Leadership Conference Education Fund

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Volume 8, Number 3 FALL 1995

INSIDE...

AFFIRMATIVE ACTION ADDRESSED BY ALL THREE BRANCHES OF THE FEDERAL GOVERNMENT IN 1995

OVERVIEW

In 1995, affirmative action policy was high on the agenda of the Supreme Court, the President, and the Congress. On June 12, 1995, the U.S. Supreme Court issued a major decision on affirmative action, ruling for the first time that when challenged all federal laws that create

racial classifications, whether meant to burden or benefit minorities, must be tested by the same stringent standard, i.e., strict scrutiny. In legal terms this means that the government must show that the program was established to meet a compelling state interest and that it is narrowly tailored to achieve that purpose. Adarand v. Pena, No. 63-1841. On May 22, 1995, the Court without comment denied review of a Fourth Circuit Court of Appeals holding that the Benjamin Banneker scholarship program at the University of Maryland for high achieving African-American students violated the Fourteenth Amendment's Equal Protection Clause, Podberesky v. Kirwan, No. 93-2585.

During the 1st session of the 104th Congress, the House and Senate held a total of 12 hearings on affirmative action and related issues. Senate Majority Leader Robert Dole (R-KS) and Representative Charles Canady (R-FL), chair of the House Judiciary Committee Subcommittee on the Constitution introduced legislation that would make unlawful almost all forms of federal affirmative action. There were also several votes in the House and Senate in which for the most part supporters of affirmative action prevailed.

On July 19, President Clinton delivered a major speech expressing strong support for affirmative action, issued a review of the federal government's affirmative action programs and in an effort to comply with the Adarand decision instructed all federal agency heads to ensure that their affirmative action programs did not create a quota, create preferences for unqualified individuals, create reverse discrimination or continue after their equal opportunity purpose had been achieved.

At the end of 1995, affirmative action remained a federal remedy for addressing discrimination against minorities and women, and for promoting equality of opportunity for all. However, there were clear signs that Republican opponents of affirmative action were poised to launch a coordinated attack on federal affirmative action with the Dole-Canady bill as the vehicle.

THE SUPREME COURT

Below is a brief summary of the Supreme Court decision in Adarand v. Pena. Previous MONITORS have reported extensively on the case. For a summary of the background of the case and the oral argument before the Supreme Court see vol. 7, no. 6, and for a summary and analysis of the opinion see vol. 8, no 2.

The Adarand decision established that federal race-conscious programs will be reviewed by the courts under the due process requirement of the Fifth Amendment in the same manner that all local and state racial classifications have been reviewed under the Fourteenth Amendment since Croson v. City of Richmond (1989). Prior to Croson, the court tended to apply a more lenient standard to racial classifications that sought to benefit minorities as a remedy for past discrimination.

In its Croson decision, the Court distinguished its earlier decision in Fullilove v. Klutznick (1980), in which the Court had upheld a congressional program requiring that 10 percent of certain federal construction grants be awarded to minority contractors, emphasizing that

Congress had broader power to adopt such programs than do state and local governments. The Croson opinion stated that Congress has been given a "special constitutional mandate" to enforce the protections of the 14th Amendment, whereas section 1 of the 14th Amendment is an "explicit constraint on state power and the state must undertake any remedial efforts in accordance with that promise.... Correctly viewed sec. 5 [of the 14th Amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the 14th Amendment."

In Adarand, however, the majority effectively overruled Fullilove and Metro Broadcasting (a 1990 case sustaining federal set-asides in broadcasting licenses) as these earlier decisions used a more lenient standard. It is worth noting that in Adarand seven of the nine justices upheld the use of federal racial classifications in appropriate circumstances. Justice O'Connor for the majority took pains to note that the application of strict scrutiny was not "fatal in fact" to all affirmative action. Only Justices Scalia and Thomas expressed the view that government race-conscious programs can never survive constitutional muster.

In denying review of Podberesky v. Kirwan, the Court let stand a Fourth Circuit unanimous holding that the University of Maryland's Benjamin Banneker minority scholarship program was unconstitutional. The Fourth Circuit opinion had concluded:

> "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 objectives, we reverse the district court's grant of summary judgment to the University."

In response to the denial of review, the University of Maryland has combined its Benjamin Banneker program with its Francis Scott Key merit scholarship program, with one of the goals of the combined program being to maintain a diverse student body. For the 1995-96 school year the University awarded 72 scholarships under the combined program, 19 of them going to African-American students. During the 1994-95 school year, a total of 69 scholarships were awarded through the two programs with 37 African Americans receiving Banneker scholarships.

Although the ruling technically applies only to states in the Fourth Circuit -- Maryland, North Carolina, South Carolina, Virginia, and West Virginia -- there are signs that other states are reexamining their minority scholarship programs in light of the Court's denial of review. The state of Colorado recently announced that it was changing its criteria for awarding state scholarships from consideration of race to consideration of financial need.

For a thorough discussion of this case, see CIVIL RIGHTS MONITOR, vol. 8, no. 1, and vol. 7, nos. 6, 3, and 2.

THE ADMINISTRATION

On March 7, 1995, President Clinton directed a review of the Federal Government's affirmative action programs and put in charge of the review George Stephanopoulos, Senior Adviser to the President for Policy and Strategy, and Christopher Edley, Jr., Special Counsel to the President. The instructions from the President were to determine:

> o what kinds of Federal programs and initiatives are now in place and how they are designed?
>
> o what is known about their effects -- benefits and costs, direct and indirect, intended and unintended -- both to the specified beneficiaries and to others? In short, how are they run? Do they work? Are they fair?

Initially, a report on the review of affirmative action programs was expected within weeks of the President's directive. But the review stretched into months and on June 12, the Court issued the Adarand decision. In response to Adarand, on June 28, Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel, issued a 38 page memorandum to the General Counsels of federal agencies setting forth "preliminary legal guidance on the implications of the [Adarand] decision."

That memorandum states that Adarand "federalizes" Croson with the caveat that "Congress may be entitled to some deference when it acts on the basis of race or ethnicity to remedy the effects of discrimination." The memorandum continues:

> "The Court in Adarand hinted that at least where a federal affirmative action program is congressionally mandated, the Croson standards might apply somewhat more loosely. The Court concluded that it need not resolve whether and to what extent the judiciary should pay special deference to Congress in this area. The Court did, however, cite the opinions of various Justices in Fullilove, Croson, and Metro Broadcasting concerning the significance of Congress' express constitutional power to enforce the antidiscrimination guarantees of the Thirteenth and Fourteenth Amendments -- under Section 2 of the former and Section 5 of the latter -- and the extent to which courts should defer to exercises of that authority that entail the use of racial and ethnic classifications to remedy discrimination.... Some of those opinions indicate that even under strict scrutiny, Congress does not have to make findings of discrimination with the same degree of precision as a state or local government, and that Congress may be entitled to some latitude with respect to its selection of the means to the end of remedying discrimination."

The memorandum concludes:

> "Adarand makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with the strict scrutiny standard. No affirmative action program should be suspended prior to such an evaluation. The information gathered by many agencies in connection with the President's recent review of federal affirmative action programs should prove helpful in this regard."

On July 19, President Clinton delivered a major speech on affirmative action and released the long awaited Affirmative Action Review of federal programs. The President reaffirmed his

support for the goals of affirmative action. He said:

> "The purpose of affirmative action is to give our nation a way to finally address the systemic exclusion of individuals of talent on the basis of their gender or race from opportunities to develop, perform, achieve, and contribute. Affirmative action is an effort to develop a systematic approach to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination.... When affirmative action is done right, it is flexible, it is fair, and it works."

The President called on Americans to meet a twofold challenge: "[F]irst, to restore the American dream of opportunity and the American value of responsibility; and second, to bring our country together amid all our diversity into a stronger community, so that we can find common ground and move forward as one." Mr. Clinton noted that in addition to opening doors of opportunity for individual Americans, affirmative action has helped strengthen the economy:

> "Most economists who've studied [affirmative action] agree that affirmative action has also been an important part in closing gaps in economic opportunity in our society, thereby strengthening the entire economy."

Touting the benefits those choosing diversity and inclusiveness enjoy, the President pointed to the example of Atlanta, Georgia:

> "In 1960, Atlanta, Georgia, in reaction to all the things that were going on all across the South, adopted the motto, 'The city too busy to hate.' And however imperfectly over the years, they tried to live by it. I am convinced that Atlanta's success -- it now is home to more foreign corporations than any other American city, and one year from today it will begin to host the Olympics -- that success all began when people got too busy to hate."

Using the theme, "Mend it, but don't end it," the President said:

> "Affirmative action has been good for America. Affirmative action has not always been perfect and affirmative action should not go on forever. It should be changed now to take care of those things that are wrong and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggests, indeed, screams that that day has not come....We should reaffirm the principle of affirmative action and fix the practices."

President Clinton called on agency heads to continue their review of affirmative action programs consistent with the guidance in the Dellinger memorandum and said that any federal affirmative action program must be eliminated or reformed if it:

o creates a quota;

o creates preferences for unqualified individuals;

o creates reverse discrimination; or

o continues even after its equal opportunity purposes have been achieved.

The review of government programs continues and is being spearheaded by the Department of Justice.

Department of Education Guidance

On September 7, 1995, the Department of Education issued a memorandum to College and University Counsel stating that the "Department of Education's policy guidance on race-targeted student financial aid has not changed as a result of either the Supreme Court's recent decision not to hear the appeal requested by the University of Maryland in the Podberesky v. Kirwan case or the Supreme Court's decision in Adarand Constructors v. Pena." The memo concludes that "under governing standards, race-targeted student aid is legal in appropriate circumstances as a remedy for past discrimination or as a tool to achieve a diverse student body. Scholarships for these purposes are vital to the education of all students."

The Department issued its policy guidance on minority scholarships on February 17, 1994. The policy provides that "colleges can use financial aid to remedy past discrimination and to promote campus diversity without violating federal anti-discrimination laws."

Department of Defense Suspension

On October 23, the Department of Defense announced that as part of the government's review of affirmative action programs, it was suspending its "rule of two" set-aside contract program. Under this program, a Department of Defense prime contract is set-aside for Small Disadvantaged Businesses (SDBs) (most of which are minority) whenever two or more such businesses are qualified and available to perform the work. The bid is not acceptable if it is more than 10 percent above the fair market price.

In announcing the suspension, DOD officials stated that several cases had been filed challenging the constitutionality of the program, and that after consultation with the Department of Justice they concluded that the program did not meet the standards established by the President and might be legally vulnerable.

The "rule of two" was a regulatory mandate, one tool that DOD used to implement section 1207 of the Defense Authorization Act of 1987 which established a five percent goal for awarding contracts and subcontracts to small disadvantaged businesses, Historically Black Colleges and Universities, and minority institutions. This program accounted for approximately 12 percent ($1 billion) of DOD's total contracting with disadvantaged businesses ($8.4 billion) and less than 1 percent of total DOD contracting ($112 billion).

DOD officials said the suspension should not be viewed as a lack of commitment to minority contracting and that DOD would redouble its efforts to contract with SDBs. Under Secretary of Defense Paul G. Kaminski said:

> "I have directed all DOD contracting activities to use their utmost skill and existing authorities to increase awards to SDBs. I have also personally called leaders in the

defense industry to tell them of the impact of Adarand on DOD programs and to ask their assistance in substantially increasing subcontract support to SDBs. I have been gratified by the positive responses I have received."

CONGRESS

The 1st session of the 104th Congress ended with the House having held six hearings on affirmative action and related issues, the Senate five, and one hearing held jointly.

House Subcommittee on Employer/Employee Relations of the Economic and Educational Opportunities Committee, Rep. Harris Fawell (R-IL), Chair

March 25, 1995: Economic and Educational Opportunities

May 2, 1995: Economic and Educational Opportunities

House Subcommittee on the Constitution of the Judiciary Committee, Rep. Charles Canady (R-FL), Chair

April 3, 1995: Group Preferences and the Law

July 1, 1995: (in San Diego), Group Preferences and the Law

September 22, 1995: Joint hearing with the Senate Subcommittee on the Constitution of the Judiciary Committee, Impact of Adarand v. Pena.

October 25, 1995: Economic and Social Impact of Race and Gender Preference Programs

December 7, 1995: The Equal Opportunity Act of 1995

Senate Labor and Human Resources Committee, Nancy Kassenbaum (R-KS), Chair

May 23, 1995: Oversight of the Equal Employment Opportunity Commission

June 15, 1995: Affirmative Action and the Office of Federal Contract Compliance

Senate Small Business Committee, Christopher S. Bond (R-MO), Chair

April 4, 1995: Small Business Administration's 8(a) Minority Business Development Program

October 19, 1995: Revitalizing America's Rural and Urban Communities

Senate Judiciary Committee, Subcommittee on the Constitution, Federalism and Property Rights, Hank Brown (R-CO), Chair

September 7, 1995: An Overview of Affirmative Action

September 22, 1995: Joint Hearing with House Subcommittee, Impact of Adarand v. Pena.

First Vote on Affirmative Action

In the 1st session, the 104th Congress ended a Federal Communications Commission program that sought to increase the number of minority owned television and radio stations and thus provide "a diversity of expression over the airwaves" by giving a tax break to companies that sell such businesses to minorities. Efforts to limit the tax break to transactions under $50 million failed. The savings from eliminating this tax break will go toward extending permanently a tax break that allows self-employed persons to deduct 25 percent of the cost of their health insurance premiums from their taxable income.

Some members of the Congressional Black Caucus argued that the elimination of the FCC tax break was an opening attack on affirmative action. Supporters of eliminating the tax break argued that it allowed abuse and that minorities were sometimes used as "fronts" for white owned businesses. In response, Rep. John Lewis (D-GA) said: "Each year we provide tremendous loopholes for large companies; we could have closed any one of those loopholes and paid for this."

The provision passed the House on January 17, 1995 by a vote of 381-44 and the Senate on March 24 by voice vote. It was signed into law on April 11, 1995 as part of the Self-Employed Health Insurance Deduction Bill, P.L. 104-7.

Efforts to Attach Anti-Affirmative Action Riders to Appropriation Bills

On July 20, 1995, the day after President Clinton delivered his speech on affirmative action, Senator Phil Gramm (R-TX), a candidate for the Republican Presidential nomination, offered on the floor of the Senate an amendment to the appropriations bill for the Legislative Branch to prohibit any money in the bill from being used to award federal contracts based on the race, color, national origin, or gender of the contractor.

On the Senate floor, there was limited debate on the merits of affirmative action, but Senators expressed bipartisan agreement that an amendment to an appropriations bill was not the best vehicle for considering an issue as important as affirmative action. Senator Arlen Specter (R-PA) said: "One of the difficulties...in considering a matter of this complexity within the confines of a two hour time limit is that it does not give near enough opportunity to go into depth on these very intricate issues." Senator Pete Domenici (R-NM) added: "There is no question that this is an important issue -- discrimination. And to come to the floor on an appropriations bill, no committee hearings that I am aware of, and to suggest that on each appropriations bill we are going to tailor some way to get rid of affirmative action in the United States, in my opinion, is as apt to miss the point as it is to solve anything....Frankly, I don't think this is the way we ought to handle a matter of this importance."

Senator Gramm asserted that now was the time for the Senate to act because for 25 years

the Senate had legislated unfairness through affirmative action programs. In response, Senator William Cohen (R-ME) stated:

> "The 25 years stood out in my mind because it tended to ignore that for 200 years we have tolerated and practiced unfairness. We said that all men are created equal. This is our defining document. Not all women are created equal. Not all blacks are created equal. They were not even treated as human but only three-fifths human, as slaves, as pack mules. We broke up their families, and we humiliated them for years and years -- not 25 years -- but a couple of hundred years or more. And suddenly we come back and say. Well, it is all equal now. The field is completely level. We live in a color blind society. Does anyone really believe that, that we live in a color blind society."

In the end, Senator Gramm was the only senator to speak in support of his amendment. The amendment was defeated 36-61.

An alternative amendment offered by Senator Patty Murray (D-WA) passed 84-13. Senator Murray's amendment stated that none of the funds could be used for "any affirmative action program that results in quotas, reverse discrimination, or in the hiring of unqualified persons," and that such programs "must be completely consistent with the Supreme Court's recent decision in the Adarand case." However, the Murray amendment was deleted from the bill in conference committee.

In the House, Rep. Gary Franks (R-CT) was poised to offer an amendment similar to Senator Gramm's to the Appropriations Bill for the Department of Defense, but his efforts were rebuffed by the House leadership who decided that the time was not ripe for considering the issue of affirmative action nor was an appropriations bill the appropriate vehicle. Newt Gingrich (R-GA), Speaker of the House, said: "There's no question we're going to do affirmative action in a very big way in this Congress...But the truth is we don't have a very good, clear-cut positive [alternative]." Rep. Bob Livingston (R-LA), chair of the Appropriations Committee said: "I don't want one of my bills to be encumbered in three weeks of debate on affirmative action."

Speaker Gingrich appointed Rep. J.C. Watts (R-OK) to chair a Minority Issues Task Force "to develop a legislative agenda to empower the nation's low-income communities so that the residents may solve their community's problems rather than rely on ineffective government bureaucracies." The task force held a press conference to outline its empowerment agenda that calls for reducing taxes, increasing incentives for investments in the inner cities, reducing federal regulations, supporting the welfare reform bill, improving crime fighting and education, and promoting the free market. The task force plans to hold hearings and "listening groups" around the country to hear from people working on poverty. Rep. Watts said the goal of the task force is to have a package of legislation to introduce in the Spring of 1996 to "revitalize our inner cities and restore hope to our nation's poor neighborhoods."

It is not clear whether the task force legislation will be presented as an alternative to affirmative action. In response to a question at the press conference, Rep. Watts said that he has been interested in this issue for a long time and had planned to introduce empowerment legislation long before affirmative action became an issue.

Equal Opportunity Act of 1995

On July 27, Senator Robert Dole (R-KS) and Rep. Charles Canady (R-FL) introduced the Equal Opportunity Act of 1995 "to prohibit discrimination and preferential treatment on the basis of race, color, national origin and sex with respect to Federal employment, contracts, and programs and for other purposes." At a press conference marking the introduction of the legislation, Senator Dole asserted: "It's time to get the federal government out of the business of dividing Americans and into the business of uniting Americans." Rep. Canady said: "When the government grants preferences based on race, and gender, it perpetuates the pernicious notion that these characteristics are permissible grounds for making decisions. They are not and our bill will prevent the government from sending this misguided message."

Civil rights advocates were swift in expressing their profound disappointment over Senate Majority Leader and Presidential Candidate Dole's sponsorship of the bill which they said would eliminate federal affirmative action programs for women and minorities. These advocates said Senator Dole's introduction of the bill was a stark reversal of his past support for affirmative action. In 1985, Senator Dole had been among 66 senators who urged President Reagan not to change the Executive Order on Affirmative Action which calls for the use of goals and timetables to expand job opportunities for women and minorities in the workforces of federal contractors. In 1991, Senator Dole introduced the Glass Ceiling Act that established the Glass Ceiling Commission to conduct a study and prepare recommendations on "eliminating artificial barriers to the advancement of women and minorities to management and decisionmaking positions in business."

Ralph G. Neas, Counsel to the Leadership Conference on Civil Rights (LCCR) on Affirmative Action and Richard Womack, LCCR Acting Executive Director, issued a statement expressing LCCR's strong opposition to the "misnamed" Equal Opportunity Act of 1995. The statement reads:

> "This dangerous and draconian measure would wipe out thirty years of bipartisan federal civil rights enforcement policies. If enacted, the bill would effectively overturn decades of Supreme Court decisions regarding affirmative action. Indeed, by eliminating race-conscious remedies entirely, it embraces a position rejected by seven of the nine Justices in the Court's recent Adarand decision."
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> An LCCR analysis of the bill states in part:
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> o This is a radical, extreme measure. It goes beyond Adarand, in that it makes any race-based classification per se illegal....The Dole/Canady bill would not even permit affirmative action programs when...there is a solid record of past or continuing discrimination and the remedy is precisely tailored to rectify it, without creating quotas or preferences for unqualified candidates."

In testimony before the House Judiciary Committee's Subcommittee on the Constitution, Deval L. Patrick, Assistant Attorney General for Civil Rights, expressed strong opposition to the legislation and said if it were presented to the President for his signature, the Attorney General would recommend a veto. Patrick testified:

"While legislative titles are not generally matters of great import, this one is ironic, if not distressing, because beneath its promising title this bill does nothing to address the enormous problems that face the overwhelming majority of people who are denied equal opportunity. It ignores those who because of centuries of discrimination -- discrimination that no reasonable person denies persists today -- have been denied opportunities to obtain a decent education, compete equally for jobs, participate in the political process and generally partake fairly of the bounty of this magnificent nation.

"Instead, this bill would eliminate remedies that the Congress and prior Administrations, as well as this one, have tried to implement to overcome this nation's history of exclusion based on race, ethnicity, and gender. By completely prohibiting otherwise lawful and flexible affirmative action and categorically rejecting several decades of Supreme Court precedent imposing reasonable limits on affirmative action, this bill attacks remedies that have evolved as a modest, helpful response to the deep intransigence of institutions peopled by those who persist in viewing African Americans, Hispanics, Native Americans, Asians and women as less deserving of jobs, business opportunities and places in universities. When by every measure of social well-being members of racial and ethnic minority groups and women lag far behind white males, when study after study shows that enforcement of the antidiscrimination laws alone has not leveled the playing field between dominant white males and other citizens, when affirmative action -- done the right way -- represents one sensible, restrained tool available to help our society achieve its goal of integration, this bill would set us all back. The Administration strongly opposes it."

On September 29, Senator and Presidential candidate Gramm tried again to attach anti-affirmative action riders to an appropriations bill, this time the Commerce, Justice, and State Appropriations bill. The first rider would have repealed section 8a of the Small Business Administration which seeks to direct government business to small disadvantaged businesses many of which are minority-owned. The second rider sought in effect to enact the Dole/Canady bill and thus would have prohibited all federal affirmative action programs. Both riders were rejected by voice vote.

SUPREME COURT HEARS ORAL ARGUMENTS IN VOTING RIGHTS REDISTRICTING CASES

The latest chapter in the Supreme Court's continuing efforts to articulate principles governing the use of race in drawing voting districts came on December 5, 1995, when the Supreme Court heard oral arguments in cases from Texas (Bush v. Vera, No. 94-805, Lawson v. Vera, No. 94-806, and U.S. v. Vera, No. 94-988) and North Carolina (Shaw v. Hunt, No. 94-923, and Pope v. Hunt, No. 94-924).

TEXAS CASES

In the Texas cases, a three-judge panel of the U.S. District Court, Southern District of

Texas, ruled on August 17, 1994 that majority-minority congressional districts 18, 29, and 30 were unconstitutional. The court held:

> "[The districts] were conceived for the purpose of providing 'safe' seats in Congress for two African-American and an Hispanic representatives. They were scientifically designed to muster a minimum percentage of the favored minority or ethnic group; minority numbers are virtually all that mattered in the shape of those districts. Those districts consequently bear the odious imprint of racial apartheid, and districts that intermesh with them are necessarily racially tainted....
>
> "We do not hold that the state may only draw Congressional boundaries with a blind eye toward race, a goal which would be impossible, nor that it is altogether prohibited from creating majority-minority districts. But when the State redraws the boundaries of Districts 18, 29, and 30 and contiguous districts, it can and must exhibit respect for neighborhoods, communities, and political subdivision lines. As the Supreme Court put it, appearances do matter. In appearance and in reality, these three districts were racially gerrymandered."

The Questions Presented

The questions presented by the state appellants in Bush v. Vera are:

1. Whether the trial court properly invoked strict scrutiny where the evidence shows that Texas used its customary and traditional districting principle of incumbency protection in drawing minority opportunity districts to comply with the Voting Rights Act?

2. Whether a consistent state tradition of incumbency protection in congressional redistricting is within the category of traditional districting principles which make strict scrutiny inappropriate under Miller v. Johnson if observed in a redistricting plan? [For a brief summary of Miller, see p. 18.]

3. Whether the Voting Rights Act and the history of past discrimination against minority voters in Texas that the state seeks to eradicate are compelling state interests?

4. Whether narrow tailoring to meet the compelling interests of compliance with the Voting Rights Act and eradication of past voter discrimination in Texas requires the state to set aside other non-racial traditional redistricting principles, ignore politics, and draw only those minority opportunity districts conforming to the most idealized possible version of compact shape?

5. Whether the injury-in-fact element of constitutional standing is satisfied in an equal protection redistricting case by plaintiffs who do not claim vote dilution, who are not the object of invidious discrimination by the challenged plan, who have not suffered representational harm, and whose only identified harm is not living in a state whose congressional redistricting plan is designed wholly without race consciousness?

Oral Argument

The Court allocated one hour and twenty minutes for the oral argument. Javier Aguilar, Special Assistant Attorney General of Texas, argued 20 minutes for the state appellants, Paul Bender, Deputy Solicitor General, Department of Justice, argued 10 minutes for the federal appellant, and Penda D. Hair of the NAACP Legal Defense Fund argued 10 minutes for the private appellants. Daniel E. Troy represented the appellees and had 40 minutes.

With the exception of Justice Clarence Thomas, the Justices were very spirited in their questioning and at times seemed to be debating one another rather than the attorneys. At other times they clarified the attorneys' arguments for the benefit of the other Justices or so it seemed.

Aguilar began his argument by stating: "The question before the court is the constitutionality of three congressional districts that the court below erroneously ruled were racially gerrymandered. The districts are number 18, a black opportunity district created in 1970, district 29 a new hispanic opportunity district and district 30 a new black opportunity district."

Justice Scalia challenged the attorney's use of the words "opportunity district: Why not call them majority-minority districts, you are insulting my intelligence by trying to give the districts an unemotive term." Aguilar continued to outline what he contended were the lower court's errors and switched to the more common description of the challenged districts as majority-minority districts. He asserted that the court erred in holding that race was the predominant factor, and in not recognizing that the state's principal concerns in drawing the boundary lines were incumbency protection and equalizing the population in the districts.

This led to a series of questions about the factual findings of the lower court and whether incumbency protection should be treated as a traditional redistricting principle. Chief Justice Rehnquist said whether the predominant factor was incumbency protection or creating majority-minority districts was an issue of fact that was settled by the lower court. Aguilar agreed that it was a question of fact but asserted that the lower court failed to recognize incumbency protection as a traditional redistricting principle. The determination as to what qualifies as a traditional redistricting principle should be made by the state, Aguilar said. In Texas, he continued, the legislature was interested in not impairing the incumbents so as to preserve the seniority status of the state's congressional delegation.

Chief Justice Rehnquist repeated his contention that these facts were presented to the lower court and they were rejected. Justice O'Connor added that the district court's finding was that the districts were drawn in disregard of traditional principles and that race was the dominant factor. Aguilar repeated his argument that the lower court findings were tainted by the legal error of not recognizing Texas' longstanding protection of incumbency as a traditional redistricting principle.

Justice O'Connor then queried whether protection of incumbents was a compelling state interest. Aguilar responded in the negative and said "but it is a traditional redistricting principle." Justice Souter tried to summarize the state's argument: "Isn't your argument after Miller that the court should have considered incumbency as a traditional factor in determining whether race predominated in drawing the lines in disregard of traditional factors." Aguilar agreed.

The Justices asked a series of questions about whether using racial data to accomplish the goal of incumbency protection was constitutional. Justice Kennedy asked: "If incumbency protection is the motive but the means used to protect incumbents is racial gerrymandering is that constitutional? Does that comply with Miller?" After going back and forth with Justice Kennedy on this issue, Aguilar seemed to say that Justice Kennedy's hypothetical would be constitutional as long as race was not the predominant motive.

Justice O'Connor asked whether evidence was presented that showed that the majority-minority districts could have been drawn more compactly and could also have protected incumbents; and she also asked if this went to the issue of "narrowly tailored." Aguilar responded positively to the first question but said that "narrowly tailored" went to the issue of whether the districts necessary to allow minorities to elect representatives of choice were drawn. Chief Justice Rehnquist queried what would be broad tailoring.

There were more questions about whether the shape of the districts was attributable to the creation of majority-minority districts or to incumbency protection. Justice Breyer said: "Under Miller we said that race could be a factor. The question is, is it okay to depart from compact shape if that departure has nothing to do with race, i.e., in this case incumbency. Do we need to remand this case to determine whether incumbency was the major factor." Aguilar replied that a remand was not necessary, that there were enough legal errors to reverse the lower court.

Justice Ginsburg sought to clarify the attorney's response to Justice O'Connor's question: "I thought you said that the state legislature could have drawn more compact districts. Maybe you should finish that argument." Aguilar responded that more compact majority-minority districts could have been drawn but they would have endangered incumbents.

Justice Stevens inquired: "Isn't it true that in this case incumbency protection had nothing to do with the number of majority-minority districts, but it did affect the shape [of the districts.]" Aguilar said that was correct.

Paul Bender began his argument for the U.S. by saying that even if strict scrutiny is applicable in the case, the lower court decision must be reversed because Texas has a compelling state interest to protect the voting rights of its minority voters.

Justice Souter questioned whether there is a point at which the line is crossed between protecting incumbents and the rights of minority voters by for example packing minorities into a district. Bender responded in the affirmative.

Justice Scalia interjected that a Michigan Law Review article rated districts for irregularity and Texas' 18th and 29th are tied for number one with one other district. Bender said that some of the most irregular districts exist because of the state's interest in protecting incumbents. "That is a very strong motivation in Texas." Justice O'Connor asserted that the interest was no greater than in other states and questioned whether incumbency protection overrode the need to draw boundaries based on race.

Bender said the state had a compelling interest to create majority-minority districts and

an interest in protecting incumbents and it did not want to have to choose between the two. Justice O'Connor asserted that there is a constitutional requirement not to draw lines predominantly on the basis of race. Bender asserted that there is not an absolute prohibition on the use of race in drawing the boundaries, but that there must be a compelling state interest. He continued that in drawing the lines the incumbents were looking for Democratic voters and that correlated with race. "Selecting black voters just because they were black is unconstitutional but it is okay to select Democratic voters."

Justice Scalia asked if Bender were saying that race can be a surrogate for something else. Justice Souter interjected: "But if race is a real surrogate -- then you don't have to look for race, you can just look for Democrats." Bender ended his argument by saying that the state can consider race as one of a number of factors.

Penda Hair, counsel for the private appellants began by contending that race was used as a surrogate in this case to protect the seats of Representatives Frost and Bryant. "The lower court made a legal error," she said, "protection of incumbency is a traditional redistricting factor." Justice Ginsburg asked: "if one accepts that incumbency is a legitimate traditional factor does that...[allow for] protecting incumbency by using race?"

Hair said that in this case, race was used to decide whether a majority-minority district could be created and it was determined that in South Dallas, a 69 percent majority-minority oval shaped district could be created. But then, Hair asserted, Democratic Representatives Frost and Bryant pulled off voters from that compact district to protect their seats and the shape changed. She continued that while there is no federal requirement of compactness, she thought that if the majority-minority districts were compact the court would have upheld them. "To single out majority-minority districts and say they must be compact violates the voting rights of the minorities," Hair argued.

Justice O'Connor asked Hair to reverse the situation and assume that white majority districts were created to protect whites. "Is that constitutional," she queried. Hair responded that it would not be because in that case race would predominate and that race did not predominate in this case. "Integrated districts were created," she added. Hair repeated that the district court made a legal error -- that it confused counting Democratic voters with counting voters by race.

Justice Souter asked: "If the Court finds that the lower court's basis for rejecting the districts was ambiguous should the Court remand the case" [so that the lower court could make clearer findings]. Hair responded that the appellants thought the case was clear but if the Court found it ambiguous then yes, they should remand the case.

Attorney Troy representing the plaintiffs-appellees began by arguing that the district court found that the state had segregated the population by race to protect incumbency and to create majority-minority districts. "The evidence was overwhelming that race was the predominant factor," he asserted.

There followed a series of questions about the relevancy of the shape of the districts. Justice Breyer asked why anyone should care about the irregular shape of majority-minority districts if the districts could have been compact but for consideration of incumbency. Troy

responded because race was the tool used to create the districts. Justice Breyer repeated his question and Justice Ginsburg interjected to ask "if you created a compact district that was majority-minority and race was the major consideration -- is that unconstitutional?" Troy questioned Justice Ginsburg's use of a hypothetical and said that a compact district would necessarily take into consideration factors other than race.

Justice Kennedy continued the line of questioning, asking: "Is it okay to [create districts] for racial reasons if you do it consistent with normal and traditional redistricting principles." Troy replied that a state can take race into consideration but that race cannot be the predominant factor.

Justice Kennedy asked how one determines whether race is predominant -- "Is it determined by whether the district is compact or not.?" Justice Ginsburg added: "If race is the major reason for creating the districts -- Texas says we want three majority-minority districts but we are going to achieve them consistent with compactness, is that okay?" Troy said it would not be okay because race would be the major factor.

Justice Souter suggested that Troy was changing the Miller definition. "Didn't Miller ask whether race subordinated traditional districting factors? Race is going to be used, sometimes it is good and sometimes not, the question is what is the trigger and Miller said race must be shown to have subordinated the other factors, and if it can be shown that the shape of the districts resulted from incumbency protection then it cannot follow that race was the predominant factor," Justice Souter asserted.

Justice Scalia jumped in to ask: "Isn't the response that incumbency protection is okay if you count by Democrats but not okay if you count by race." Justice Souter in response to Justice Scalia's comment asked the attorney if that was his answer and added "it's a good answer." [Laughter] Justice Souter continued his line of questioning by asking: "if incumbency protection is achieved by knowing who the Democrats are and drawing lines by neighborhoods that are Democratic and they happen to be black and you end up with...appendages -- is that okay under Miller?"

Troy said it would be okay if race was not the tool used to find out who was Democratic. Justice Souter said, so maybe we should send the case back for the lower court to tell us whether the line drawing was based on political data that happened to disclose race or was based purely on racial data. Troy responded that the court had already made that determination, that the computer program that was used provided racial data.

Justice O'Connor said: "So race became a surrogate for incumbency protection." Troy said race was used as a proxy for incumbency protection and that the state should not be allowed to use race for mere administrative convenience to determine who is a Democrat. Justice Breyer queried whether the computer program had registration data that identified party affiliation. Troy responded in the negative and repeated that race was the tool used to draw the lines, and that the precinct level was the lowest breakdown of party affiliation.

Justice Breyer then asked a variation of a question previously asked by Justice Souter: "If the legislature created a majority-minority district to comply with the VRA [and accomplished

that goal] with the creation of a compact district and then to protect incumbents the district became more oddly shaped, is that okay?" Troy said that it was, but insisted that that was not what happened in this case.

Justice Souter said: "Let's assume that political data about prior voting was the basis for drawing the lines to accomplish incumbency protection, and that it is traditional to put the French and Irish in their own districts and you now [can create] Black and Hispanic districts and black-white districts and you have the choice to integrate them or keep them separate, is that okay." Troy responded in the negative, and Justice Souter said: "So you can do it for the French and Irish but not for blacks or Hispanics?"

Justice Breyer raised a similar hypothetical but used religion, questioning whether Catholics could be separated out to protect an incumbent because they usually vote Democratic. Troy responded: "If the tool is race and the predominant goal is separation then it is wrong -- race or religion."

Justice Ginsburg referred back to a previous response by Troy, saying: "As I understand your argument if race is used alone and nothing else and the district is compact and incumbency is not a factor you say that is okay...and your argument is that once incumbency came into play and created the odd shape that is not okay." Justice O'Connor asked Troy if he had conceded that, and added "I thought you said that strict scrutiny would apply."

Justice Stevens interjected that Troy had said: "If the district is compact and nicely shaped but the motive was race -- didn't you say that was okay." Troy said he didn't say that and if he did he had misspoken. Justice Stevens said well then you misspoke.

Justice Scalia observed that the Constitution says that race cannot be a surrogate, and the VRA does not say that in order to provide minorities voting opportunities you need to herd minority voters together.

Justice Breyer asked whether compliance with the VRA is a compelling state interest, and Troy answered affirmatively. Chief Justice Rehnquist jumped in and asked: "Why do you concede that, the Court has never held that compliance with the VRA is a compelling state interest." Troy said that the VRA prohibits packing and cracking and that compliance can be a compelling state interest.

Justices Souter and Scalia then asked a series of questions related to the Court's decision in Miller. Justice Souter said: "the Miller definition says that if the motive to create majority-minority districts is compliance with the Voting Rights Act and the district's shape is consistent with the shape [of districts] when traditional districting principles are followed then race did not subordinate those principles, [and strict scrutiny is not triggered]." Troy responded that if you want to comply with the Voting Rights Act, then by definition, you will trigger strict scrutiny.

Justice Souter asserted that Troy was changing the holding in Miller that the use of race is only wrong when it subordinates traditional principles. "Your answer requires an expansion of Miller," he said. Justice Scalia interjected that it depends on what Miller means by subordinate. "If you are starting out to create majority-minority districts then everything is subordinated,"

Justice Scalia said. Justice Souter insisted that was not what Miller held and asked: "If compact districts that recognized traditional principles are created, is strict scrutiny triggered or not?" Troy responded in the affirmative, and Justice Souter repeated that the attorney was asking the Court to recognize a cause of action that is broader than Miller.

Justice O'Connor interjected that that is not the issue in this case: "the finding is that these districts did not follow traditional principles." Troy said: "absolutely not."

Justice Breyer asked if African-Americans were fenced out to protect incumbency, the question is were they fenced out because they are African-American or because they would likely vote Democratic. Troy said that neither race nor religion can be used as a surrogate for political affiliation, and that in this case race was used as a tool for incumbency protection only secondarily -- "the motive was to comply with the DOJ's maximization principle."

Justice Stevens asked: "If three districts were created that are compact and contiguous and race was one of the factors, and they were then redrawn with appendages to get more Democrats, is that okay, is it okay to protect Democrats? Does a political motivation justify non-compactness?" Troy said yes if the political motivations are non-racial.

NORTH CAROLINA CASES

The North Carolina cases are the latest appeals in a case that was initially decided by the Supreme Court in June 1993, Shaw v. Reno. The Court concluded that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and the separation lacks sufficient justification." On remand from the Supreme Court, the three-judge panel of the U.S. District Court for the Eastern District of North Carolina ruled 2-1 that the two challenged majority-African-American congressional districts (the 1st and 12th) "did not violate any rights of the plaintiffs or their supporting intervenors." The panel reasoned that the North Carolina plan met a compelling state interest because it was developed in compliance with the Voting Rights Act, and that apart from the Voting Rights Act, its purpose was to eradicate the effects of past and present racial discrimination in North Carolina's political process. The panel further found that the plan was narrowly tailored to achieve that goal. That decision is now back before the Supreme Court. (For a thorough discussion of this case, see CIVIL RIGHTS MONITOR, vol. 7, nos. 3, 4, and 6.)

Since the initial decision in the North Carolina case, the Court has ruled in another redistricting case out of Georgia (Miller v. Johnson, No. 94-631) that since race was the "predominant, overriding factor" explaining the creation of the challenged Georgia district, the 11th which is majority-minority, and the "legislature subordinated traditional race-neutral districting principles, including...compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations," Georgia's redistricting plan could not be upheld unless it satisfies strict scrutiny, i.e., is narrowly tailored to meet a compelling state interest (for a thorough discussion, see CIVIL RIGHTS MONITOR, vol. 8, no. 2).

Questions Presented

The questions presented by the appellants in Shaw v. Hunt are:

1. Was North Carolina's racially gerrymandered redistricting plan enacted without a compelling state interest for doing so?

2. Did the General Assembly enact North Carolina's racially gerrymandered redistricting plan without narrowly tailoring it?

3. Did the court below negate the 'strict scrutiny' test by misallocating the burden of persuasion, relying on post hoc rationalizations, and making clearly erroneous findings of fact?

The Oral Argument

The Court allocated one hour and twenty minutes for the oral argument. Robinson O. Everett, himself a plaintiff-appellant as well as a law professor, argued 30 minutes for the Shaw appellants, and Thomas A. Farr, ten minutes for the Pope appellants. Edwin M. Speas, Jr., Senior Deputy Attorney General of North Carolina, argued 20 minutes for the Hunt appellees, Julius L. Chambers, former Director-Counsel of the NAACP Legal Defense Fund, argued ten minutes for the private appellees, and Paul Bender argued ten minutes for the United States as amicus curiae supporting the appellees.

As with the Texas argument, the Justices, with the exception of Justice Clarence Thomas, asked many questions and at times seemed to be debating one another.

Robinson O. Everett began his argument by stating that North Carolina has two of the "least regularly shaped districts" and that "this is not a case of narrow-tailoring or broad-tailoring but of no tailoring." He then compared the creation of majority-minority districts to water fountains designated for African-Americans or whites and said "no one would approve such racial classifications." He asserted that the state's redistricting plan involves that type of racial classification.

Justice Stevens took issue with Everett's analogy and said the difference was that all voters in North Carolina can vote as they please. Everett rejoined that the districts carry a message similar to signs designated for whites and blacks and that "the signs on these districts should be removed." He then turned to the issue of standing and said that the plaintiffs and the plaintiff intervenors all had standing in this case because they are all registered to vote in North Carolina, they were assigned to vote in particular districts because of race, and the "racial assignment" resulted in the creation of two black majority opportunity districts.

Chief Justice Rehnquist contested Everett's assertion that all the plaintiffs had standing given that some of them did not reside in the challenged districts. Everett responded: "We maintain that there is a ripple effect in that all voters are affected and thus voters in all districts have standing. Chief Justice Rehnquist followed-up: "But what if we don't hold to the ripple effect given our decision in Hays [Court ruled 9-0 that the plaintiffs did not have standing to

challenge a majority-minority district because they did not reside in the district.]

Everett side-stepped the question and said the state's plan is a seamless web and the 12th district is essential to the plan. "The question is whether this plan is a violation of the equal protection clause," he asserted. Justice Scalia asked: "Are you saying that if a voter lives in one district, he has the right to challenge the entire plan?" Everett responded in the affirmative saying that everything in the middle and eastern part of North Carolina is so "tied together."

Everett continued: "Since this case was originally argued before this Court two and a half years ago...it has not changed. The North Carolina General Assembly created two majority-minority districts to comply with section 5 and gain preclearance by the Department of Justice. There is no dispute over what was the State's purpose: the determining factor was section 5 preclearance. The policy of the DOJ resulted in the [state's] creation of this monstrosity to get preclearance. This map almost speaks for itself as to racial gerrymandering, race was the overriding factor. Now we hear that race was not the motivating factor, that it is now not just a question of section 5, but also of section 2 and the need to remedy discrimination. Section 2 of the Voting Rights Act may require the creation of majority-minority districts but not in this case. Their [the defendants and intervenors] arguments have gotten very creative."

Justice Souter asked Everett to consider the following facts: a court rules that a plan is unconstitutional and orders the development of a new plan, and the state retains the old plan but now argues that the plan is necessary to comply with section 2. He then asked: "May a three judge district court consider that defense? This goes to proof, may they consider that defense, is it relevant as a defense?" Everett said no.

There followed a series of questions about whether the goal of creating a majority-minority district could ever be constitutional. Justice Ginsburg asked whether, if the purpose is to create a majority-minority district, no matter how compact, is it unconstitutional? Everett said yes, that such a goal was a violation of the equal protection clause. Justice Ginsburg responded: "There are many districts where people said we want a majority-minority district, thus your reasoning is that many districts are unconstitutional." Everett said that for the districts created in the last round of redistricting that was the case -- "it is as simple as the labeling of water fountains."

Justice O'Connor asked if he would take that position if the goal was the creation of majority-minority districts but the lines were drawn on the basis of party affiliation. Everett said that if the goal is race then it is impermissible. Justice O'Connor asked the question again, saying that the goal was a majority-minority district but the lines were drawn with non-racial data. Everett again said the goal was impermissible, that any racial classification is wrong.

Justice Breyer asked if the drawing of lines based on race, religion, ethnic background, or sex should be treated the same --were they all impermissible? Everett said that classifications based on race were impermissible as race has a special significance. Chief Justice Rehnquist interjected that classifications based on gender are not subject to strict scrutiny.

Justice Stevens asked Everett if there was any way for the two majority-minority districts to survive, and if so what would be the set of facts -- the factors. Everett said you would need to

look at the totality of circumstances. Justice Scalia chastised Everett for his answer and said "the motivation cannot be racial, that's the end of it, isn't that your argument?" Everett responded affirmatively.

Justice O'Connor said: "so strict scrutiny is fatal in fact, nothing survives." Everett said that was right -- "nothing survives." [In Adarand v. Pena, a minority business case, Justice O'Connor asserts in the majority opinion that "strict scrutiny is strict in theory, but not fatal in fact."] Justice O'Connor said: "But we have said that plans can survive if they serve a compelling state interest and are narrowly tailored. You are asking for something more." She then asked: "Is compliance with section 2 a compelling state interest?"

Everett said the Court did not have to address the question of section 2 compliance to decide the case in the plaintiffs' favor. "The state's section 2 position is tainted," he asserted. "The district court misconstrued the numerical facts... and section 2 was an afterthought [in the state's defense]."

Thomas Farr, Counsel for the Pope appellants, began by saying that the constitutionality of the Voting Rights Act is not at issue in this case. "We believe there is no question that compliance with section 2 is a compelling state interest, but that is not the issue in this case" he said. Chief Justice Rehnquist asked why. Farr responded that there can be no question of remedying a section 2 violation here because there is no evidence of such a violation, i.e., that the district met the [Supreme Court's] Gingles [decision] requirements [(1) that the minority group be sufficiently large and geographically compact to constitute a majority in a single-member district, (2) that the group be politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate] and no one in the state legislature thought they were remedying a section 2 violation when they drew this map.

Justice Stevens asked why that mattered. Farr said that a "section 2" remedial district would need to be located in the area where the vote dilution violation occurred and that had not happened in this case. Justice Scalia said: "but if you buy the racial entitlement theory, that the race as a whole must be made whole, then wouldn't it follow that it didn't have to be any particular district."

Farr said that the right under the Voting Rights Act is a right to be free from vote dilution and it is district specific. He continued that it was possible to create a rather compact majority-minority district but that was not done because of incumbency protection.

Justice Breyer asked if in remedying a section 2 violation it is okay to create two districts in areas other than where the violations occurred in order to protect incumbents -- the location being due to incumbency protection not the section 2 violation. Farr said there was no evidence to support the idea that blacks were entitled to two districts to remedy a section 2 violation, and that locating the districts in areas other than where the violations occurred failed the narrow tailoring requirement of strict scrutiny.

Justice Souter said the relevant consideration under Miller is to determine whether race predominates in the legislative determination; the question is, did race subordinate traditional principles and one of those is incumbency protection. Farr asserted that the remedy must go to

the people injured. Justice Souter said, you are asking the Court to depart from Miller. He continued that if Farr was saying that incumbency is not a traditional districting principle in North Carolina, he was asking for a change from Miller.

Farr asserted that his clients were not asking for a change in Miller, and that there is a distinction between incumbency protection and other districting principles that a state might follow -- incumbency protection is far more subjective. He continued that drawing majority-minority districts may be a compelling state interest, that a section 2 remedy must address the people injured, and that incumbency protection is not a compelling state interest.

Edwin Speas, counsel for the state, said there is evidence that the legislators intended to draw district 12 as a urban district -- the Piedmont Urban Crescent -- linked together by accessible highways. The district court said this is fair and effective representation. Justice Scalia asked whether the courts were to determine what is fair and effective representation? Who would want to be against it, but is this the kind of thing lawyers and judges are good at, he asked.

Chief Justice Rehnquist asked whether that was how all the districts should be judged? Speas said no, but that if race were the predominant factor that would not be fair and effective representation. Justice O'Connor asserted that the Court had remanded this case to have strict scrutiny applied, so how is that relevant. Speas said we believe this case meets strict scrutiny.

Justice Kennedy asked what was the compelling state interest? Speas said it was compliance with sections 2 and 5. He said that there was racially polarized voting in the state. Justice Kennedy said, but you have to find compactness and cohesiveness too under Gingles.

Justice Scalia asked if there was any evidence that two compact black districts could have been created -- "Your opponent said no, that one black and one minority district [black and Native American] could have been created but not two black districts. Can you cite anything to refute that?" Speas indicated that the state legislators believed that two could be created. Justice Scalia asked where was the evidence to support that? "The legislators have to be right," Justice Scalia said.

Justice Souter asked whether the state takes the position that if a majority-minority district can be drawn subject to Gingles principles, the state legislature can move it anywhere to meet its other principles. Speas said yes, it was within the state's discretion once it had determined there was a section 2 violation.

Justice Kennedy asserted that Speas' position was the polar opposite of narrow tailoring which says that once there is a wrong, the remedy should be closely drawn to remedy that wrong. Speas said there are limitations and harm to innocent third parties should be minimized, but that in this case there was racially polarized voting throughout the state.

Justice Ginsburg commented that Speas was saying that despite Shaw I, the district court did not have to go to strict scrutiny because race did not predominate. Why is that so, she asked. Speas said the district was not subject to strict scrutiny because the test is whether race was one of several factors, that here race was used in combination with 50 other factors and Miller says that race must predominate to trigger strict scrutiny.

Julius Chambers, arguing for the private appellees, said that the state's redistricting plan does not exclude anyone from participating in the political process. He continued: "Everyone has an opportunity for the first time in 90 years to have an effective vote. Blacks will now have an opportunity to have a voice. This case needs to be examined within the context of the history of voting in North Carolina. Redistricting is not happening within a vacuum but within a history of purposeful exclusion. Now we have a remedy, the creation of majority- minority districts which gives black people a voice in deciding who their representative should be. Districts have been created that give blacks a real voice."

Justice Scalia said: "With all due respect there are some who say that blacks have a greater voice when they are a substantial minority or close to a majority [in a district]. It is in the political interest of some to put them all in one district but that may not give them the greatest voice. I am in agreement with the goal, but the net effect may be to reduce their political power. I don't know the answer, but I can't agree that this is the only answer."

Chambers said that North Carolina had the experience of a district that was 41 percent black and blacks were still not able to elect a representative of choice because of racial bloc voting. Justice Scalia said that doesn't mean that their interests were not represented.

Justice O'Connor asked, if the facts are that the Gingles standards are met to establish a section 2 violation, and a compact district can be drawn, can the remedy be a district in a different part of the state -- is that a narrowly tailored remedy? Chambers said the state should have the discretion to decide where the district should be located because all the people in the state suffer from the dilution. He contended that the state legislature can look at the way the state has developed and the communities of interest and decide where to draw the lines.

Justice Kennedy said, this will lead to proportional representation and that is the last thing you should argue for, it is divisive and dangerous. Chambers said he was not arguing for proportional representation and it would not exist in North Carolina even if this decision is upheld. "This is a chance for the first time for blacks to have a voice," he asserted.

Bender, arguing for the U.S. as amicus curiae supporting the appellees, said it was not the Department of Justice's position that in complying with section 2 the state can draw districts anywhere and the state did not do that in this case. He continued that both Charlotte and Durham are in the 12th district and both cities were in the compact district that could have been drawn pursuant to the Gingles standards. There is substantial overlap between the districts. The lines must be drawn so that a majority in the district has been victim of vote dilution. The facts demonstrate that that is the case. [In its brief, the U.S. states: "District 1 contains the same core minority population from the northeast Coastal Plain that was included in a minority opportunity district in ..... the ..... plans that were found by the district court to support a Section 2 suit. District 12, in turn, contains the heavy concentration of African Americans in Mecklenburg County, the same urban component in some of the alternative plans" drawn to address a section 2 violation.]

Justice Breyer asked if the requirement of compactness applied only to the majority-black districts and not to the white districts. Bender said that was exactly right: the state could decide to create a district that was majority farmers, that would be legitimate and it could be non-

compact. "I can't believe that under the obligation to comply with section 2 the state has less discretion in creating non-compact districts," he said.

Justice O'Connor said the problem is that the 14th Amendment says you cannot act on race alone in bestowing public benefits such as redistricting. Bender said, but you can act on the basis of race to counter discrimination and to counter the legacy of polarized voting. Justice Scalia asked if two majority-black compact districts could have been created at the same time. Bender said that there could not have been two at the same time, but that there was an obligation under Gingles to create majority opportunity districts.

Justice Scalia said it was not necessary to create two districts to comply with section 2. Bender said, but the state chose to create two, and there was almost no cohesiveness between the populations in what would have been a compact majority-minority district. Justice Scalia questioned what cohesiveness there was here. Bender responded that one district was urban and one was rural.

He continued: "These districts give blacks a fair opportunity to participate in the political process. What the percentage should be depends on the extent of racial polarization. North Carolina has done that, the courts cannot force North Carolina to give up traditional voting principles and incumbency [protection]."

Justice Scalia asked whether, to be considered, redistricting principles must be traditional? Bender said that if the principles used are traditionally used, it is evidence that they were not used in this instance for racial reasons. He added that the redistricting principles do not have to be long-standing.

A decision in this case and the Texas case is expected by late June.

UPDATE ON GEORGIA AND LOUISIANA CASES

In the Miller v. Johnson case, on remand from the Supreme Court, the Georgia legislature failed to agree on a revised plan and adjourned a special session called by Governor Zel Miller for the purpose of redrawing the congressional plan. The task of redrawing the map then went to the three-judge federal district panel. On December 13, 1995, the panel released a revised redistricting plan that eliminated two of Georgia's three majority-African-American districts. The African-American voting population in the 11th district represented by Cynthia McKinney (D) dropped from 60.4 to 10.8 percent and in the 2nd district represented by Democrat Sanford Bishop, the population dropped from 52.3 to 35.1 percent. Under the plan, the sole remaining majority-African-American district -- the Atlanta-based 5th district represented by Democrat John Lewis -- retained its African-American voting age population of 57 percent. The African-American population in the remaining 8 districts ranges from 6.2 to 34.5 percent.

There were indications that at least some parties in the case would appeal the case again to the Supreme Court. Laughlin McDonald, Southern Regional Director of the ACLU, said that the plan would be appealed because it is "retrogressive" and because "instead of curing the constitutional defects of the old plan, the judges started from scratch and completely redrew the

map." He asserted that was not the role of the courts, i.e., "acting as a super legislature."

In U.S. v. Hays, a case in which the Supreme Court ruled 9-0 that the plaintiffs lacked standing to challenge a Louisiana majority-minority district because they did not live in the district, a revised challenge was filed with new plaintiffs who reside in the challenged district. On January 5, 1996, the three judge federal panel for the third time struck down Louisiana's redistricting plan ruling that the plan violated the Constitution's equal protection clause because race was the predominant factor in drawing the 4th district represented by Cleo Fields (D). The panel imposed their own plan which retains only the New Orleans based 2nd district, represented by William Jefferson (D) as a majority African-American district.

The Louisiana legislative black caucus has indicated that it plans to appeal the decision, and Rep. Cleo Fields has indicated he will do likewise if the Governor's office decides not to appeal which is likely. Since the last appeal to the Supreme Court, Mike Foster, a conservative Republican, won election to the governorship.