.S APPELLATE COURT REJECTS MINORITY SCHOLARSHIP PROGRAM

On October 27, 1994, a panel of the U.S. Court of Appeals for the Fourth Circuit ruled unanimously that the Benjamin Banneker scholarship program for African-American students at the University of Maryland College Park (UMCP) was unconstitutional, *Podberesky v. Kirwan* No. 93-2585. Despite evidence of past discrimination offered by the university itself, the appellate court overturned the district court's ruling that the Banneker scholarship program was narrowly tailored to meet a compelling state interest, and therefore was constitutional. In delivering the unanimous opinion of the court, Circuit Judge Widener wrote:

"The issue in this case is whether the University of Maryland at College Park may maintain a separate merit scholarship that it voluntarily established for which only African-American students are eligible. Because we find that the district court erred in finding that the University had sufficient evidence of past discrimination to justify the program and in finding that the program is

narrowly tailored to serve its stated objectives, we reverse the district court's grant of summary judgment to the University. We further reverse the district court's denial of Podberesky's motion for summary judgment, and we remand for entry of judgment in favor of Podberesky."

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, schools that were segregated and vastly underfunded. 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 the 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 dollars 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.

In 1978, the African-American undergraduates at UMCP made up 7.2 percent of the undergraduate population; in 1987 they were 8.3 percent and in 1994 12.3 percent. The university lauds the Banneker program as a tool of integration as the Banneker scholars are campus leaders and role models for both black and white students thus helping to ameliorate racial stereotypes. The student body is generally supportive of the program and the student government association and the student newspaper have taken positions in support of the program.

In November of 1993, U.S. District Court Judge J. Frederick Motz ruled that the UMCP's Banneker scholarship program was constitutional as it was narrowly tailored to meet a compelling state interest and it addressed the present-day effects of the University's past discrimination, as documented in the UMCP's April 1993 Decision and Report (D&R). The D&R identified four present day effects of the University's past discrimination: (1) the 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 Appellate Court Opinion

The case was argued before the appellate court last May. According to the appellate court, the district court was not presented sufficient evidence of present effects of past discrimination to justify the scholarship program. In addition, the appellate court disagreed with the lower court's finding that the scholarship program was narrowly tailored to remedy discrimination.

The appellate court maintained that the lower court erred in ruling that evidence of any present effect of discrimination on the part of the University would be sufficient to justify the remedial measures of the Banneker scholarship program. The court asserted that for a present effect of past discrimination to sufficiently justify the program, the University must prove that the effect it cites is caused by the past discrimination, and then the effect must be examined to determine whether it is "of a type that justifies the program."

In examining the effects cited by the University, the court disagreed that the first effect, a poor reputation in the African-American community, and the fourth effect, a climate on campus that is perceived as being racially hostile, were sufficient for a race-conscious remedy to be sustained under the Constitution.

While the court agreed with the district court's assessment that any poor reputation the University might have in the African-American community is due to knowledge of the University's past discrimination, it asserted that the mere knowledge of this historical fact is not enough to justify a race-conscious remedy. As Circuit Judge Widener wrote, "If it were otherwise, as long as there are people who have access to history books, there would be programs such as this one. Our decisions do not permit such a result."

Podberesky had argued before the district court that the fourth effect, a hostile climate, did not have its genesis in past discriminatory acts, and the appellate court agreed, reasoning that the current racial environment was evidence of present societal discrimination rather than the result of past discrimination on the part of the University. In the words of Circuit Judge Widener, "...we are confronting societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy."

In addressing the second and third effects, i.e., underrepresentation of African-Americans in the student population and lower retention and graduation rates of African-American students, the appellate court stated that the district court should not have granted summary judgment (judgment without a trial) because there was a dispute as to why African-Americans leave the university in greater numbers than their counterparts and as to the correct reference pool for assessing underrepresentation. The appellate opinion states: "The factual disputes in this case are not inconsequential and could have been resolved only at trial. A district court may not resolve conflicts in the evidence on summary judgment motions, and the district court erred in doing so here."

The appellate court found that the Banneker program was not sufficiently narrowly tailored because it recruited only high achieving African-American students, and the court asserted that high achievers of any race are not the group that suffered from past

discriminatory acts of the University, it was open to persons not residents of Maryland, and the reference pool used to assess underrepresentation was arbitrarily selected.

The University asked for a rehearing by all thirteen judges of the 4th Circuit (en banc) and on November 10, 1994 the NAACP Legal Defense and Educational Fund also filed a petition for an en banc hearing. At the court's request, Podberesky filed a brief in opposition to the request on November 25. The defendant's petition for an en banc hearing was denied with eight appellate judges denying the petition, two voting to grant the hearing and three abstaining. As a result, on January 10, 1995, the case record was returned to the district court. The University has said that it will petition the U.S. Supreme Court to review the case.

In the interim, the University has decided to combine the Banneker scholarship with its other merit scholarship program, the Francis Scott Key scholarship. The combined Banneker/Key scholarship program will select scholarship recipients from a combined pool of applicants. While the selections will be made on a nonracial basis, one criterion will be the extent to which the total pool of scholarship recipients contributes to a diverse environment on campus, thereby continuing the University initiative to encourage diversity.

Reactions and Implications

University President William E. Kirwan noted that since the Banneker scholarship program is a "program that sends an important signal in the state that the university is proactively seeking the participation of African Americans," the school's ability to attract black students will be hampered. Elaine Jones, director-counsel of the NAACP Legal Defense and Educational Fund, Inc. said the decision is "an assault on our nation's commitment to diversity, equal opportunity, and inclusion of African-American students in the American Dream." She continued:

"At a time when we should be encouraging African American youth to live up to their potential and seek higher education, the Court's decision instead serves to stifle hope that African-Americans can participate fully and fairly in American society. It tells even the best and brightest African American youth that they should expect to be sideline players when it comes to higher education. The decision tells colleges and universities that creative programs to reverse the legacy of underachievement brought about by our long history of slavery and Jim Crow education should cease."

Thomas J. Henderson, deputy director of the Lawyers' Committee for Civil Rights Under Law, noted that many institutions might retreat from similar scholarship programs out of fear of being taken to court.

Although the ruling directly affects only those states covered by the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia) counsel on both sides concur that this decision potentially could affect colleges and universities across the nation. Podberesky's attorney, Richard A. Samp, chief counsel of the Washington Legal Foundation stated, "If race-based scholarships are not justified there-- and the courts say they are not-- I don't see how such scholarships can be justified anywhere in the country." (for further details consult the Fall '93 issue of the *Monitor*)

CIVIL RIGHTS AND ANTI-POVERTY ORGANIZATIONS OPPOSE THE BALANCED BUDGET AMENDMENT TO THE CONSTITUTION

Civil rights and anti-poverty organizations have expressed strong opposition to the Balanced Budget Amendment which passed the House on January 26, 1995, with more than the two-thirds vote needed for a constitutional amendment. If the amendment clears the Senate, it will be sent to the States (the President has no role in this process), of which three-fourths (38) must ratify for addition of an amendment to the Constitution.

The amendment that passed the House requires that by the year 2002 or two years after ratification, whichever is later, the Federal Government could not spend more in a year than it raises in revenue. That limitation could be suspended during war and other conflicts, and in specific instances deficit spending would be permitted if three-fifths of each House of the Congress approved. A provision that would have barred tax increases without the consent of three-fifths of the membership of each House failed in the House, which instead adopted a provision requiring approval by an absolute majority in each House.

The opposition argues that the amendment would have a profound negative effect on minorities and the poor:

- During a recession, when minorities and low-income persons become the brunt of unemployment, programs to alleviate their misery could be cut in order to balance the budget; moreover recessions could last longer because the economic stimulus that flows from temporary deficit spending would be lacking.
- The amendment would make it harder to raise taxes than to cut spending, making it more likely that programs serving minorities and the poor would be cut. Wealthy individuals and large corporations receive most of their government subsidies through tax benefits, while low- and middle-class families receive most of their government benefits through programs. Thus constitutional procedures making it harder to close tax loopholes than cut programs could mean the burden of deficit reduction would fall disproportionately on those in the bottom half of the income scale.
- Eliminating the federal budget deficit under the Republican budget plan would require massive cuts in other government programs -- an average of 30 percent by 2002. In practice, programs such as nutrition, health, housing and education that are not protected by powerful constituencies would likely face even deeper cuts or outright elimination, and thus low-income persons and minorities would probably shoulder a disproportionate share of the deficit reduction burdens.
- The constitutional amendment and Republican budget plan would limit public investments that are critical to reinvesting in our cities and to long-term economic growth. These investments include education and training,

infrastructure, civilian research and development and early intervention programs for children. In many cases, minorities and low-income persons would disproportionately benefit from these kinds of public investments.

- The amendment would also shift power to the President and the Courts. The amendment is fraught with questions about how it would be implemented and enforced. For example, what happens if a budget is balanced at the start of a year, but falls out of balance during the year as a result of slower-than-expected economic growth, and Congress cannot act rapidly enough to prevent a deficit. The courts might rule that the amendment gave the President the authority to cut programs unilaterally, and some Presidents might use this power in ways that disproportionately injure politically weak constituencies, such as low-income persons and minorities.
- The amendment would shift power within Congress, and increase the power of a Congressional minority because it requires balancing the budget even when the economy falters or slips into recession (or when natural disasters unexpectedly raise government costs) unless three-fifths of Congress agrees to waive this requirement. This would enable a minority to block actions favored by a majority of Congress and to exercise an unprecedented degree of leverage over national economic and budget policy.

For additional information, contact the Center on Budget and Policy Priorities, 777 North Capitol Street, NE, Suite 705, Washington, DC, 20002.

DEPARTMENT OF JUSTICE SUES FOUR STATES FOR FAILURE TO COMPLY WITH MOTOR VOTER LEGISLATION

On January 23, 1995, Attorney General Janet Reno and Assistant Attorney General for Civil Rights Deval Patrick announced that the Department of Justice had filed suit against Illinois, Pennsylvania, and California for non-compliance with the National Voter Registration Act of 1993 (NVRA), and was closely monitoring other states that had not yet fully complied with the law. On February 6, the Department filed suit against South Carolina.

Arkansas, Virginia and Vermont have been provided additional time to allow for the amending of their state constitutions, and negotiations were ongoing with South Carolina and Michigan. Minnesota, North Dakota, Wisconsin, and Wyoming are exempt from the law because they had same day or no registration requirements prior to enactment of the legislation.

Background

On May 20, 1993, President Clinton signed into law the National Voter Registration

Act of 1993 or Motor Voter Bill as it is commonly called, ending a five year campaign to enact the legislation. 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. Under the law, states were required to implement the Act by January 1, 1995. States whose constitutions have provisions that preclude compliance must implement the Act by January 1, 1996 or 120 days after the date it would be legally possible to amend their constitutions without requiring special elections.

DOJ's Lawsuits

In announcing the lawsuits, Attorney General Reno said: "This is a common sense law that already is making voting more available to all Americans. States have seen tremendous increases in the number of people registering to vote in the 23 days since the law took effect." Assistant Attorney General Patrick said the Justice Department notified the states of their obligations under the law last May, and has been seeking voluntary compliance. "We cannot understand why any elected official would stand in the way of making it easier to register to vote," he said.

The suit against Illinois, filed in U.S. District Court for the Northern District of Illinois, Eastern Division, asserts that the state has failed to comply with the law's requirements that states "provide simultaneous application for motor vehicle driver's licenses and for registration of voters for elections for federal office," establish procedures for registering voters "at federal, state and nongovernmental agencies designated by the state...includ[ing] agencies which provide public assistance and serve people with disabilities,...accept and use the mail registration form prescribed by the Federal Election Commission," or develop a comparable state form, and prohibit the removal of names of registered voters from the rolls for failure to vote.

The suit against Pennsylvania, filed in the U.S. District Court for the Eastern District of Pennsylvania cites similar violations. Pennsylvania's newly elected governor, Thomas Ridge (R), claimed the DOJ had not given his new administration enough time to comply with the law and said the lawsuit was a waste of taxpayers' money.

The suit against California is a countersuit to a suit the state filed in December 1994 challenging the constitutionality of the Motor Voter law. Governor Pete Wilson (R) vetoed state legislation to implement the NVRA. On August 12, 1994, the Governor issued an Executive Order directing the California Department of Motor Vehicles to comply with NVRA's provisions requiring simultaneous application for voter registration and a driver's license and designated certain state agencies as voter registration agencies, but the E.O. provided that after January 1, 1995, voter registration services should be provided only to "the extent federal funding is made available for such purposes." Wilson has maintained that full implementation of the law would cost California \$35.8 million annually. In February 1994, the Congressional Budget Office estimated that the cost nationwide would be approximately \$20 million per year for the first five years.

The South Carolina suit is also a countersuit to a South Carolina challenge to the law.

In 1994, the South Carolina state legislature passed legislation to enact the NVRA, but the Governor vetoed the legislation. DOJ had been working with the state to attempt to avoid litigation and DOJ attorneys had indicated that the state's election commission appeared to be trying to comply with the law. These efforts ceased with the state's suit.

At the January 23 press conference Attorney General Reno provided information on the results of implementing the law in 6 states:

- Florida is averaging more than 3,000 new voter registrations per day through driver licensing.
- In Georgia, more than 18,000 people have been registered since January 1, 1995, through the Department of Public Safety (vehicle licensing), mail in registration, and through other agencies. In 1994, a total of 85,426 persons were registered.
- In Washington, approximately 3,700 voters were registered in the first week of operation through the combined use of "motor voter," registration by mail, and agency based registration.
- In Kentucky, in the first ten days of implementation, Kentucky registered more than 10,000 voters and completed more than 15,000 changes in address through the motor vehicle services and public assistance agencies. Additional voters were registered through disability services, military recruitment, the Women Infants and Children's program, and mail in applications.
- In Oregon, in 1984, using procedures substantially equivalent to those required by the NVRA, an average of more than 9,000 voters a month were registered through motor voter services alone.
- In Mississippi, nearly 12 percent of people getting driver's licenses registered to vote at the Jackson Department of Public Safety.

CITIZENS' COMMISSION ON CIVIL RIGHTS RELEASES PROGRESS REPORT ON THE FEDERAL GOVERNMENT'S CIVIL RIGHTS RECORD

The Citizens' Commission on Civil Rights (CCCCR) released its 1995 report, "New Challenges: The Civil Rights Record of the Clinton Administration Mid-term," on January 17th at a press conference in Washington, D.C. The report praises the performance of the Administration, and calls for leadership from the President and Congress to strengthen federal guarantees of equal opportunity in light of what the Commission calls the most

serious threats to civil rights in thirty years. Referring to the Republicans' "Contract on America," Commission Chair Arthur Flemming stated, "I have noted proposals on Capitol Hill that, if passed, would undermine the Civil Rights Movement as we know it."

Of specific concern to the Commission are current proposals regarding unfunded mandates, a balanced-budget amendment, block-grants, and the rewriting of the Crime Bill to redirect some funds allocated for preventive measures to the construction of more prisons. According to the CCCR, many of these measures would slash funds allocated for the nation's poor as well as replace national standards for civil rights enforcement with local standards. In addition, the Commission expressed apprehension about cases before the Supreme Court on such issues as desegregation, minority redistricting and affirmative action. It stressed that these tools have been very effective in combating the effects of past discrimination as well as current discrimination.

Speaking at the press conference, Chairman Arthur Flemming, former Secretary of the Department of Health, Education and Welfare, referred to the balanced-budget amendment as a radical proposal, stating, "As I see it, if that amendment should be included in the Constitution of the United States, we as a nation would be tying our hands behind our back." Though he concurred that reducing the deficit should be a national priority, he noted that it has been steadily decreasing in recent years and that "drastic" efforts to balance the budget by 2002 will have devastating effects on the nation's 39 million poor people. Dr. Flemming stated, "We seem to be unwilling to come to grips with the fact that we are the wealthiest nation in the world and at the same time, we are a nation where the rich are getting richer and the poor are getting poorer."

Bill Taylor, Vice-Chairman of the Citizens' Commission and former Staff Director at the U.S. Commission on Civil Rights, warned of the possible repeal of affirmative action by the courts. "It would be one thing if we had reached the point in this nation where discrimination were a rare exception, rather than a prevalent fact of life. The evidence in this report and other reports is overwhelming that discrimination is still pervasive in many areas." Taylor also voiced concern about desegregation cases currently before the courts. "Efforts are being made in the courts to terminate the court orders under which desegregation and educational improvement have taken place." He warned that this country was moving backward in its desegregation efforts, citing that for the first time since the 1960s schools are becoming more and not less segregated.

The Honorable Augustus F. (Gus) Hawkins, who represented the 29th Congressional District of California for more than three decades, urged the country to return to a "moral high road" in which human relations are viewed as an important contributor to the overall health of the nation. In doing so, he suggested civil rights be viewed in a larger, macroeconomic context, noting that the well-being of any one group is inextricably linked to the well-being of the entire nation. Hawkins asserted that economic and social justice issues could regain the sense of national urgency they once enjoyed if seen as an element of long-term fiscal responsibility. Expanding on this cost-benefit argument, Taylor noted that sources of revenue are drying up and that measures that have proven to be cost-effective, like early childhood education, health care and nutritional programs, may end up serving fewer and fewer people, thereby costing Americans more in the long run.

Frankie Muse Freeman, a lawyer and long-time civil rights advocate and the first woman to serve on the U.S. Commission on Civil Rights, highlighted the one trend that she said is dominant throughout the report- the interrelationship between race, sex discrimination and poverty. This "dual-burden" experienced by minority women is particularly evident in education, employment, and health care among many other areas according to the report.

Additionally, the Commission's report discusses the increase in racial tensions in American society and cites the isolation and concentration of impoverished urban dwellers as a contributing factor. This isolation breeds an atmosphere of fear and mistrust, and the report states that there is a general lack of understanding of the factors that contribute to these deplorable conditions. The report notes that hate-crimes are on the rise and much of the increase has been directed at immigrants, particularly immigrants of color. This anti-immigrant feeling has fed recent efforts and proposals to deny government benefits to legal immigrants. The Commission warned that if these efforts succeed, a price is to be paid by everyone in the form of increasing divisiveness in this country and the harm that is done to people when they are not given a chance to succeed.

Finally, the Commission noted a growing "mythology" regarding civil rights issues in general, in which opponents praise it and bury it in the same breath. This myth, as expressed by William Taylor, is essentially that while Martin Luther King Jr. was a noble man and the civil rights legal revolution may have been necessary in the 1960s, it is no longer needed. Everyone who could have benefited from civil rights legislation has benefited, some unfairly, and those who have not, namely the poor, simply lack the ability or the moral fiber to do so. This mythology fails to take into account the legacy of discrimination in this country as well as current forms of discrimination that are highlighted in the report.

The report generally lauds the efforts of the Clinton Administration, and Dr. Flemming referred to President Clinton "as a friend of the civil rights movement." Flemming added that the tone underlying this year's report is much more favorable than those issued during the past two Republican administrations and commended the Administration for reversing federal policies of the Reagan-Bush years on such issues as desegregation, affirmative action, and housing discrimination, among others.

Among the report's other recommendations to the President are:

- Maintain support for the use of affirmative remedies for violations of civil rights laws
- Further equal educational opportunities, including the monitoring of new education laws which guarantee services to language-minority students
- Defend minority opportunity congressional districts
- Enforce the National Voter Registration Act

- Intervene in support of the plaintiffs' challenging Proposition 187 in California
- Support the Americans With Disabilities Act
- Revitalize the Equal Employment Opportunity Commission as well as the United States Commission on Civil Rights
- Develop a comprehensive urban policy to provide opportunity to economically disadvantaged citizens, particularly minorities who live in high concentrations of poverty in inner cities

The Citizens' Commission was founded in 1982 with equal numbers of Democrats and Republicans, drawn together over their concern that civil rights laws were no longer being enforced by the federal government. It was established under the leadership of Arthur Flemming, a Republican, who was fired by President Ronald Reagan as Chairman of the U.S. Commission on Civil Rights for his support of affirmative action and other civil rights related issues.

The 300-page report is available for \$24.95 including shipping and handling charges by calling the Citizens' Commission on Civil Rights at (202) 659-5565.

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