

# Leadership Conference Education Fund

1629 K Street, N.W., Suite 1010 ■ Washington, D.C. 20006 ■ (202) 466-3434

Volume 8, Number 4

WINTER 1996

## INSIDE...

### UPDATE ON AFFIRMATIVE ACTION

In the second session of the 104th Congress, Republicans have been pushing the Equal Opportunity Act of 1995 sponsored by former Senator Robert Dole (D-KS) and Rep. Charles Canady (R-FL). The bill would end all federal affirmative action programs.....2

### FIFTH CIRCUIT DECISION ON AFFIRMATIVE ACTION APPEALED TO THE SUPREME COURT

On April 30, 1996, the state of Texas petitioned the Supreme Court for review of the March 18, 1996, ruling of the U.S. Court of Appeals for the Fifth Circuit that the University of Texas School of Law's affirmative action program violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution.....8

### ENGLISH-ONLY INITIATIVES BEFORE THE CONGRESS

The movement to make English the "official" language of the United States has taken on major national dimensions. Twenty-one states have already enacted laws declaring English their official language. In the 104th Congress, numerous "English-Only" proposals have been introduced and last month the Supreme Court agreed to review the Ninth Circuit's decision, *Yniguez v. Arizonans for Official English*, challenging Arizona's official English law.....14

### SUPREME COURT RULES IN CENSUS CASE

On March 20, 1996, the Supreme Court ruled 9-0 in *Department of Commerce v. City of New York* that the Secretary of Commerce was not required to adjust statistically the 1990 census, despite the Department's admitted undercount of the overall population and the disproportionate undercount of certain racial and ethnic minority groups.....19

### SUPREME COURT SET TO RULE IN SEX DISCRIMINATION CASE

Oral argument has been heard in a case that challenges the constitutionality of gender-based exclusion in publicly funded institutions of higher learning.....22

### UPDATE ON VOTING RIGHTS REDISTRICTING

A review of actions in Florida, Georgia, Louisiana and Illinois redistricting cases.....26

---

# Civil Rights Monitor

## UPDATE ON AFFIRMATIVE ACTION

In the second session of the 104th Congress, Republicans have been pushing the Dole/Canady Equal Opportunity Act of 1995 which would end all federal affirmative action programs. The bill is sponsored by Senator Robert Dole (D-KS) and Rep. Charles Canady (R-FL).

### Congressional Activities

On March 7, 1996, the House Judiciary Subcommittee on the Constitution, chaired by Rep. Charles Canady (R-FL) voted out the Equal Opportunity Act of 1996 (H.R. 2128/S. 1085) on an 8-5 party line vote. The bill would prohibit affirmative action in all federal contracts and subcontracts, federal employment and any other federally conducted program or activity. The bill prohibits so-called racial preferences, and defines preference as "an advantage of any kind, and includes a quota, set-aside, numerical goal, timetable, or other numerical objective." Thus, the bill would outlaw goals and timetables established under E.O. 11246 on government contracts even for the limited purpose of increasing the pool of minority and female applicants.

In opening the mark-up session, Rep. Canady said:

"In just six short pages, H.R. 2128 sets forth a simple yet profound proposition, that the Federal Government, in all of its activities, will treat all citizens equally and without regard to race or gender....

"We now have in place a sprawling regime of hundreds of Federal programs that treat citizens differently based on skin color and sex. All it takes to qualify is to possess the right skin color or gender. It matters not whether the beneficiaries of these programs were themselves ever subjected to discrimination in this country, much less by this Government. And immigrants who arrive on our shores today will, if they belong to the right groups, tomorrow be able to benefit from these preference programs.

"Meanwhile, Americans who are not members of these favored groups are told by their Federal Government that they must bear the burden of these profoundly un-American programs."

Rep. Jose Serrano (D-NY) in his opening comments challenged the Republicans' "strange" leadership on affirmative action:

"I am beginning to hear or have been hearing for the last year from the Majority party...a very strange kind of leadership. Leadership usually is when you take people and you alert them to certain needs and you try to bring a nation or a

group of people along to a positive place in time and history, and with good thoughts about everyone, and sort of try to bring people together....

"I think the approach of the so-called leadership has been to go to the white community in this country and say, 'You know why you haven't been able to put together all of your dreams and aspirations up until now? Because this society is being overrun by minorities who are getting preference for jobs you should have had and all kinds of business opportunities you should have had'....

"But we [the minority party] will stand up and we will let you know that this is the wrong approach, [that] there is nothing wrong with...[affirmative action], that nothing has been done to harm anyone, that the only way to build a solid future for this country is to give everyone an opportunity, and not to pander to the fears of those who have not been able to achieve everything...they have wanted to achieve."

Rep. Pat Schroeder (D-CO) said:

"Let me go back to where we started when our chairman from Florida opened...He said something that made me almost come out of my seat and grab his microphone, because I have heard it so many times, it makes me terribly angry...he says [under] affirmative action...all it takes to qualify for a job is being in the right gender or race....That has been said so many times on talk radio, so many times to people, that people believe that, and that is not what the law of the land says."

The bill is expected to be marked up in full committee in June.

In the Senate, on April 30, two additional affirmative action hearings were held in the Judiciary Committee on the so-called California Civil Rights Initiative, an anti-affirmative action measure, and in the Labor and Human Resources Committee on the Dole/Canady bill, S. 1085. California Governor Pete Wilson in his testimony before the Judiciary Committee said:

"The bottom line is that...a system that confers preferences by race, ethnicity, or gender can't be defended today. It is by definition racial, ethnic or gender discrimination -- and that is indefensible....

"What Californians want to end are policies and practices that began with the best of intentions, but that today breed resentment. This is not an academic debate for Californians. Every day, they experience the unfairness of rejection that costs them or their children public jobs, public contracts, or admission to a public university. They do not lose a competition as individuals. They lose the job,

contract, or place in the class because it is given by a government to a less qualified member of a preferred group....

"Mr. Chairman, the desire to end unfair racial, ethnic or gender preferences, to end quotas may have begun in California, but it will strike a sympathetic chord in all who demand fairness and equality all across the land. Those who oppose and challenge this double-standard are increasingly finding their view supported by the law....

"And I predict Californians will overwhelmingly approve the California Civil Rights Initiative this November."

In contrast, Audrey Rice Oliver, Chief Executive Officer, Integrated Business Solutions, Inc., who in 1995 received an award from Governor Pete Wilson for her successful minority enterprise, testified that affirmative action works and that when done right, it does not result in quotas or giving unfair preferences to the unqualified. She said:

"Affirmative action simply means taking positive, concrete steps to end continuing discrimination by opening doors to equal opportunity for all. Affirmative action remains necessary today because discrimination continues to limit opportunities for women and minority business owners who are seeking to enter this country's economic mainstream.... Affirmative action works because it fosters competition and innovativeness by opening doors to a broad range of qualified companies. Creating opportunity for women and minority business owners is critical for the economic vitality of this country."

Professor Erwin Chemerinsky, Legion Lex Professor of Law, University of Southern California Law Center, spoke about the importance of diversity to higher education saying, its importance cannot be over-emphasized.

"Colleges and universities never have measured 'merit' solely on the basis of grades and test scores. In fact, they always have recognized diversity as a key part of the admissions process in accepting students who add geographic diversity, or who have outstanding athletic ability, or unusual skills, or differing backgrounds. Race obviously matters enormously in how people experience the world and thus racial diversity is crucial as part of the educational process. Also, it must be recognized that college and university admissions never have been completely merit based. There long have been preferences for children of alumni and for those of wealthy donors. Recent reports have indicated that these have been widespread in the University of California system."

In conclusion he said:

"It is often said that affirmative action programs stigmatize minorities. This argument, however, fails to account for the stigma that will exist for minorities if they are dramatically underrepresented at colleges and universities. The stigma argument gives enormous significance to what white students and faculty think. I question why their perceptions should matter so much, but if they do, having relatively few minority students probably would do more to perpetuate stereotypes and stigma than any affirmative action program. Besides, as my minority students repeatedly point out, people of color are better off with more opportunities even if there is some stigma."

At the second hearing before the Senate Labor and Human Resources Committee, chaired by Senator Nancy Kassebaum (R-KS) a number of House members testified including Tom Campbell (R-CA) who said:

"I would like to focus my comments on the general proposition that S. 1085 addresses; namely, that it is morally wrong for the government to discriminate between its citizens on the basis of their race. Everything else is secondary. I can give you examples showing that affirmative action has been counterproductive, and the supporters of it can point to people they claim who have benefited from it. But if we never depart from the fundamental issue of whether it is right or wrong, we will have the guidance we need to answer this question."

"I believe that S. 1085 successfully addresses this proposition by seeking to do away with preferences, set-asides and quotas of any kind in federal contracting. That is why I am happy to testify in favor of this bill today."

Testimony was also provided by Deval Patrick, Assistant Attorney General for Civil Rights who said:

"While legislative titles are not generally matters of great import, this one is quite troubling, because aside from 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 continues to persist today -- have been denied opportunities to obtain a decent education, to compete equally for jobs, to participate in the political process, to form businesses and generally partake fairly of the bounty of this magnificent nation."

"This Congress has yet to hold a hearing to address the serious problems discrimination causes daily in the lives of minorities and women. Rather, some in Congress propose to eliminate one of the few measures that has been utilized effectively to help eliminate discrimination and its effects and to create the level playing field that has been promised to all Americans but denied to many. While

the issue of affirmative action has been debated in this Congress, it has yet to be considered in the context in which it was intended to perform; as a limited means to remedy the undeniable effects of decades of discrimination."

Mr. Patrick continued:

"Turning to the legislation that is the immediate subject of this hearing, S. 1085 is not only misdirected as a matter of priorities, but it is such a blunt and extreme measure that it would work substantial harm. It is inconsistent with principles developed over decades by the Supreme Court, would eliminate numerous federal statutes and executive orders and curtail the battle against discrimination on the basis of race, gender and ethnicity. It would do all of this without a deliberate and intensive examination of affirmative action programs....

"S. 1085's flat prohibition against affirmative action is a rejection of the compelling need to remedy the effects of past and present discrimination. It is inconsistent with principles developed by the Supreme Court and with numerous enactments of Congress and executive branch orders. Furthermore, it will turn back the clock to an era when the law denied women equal opportunities in employment....

"S. 1085 is a giant step in the wrong direction. Should it be presented to the President for signature, the Attorney General would strongly recommend that he veto it."

Marcia Greenberger, co-president of the National Women's Law Center, testified about the limitations the bill would place on prohibitions against sex discrimination:

"In addition to abolishing critical affirmative action programs, this legislation threatens to turn the clock back for women in another way as well...a series of provisions [in the bill] would permit discrimination against women in a wide variety of circumstances where such discrimination is now against the law....

"For example, there is a wholly new exception allowing women to be excluded from certain jobs altogether based on 'privacy' concerns...permit[ting] sex discrimination if it is merely 'designed to' protect someone's privacy -- even if the asserted need for privacy is unfounded or if there are ways to protect privacy without discriminating against women. Will we now see an employer argue that it can exclude women because, for example, its workplace has no locker rooms or other facilities for them?....

"The bill would...allow gender to be a 'bona fide occupational qualification' (BFOQ) which could exclude women from federal jobs or programs. This concept exists now in very limited form in Title VII [employment discrimination], but

would be significantly broadened if this bill is enacted. This is especially dangerous because, when sex is found to be a BFOQ, any employer can legally announce that no woman need apply regardless of her skills or abilities.

"[It] would permit the wholesale exclusion of women from any federal job or program that is subject to a 'national security' requirement, regardless of whether or not an individual woman candidate poses any security risk. It is hard to imagine a rational for this.

"Finally, [it] would authorize the exclusion of women from whole classes of positions in the Armed Forces where women are now serving effectively and courageously."

### The Administration

In February, the U.S. Department of Justice, Office of Associate Attorney General John R. Schmidt, issued a Memorandum to General Counsels of Executive Branch agencies providing Post-Adarand Guidance on Affirmative Action in Federal Employment. The memorandum expresses the federal government's commitment to fair employment practices that open opportunities to all Americans and draws on the full range of the nation's talent, and asserts that affirmative action efforts can advance those vital objectives.

The memo observes that while Adarand established strict scrutiny as the standard for evaluating such programs, Adarand:

- o "does not provide specific guidance on application of the strict scrutiny standard,"
- o "left open the question whether, even under strict scrutiny, Congressionally authorized affirmative action plans undertaken by federal agencies are entitled to particular deference from the courts, given Congress' broad power to remedy discrimination,"
- o left in place an intermediate standard for gender-based affirmative action, and
- o does not apply directly to private employment actions.

The memorandum further makes the point that under the Supreme Court's decision in Brown v. GSA most lawsuits alleging race discrimination in federal employment must be brought pursuant to Title VII of the Civil Rights Act of 1964.

On May 23, 1996, the Department of Justice published in the Federal Register (Vol. 61, N. 101, pp. 26042-26063) for public comment "Proposed Reforms to Affirmative Action in Federal Procurement." The comment period ends on July 22, 1996. The proposal seeks to bring federal procurement rules in line with the Supreme Court's decision in *Adarand v. Peña*, 115 S. Ct. 2097 (1995), and to serve as a model to amend the affirmative action provisions of the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement. The proposal addresses (1) certification and eligibility, (2) benchmark limitations, (3) mechanisms for increasing minority opportunity, (4) the interaction of benchmark limitations and mechanisms and (5) outreach and technical assistance.

The proposal takes a "mend it, don't end it" approach, and clearly states the Administration's commitment to affirmative action and the view that it is still very much needed to eradicate the effects of discrimination in the procurement arena. In conclusion, the proposal states:

"The evidence shows that the federal government has a compelling interest in eradicating ..... discrimination by employers, unions, and lenders that has hindered the ability of members of racial minority groups to form and develop businesses as an initial matter ..... [and] discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies that raises the costs of doing business for minority firms once they are formed and prevents them from competing on an equal playing field with nonminority businesses."

Persons interested in submitting written comments should send them to Mark Gross, Office of the Assistant Attorney General for Civil Rights, P.O. Box 65808, Washington, D.C., 20035-5808, telefax (202) 307-2839.

#### **FIFTH CIRCUIT DECISION ON AFFIRMATIVE ACTION APPEALED TO THE SUPREME COURT**

On April 30, 1996, the state of Texas petitioned the Supreme Court for review of the March 18, 1996 ruling of the U.S. Court of Appeals for the Fifth Circuit that the University of Texas School of Law's affirmative action program violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. In its appeal, the state asserts that it has a compelling interest to ensure that the student bodies of its universities are racially and ethnically diverse:

"Diversity is an especially compelling interest in legal education. No other discipline deals so fundamentally with the ordering of human relationships in our



society, including racial and ethnic minorities who have been subjected to discrimination."

The Fifth Circuit had applied the standard of strict scrutiny to the case and concluded that while remedying the present effects of past discrimination was a compelling state interest, the university had not sufficiently established the existence of such present effects. Further, the panel held that the goal of a diverse student body did not rise to the level of a compelling state interest.

One member of the three judge panel, while concurring in the judgment as to past discrimination, stated in a separate opinion that he disagreed with the conclusion that diversity in a public graduate school can never be a compelling state interest. As to the issue, he would have ruled that the affirmative action plan was not narrowly tailored to achieve its goal.

The Fifth Circuit ruling reversed the decision of the district court that the law school's program was constitutional. The Fifth Circuit remanded the case to the lower court with instructions that the law school not use race as a factor in law school admissions.

In 1994, following the district court decision, the law school revised its two-track admissions program (see background). Under the new system, the school considers race as one of several personal factors evaluated during the admission process. It is important to note that the Fifth Circuit decision pertains to the old two-track admissions program, but the anti-affirmative language of the majority opinion ranges far more broadly.

## Background

The University of Texas Law School, which ranks in the top 20 law schools in the country, receives approximately 4,000 applications each year, and accepts 900 applicants to guarantee an entering class of 500 students. The law school was one of the defendants in a series of cases brought by the late Supreme Court Justice Thurgood Marshall, while Director-Counsel of the NAACP Legal Defense and Educational Fund, that challenged the constitutionality of "separate but equal" in higher education leading up to the Brown v. Bd. of Education case in 1954. In 1950 in Sweatt v. Painter the Supreme Court ruled that the state of Texas could not provide black students with equal educational opportunity in a separate law school.

In recent years, the law school has operated under an affirmative action plan mandated by the U.S. Department of Education to dismantle the state's segregated higher education system. The goal of the plan was a student population 10 percent Mexican-American and 5 percent African-American. All applicants to the law school

were evaluated on their combined grade point average and LSAT score (Texas Index, TI), personal qualities (background, life experiences, outlook), and residency status (only 15 percent of the students may be non-residents). The TI level used to place applicants in the three categories was lower for African- and Mexican-Americans than for white applicants. In addition, the admission committee members used their judgment in evaluating the TI in relation to the strength of the undergraduate education, differences in majors, and the applicant's grades over time.

Based on these criteria, students were placed in three categories: (1) presumptive admit (admitted with little review); (2) presumptive deny (denied entry with little consideration); and (3) middle discretionary zone (extensive scrutiny of the file). Applicants other than blacks and Mexican-Americans, placed in the third category were reviewed by three admissions committee members. Each member reviewed stacks of 30 and cast votes for nine to eleven among the 30. Candidates who received votes from at least two members were offered admission, those who received one vote were wait listed. The other applicants were denied admission.

A separate minority subcommittee of three met and discussed each minority candidate placed in the discretionary zone. Thus, each black and Mexican-American applicant in the discretionary zone received more extensive review and discussion. And the decisions of the "minority sub-committee" were "virtually final." There were also separate waiting lists for majority and minority candidates.

The plaintiffs are four white resident applicants, one female and three males, who applied to the law school in 1992. They were initially placed in the discretionary zone and after review denied admission. They challenged the constitutionality of the admissions program asserting that they were subjected to racial discrimination by the law school's evaluation of their applications. They sought injunctive and declaratory relief as well as compensatory and punitive damages.

The district court ruled that the law school had violated the plaintiffs equal protection rights and granted declaratory relief, ordered the law school to allow the plaintiffs to apply again with the regular fee waived, and granted each plaintiff an award of one dollar. The court did not enjoin the law school from using race in admission decisions. In applying the strict scrutiny standard, the court held that in most respects the admissions program passed constitutional muster under its goals of increasing racial diversity among the student body -- "obtaining the educational benefits that flow from a racially and ethnically diverse student body remain a sufficiently compelling interest to support the use of racial classifications," -- and of remedying the "present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole." The court said further that if it had restricted its examination of past discrimination to the University of Texas, it would still find a "strong evidentiary basis for concluding that remedial action is necessary."

In reviewing whether the admissions program was narrowly tailored, the district court upheld the "plus factor" granted minority students in allowing a lower TI, but struck down that part of the program that had separate admissions committees to review majority and minority applications placed in the discretionary zone. At some point, the court reasoned, all applicants in the discretionary zone should have been reviewed together. Finally, the court denied any compensatory or punitive damages because it found that the plaintiffs had not demonstrated that they would have been admitted but for the affirmative action plan and thus had suffered no proven harm.

### The Fifth Circuit Opinions

Citing the Supreme Court's decision in Adarand v. Peña, 115 S.Ct. 2097 (1995), the court of appeals majority opinion (Judges Smith and DeMoss) states that the standard by which all state racial classifications are to be judged is strict scrutiny. i.e., does the racial classification serve a compelling government interest and is it narrowly tailored to the achievement of that goal? Applying this standard, the panel ruled "that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." The decision considers the Supreme Court's 1978 decision in Regents of the University of California v. Bakke, 438 U.S. 265, in which the Court, while ruling unconstitutional the Davis School of Medicine's rigid admissions policy that reserved 16 of the 100 places in the entering class for minority students, upheld the use of race as a "plus" factor in the admissions process.

Justice Powell in a separate opinion in the Bakke case recognized diversity as a sufficient justification for using race as a plus factor in admissions. He wrote:

"An otherwise qualified medical student with a particular background -- whether it be ethnic, geographic, culturally advantaged or disadvantaged -- may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."

After consideration of all this, the majority in Hopwood stated:

"In short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in Bakke, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court case law strongly suggests, in fact, that it is not.

"Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race.

It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

"The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants. Thus, the Supreme Court has long held that governmental actors cannot justify their decisions solely because of race....

"Accordingly, we see the case law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge."

The opinion then addressed whether the goal of remedying the effects of past discrimination is a compelling state interest recognizing that a majority of the Supreme Court has held that a state may use racial classifications where it has a "strong basis in the evidence for its conclusion that remedial action was necessary." The panel held that to justify a remedial affirmative action program the state must show that present effects of past discrimination exist. The panel dismissed the state's identified present effects as examples of societal discrimination that the Supreme Court has found not to provide a "valid remedial basis" -- lingering reputation in the minority community as a "white" school, underrepresentation of minorities in the student body, and perception that the school environment is hostile to minorities. The opinion concluded as to the argument of the defense that:

"the law school has failed to show a compelling state interest in remedying the present effects of past discrimination sufficient to maintain the use of race in its admissions system. Accordingly, it is unnecessary for us to examine the district court's determination that the law school's admissions program was not narrowly tailored to meet the compelling interests that the district court erroneously perceived."

Judge Wiener concurred in the judgment as to remedial purposes but disagreed with the panel conclusion that the goal of a diverse student body can never establish a compelling state interest. He wrote:

"We judge best when we judge least, particularly in controversial matters of high public interest. In this and every other appeal, we should decide only the case before us, and should do so on the narrowest possible basis. Mindful of this credo, I concur in part and, with respect, specially concur in part.

"The sole substantive issue in this appeal is whether the admissions process employed by the law school for 1992 meets muster under the Equal Protection Clause of the Fourteenth Amendment. The law school offers alternative justifications for its race-based admissions process, each of which, it insists, is a compelling interest: (1) remedying the present effects of past discrimination...and (2) providing the educational benefits that can be obtained only when the student body is diverse.... As to the present effects, I concur in the panel opinion's analysis: Irrespective of whether the law school or the University of Texas system as a whole is deemed the relevant governmental unit to be tested, neither has established the existence of present effects of past discrimination sufficient to justify the use of a racial classification. As to diversity, however, I respectfully disagree with the panel opinion's conclusion that diversity can never be a compelling governmental interest in a public graduate school. Rather than attempt to decide that issue, I would take a considerably narrower path -- and, I believe, a more appropriate one -- to reach an equally narrow result: I would assume *arguendo* that diversity can be a compelling interest but conclude that the admissions process here under scrutiny was not narrowly tailored to achieve diversity." (emphasis added)

It is notable that the court below denied intervention to organizations of African-American students (Thurgood Marshall Legal Society and Black Pre-Law Association) who sought to provide evidence of the need to take race into consideration to mitigate the continuing effects of discrimination at the law school. The NAACP LDF is representing the organizations before the Supreme Court and in its petition for review asks the Court to review the denial of intervention. Professor Lawrence Tribe of Harvard University School of Law is representing Texas before the Supreme Court.

The plaintiffs have until the end of May to file a response to the state's petition, after which the Court will announce whether it will grant review. If review is granted, oral argument would be heard in the next term which begins the first Monday in October, 1996.

Robert H. Atwell, President of the American Council on Education, characterized the decision as "a setback for conscientious efforts to advance pluralism at one of America's leading institutions." He continued:

"At the heart of the Court's decision is a question of fundamental importance to higher education institutions throughout the country: Is promotion of student diversity a compelling interest that justifies taking race into account to a limited extent in determining which applicants to admit ... the American Council on Education and its members have long held, based on extensive analysis, that inclusionary efforts and the promotion of diversity are indispensable if the nation's colleges and universities are to serve their core

missions and maintain public confidence."

## ENGLISH-ONLY INITIATIVES BEFORE THE CONGRESS

The movement to make English the "official" language of the United States has taken on major national dimensions. Twenty-one states already have enacted laws declaring English their official language. In the 104th Congress, numerous "English-Only" proposals have been introduced and last month the Supreme Court agreed to review the Ninth Circuit's decision, *Yniguez v. Arizonans for Official English*, No. 95-974, challenging Arizona's official English law.

### Congressional Action

While English-Only proposals have been introduced in every Congress since the 97th Congress, never before has the Congress been so ardent in pushing the issue. Both supporters and opponents agree that English proficiency is very important for participation and success in American society. The debate centers on the most effective means to achieve that end. Supporters of English-Only initiatives say a single language is needed to unify the country. They point to the situation in Quebec, where voters narrowly voted against seceding from Canada, as proof that language divisions often lead to other divisions. Opponents maintain that English already is the common language of our country, and that the most effective way to ensure that non-English speakers learn English is to provide adequate funds to increase the availability of English as a Second Language (ESL) classes. In addition, opponents assert that bilingual voting assistance, which most English-only initiatives would repeal, has been instrumental in helping to remedy past as well as current discrimination against language minorities. Thus far, seven official-English bills and resolutions have been introduced in the 104th Congress and both the House and Senate have held several hearings on the matter (testimony is available from LCEF). The bills are:

H.J. Res. 109, The English Language Amendment, (constitutional amendment)  
Rep. John Doolittle (R-CA);  
H.R. 123, The Language of Government Act of 1995, Rep. Bill Emerson (R-MO);  
H.R. 345, The Language of Government Act of 1995, Rep. Owen Pickett (D-VA);  
H.R. 739, Declaration of Official Language Act of 1995, Rep. Toby Roth (R-WI);  
H.R. 1005, The National Language Act of 1995, Rep. Peter King (R-NY);  
S. 175, The Language of Government Act of 1995, Sen. Richard Shelby (R-AL);  
S. 356, The Language of Government Act of 1995, Sen. Richard Shelby (R-AL).

## House Action

At issue at the first hearing before the House Economic and Educational Opportunities Subcommittee on Early Childhood, Youth and Families was the federal government's role in encouraging non-English speakers to learn the language. Rep. Peter King (R-NY), sponsor of the National Language Act of 1995 (H.R.1005), argued that by mandating multilingual programs and services, the federal government discourages non-English speaking persons from learning English. He cited the example of bilingual education which he called a "costly failure."

In his testimony, Rep. King referred to a New York City Board of Education report showing that limited English proficient children who were taught in English fare better than those who received instruction in their native language. In contrast, a similar longitudinal study, conducted by David Ramirez of California State University and confirmed by the National Academy of Sciences, concluded that children in transitional and maintenance bilingual programs were doing better at learning English than students in English-only immersion programs. Another study, due out later this year by two George Mason University professors, also highlights the value of bilingual education programs.

Rep. Ed Pastor (D-AZ), current Chairman of the Congressional Hispanic Caucus, maintained that non-English speakers were learning English at a faster rate than ever before. He stated: "Hispanics and other new residents here recognize the economic imperative of learning the language spoken by the majority. This trend is accelerating, with the demand for English classes far exceeding the capacity of our schools and other language instruction centers."

The latest statistics do indicate that the supply of English as a Second Language classes has not kept up with the demand. In Los Angeles, for example, the demand is so great that some schools operate 24 hours a day and 50,000 students remain on waiting lists. New York City faces a similar shortage as individuals may wait up to 18 months for such classes.

The subcommittee held a second hearing in November and heard from several individuals who had immigrated to the United States and learned English as their second language. Also testifying were representatives of advocacy groups supporting and opposing the initiatives, English First and the American Civil Liberties Union (ACLU) respectively.

Charles Gogolak, an ex-Washington Redskin field goal kicker and a native Hungarian, testified that legislating English as the common language was needed as a symbolic measure to bind this country together. He noted: "Recently we have had in this nation a modern orgy of proliferation of rights demanded by every imaginable group

interest. As a consequence, our social fabric and shared moral common ground are visibly tearing. A common shared language is one of the most important binding traits we have."

In his testimony, Edward Chen, Staff Counsel at the ACLU of Northern California, stated his belief that English-Only bills would interfere with government's efficient delivery of services. He testified:

"What few services and publications are provided in multiple languages make government more efficient, not less efficient as English-only proponents contend. Barring the government from choosing in specific circumstances to communicate with its non-English speaking citizenry in languages comprehensible to these communities will result in miscommunications and hinder the implementation of governmental policies."

He added: "...by restricting the government's ability to communicate with and provide services to non-English speaking Americans, many of whom are children and elderly citizens," an English-Only requirement may violate the Equal Protection clause of the Constitution.

A staffer on the subcommittee said no future hearings had been scheduled and no further action was anticipated before late June.

### Senate Action

While two English-Only bills have been introduced in the Senate, only one, the Language of Government Act of 1995 (S. 356), has been sent to the Senate Government Affairs Committee for consideration. Although the bill makes an exemption for the teaching of foreign languages, S. 356 would repeal section 203 of the Voting Rights Act which provides voting assistance for limited-English speaking citizens. Additionally, S. 356 would deny to language minority litigants the right to have court interpreters provided for judicial proceedings. Under the proposed legislation, a member of Congress or a staff member would not be able to use a language other than English to communicate with constituents. This limitation extends to all government workers, including IRS auditors, agricultural inspectors, census takers, and public health workers, all of whom would be prohibited from using a language other than English in the performance of their duties.

The Government Affairs Committee held hearings on the bill in December of 1995 and March of 1996 with members of Congress testifying at both hearings. Senator Ted Stevens (R-AK), Chairman of the Government Affairs Committee, opened the December hearing by stating his understanding that S. 356 "...does not affect existing laws which provide bilingual and native language instruction." Chairman Stevens went on to



underscore his support for the preservation of Native American tongues and indicated he would be supportive of efforts to amend S. 356 to "expressly state that it does not affect bilingual education or Native American language instruction."

Testifying on behalf of his bill, Senator Richard Shelby (R-AL) noted the importance of Americans learning English. He stated:

"English has been, is, and will continue to be the language of opportunity. English is the language that allows individuals to take advantage of the social and economic opportunities America has to offer. Legislating English as the official language of government does nothing more than to help individuals assimilate into American society and protect government from wasteful spending and dubious duplication of services. Most importantly, this legislation shows our commitment to unity, cohesion, and inclusion over separation."

At the March hearing, Senator Paul Simon (D-IL) agreed with Sen. Shelby that it is vital for American citizens to learn English; however, he disagreed that legislating English as the official language of government is the most effective means to encourage limited English speaking citizens to learn English. Simon stated:

"While seemingly well-intentioned, proclaiming English the official language would do nothing to help individuals acquire the language skills that are essential if they are to become productive and responsible citizens. Yes, learning the English language is important for our many immigrants, as it is for our entire nation. But the way to handle the problem is not to proclaim that English is our official language. Instead, the way to deal with the problem is to provide funding for classes so that those who do not speak English can learn it."

The Senate Government Affairs Committee is expected to mark-up the Language of Government Act of 1996 in early June.

While, Sen. Shelby (R-AL) had announced his intention to offer an English-Only amendment very similar to S. 356 (with exceptions for bilingual education and languages pertaining to indigenous cultures) to the Illegal Immigration Bill that was before the Senate in late April, the amendment was not offered due to parliamentary maneuvering.

### Administration

In a memorandum from the Office of the Assistant Attorney General for Legislative Affairs, the administration voiced its opposition to S. 356. The memo states in part:

"The overwhelming majority of Federal official business is conducted in English. According to a recent GAO study, only 0.06% of Federal documents are in a

language other than English -- and these are translations of English documents. These non-English documents, such as income tax forms, voting assistance information, decennial census forms, and medical care information, assist taxpaying citizens and residents who have limited English proficiency (LEP) and are subject to the laws of this country. In those very few instances where the Government uses languages other than English, the usage promotes vital interests, such as national security; law enforcement; border enforcement; civil rights; communicating with witnesses, prisoners or parolees; protecting and promoting public health; and informing people of their legal rights and responsibilities."

### The Courts

As indicated above, Arizona's English-Only state statute was invalidated by the Ninth Circuit, en banc, in Yniguez v. Arizonans for Official English. In this case, a government employee sued the state over Article XXVIII of the state constitution, which provides that, English is "the language of the ballot, the public schools and all government functions and actions." It goes on to say that the state "shall act in English and no other language." As a state employee who dealt with members of the public who filed medical malpractice claims against the state, Ms. Yniguez used English when speaking to English-speaking people and Spanish with Spanish-speaking individuals. She also wrote some of her draft settlement forms in Spanish which her supervisor could not read. In filing suit, Ms. Yniguez alleged that the ban violated her free speech rights and a divided Ninth Circuit Federal Court of Appeals agreed.

Because the plaintiff was a government employee, and the Article in question is restricted to speech by persons performing services for the government, the court also considered what limitations may constitutionally be placed on the speech of government servants. In reaching its ruling, the court highlighted the established principle that government employees do not simply forfeit their First Amendment rights upon entering the public workplace. The court concluded that Article XXVIII is not a valid regulation of the speech of public employees, is unconstitutionally overbroad and unduly burdens the speech rights of government employees as well as the speech interests of a portion of the populace they serve.

Equal protection concerns were also raised in the Ninth Circuit's decision because the adverse impact of the ban falls almost entirely upon Hispanics and other national origin minorities. Noting that language is a "close meaningful proxy for national origin," the court reasoned that, "restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment."

Seeking review by the Supreme Court, the petitioners in this case, Arizonans for Official English, contended that the Ninth Circuit opinion conflicts with decisions permitting regulation of the choice of language in government and employment and that

courts have found no constitutional rights to government services in languages other than English nor have they permitted employees to force personal choice of language on an employer.

The Supreme Court granted certiorari on March 25. Oral arguments will be held in the Fall. The questions presented by the petitioners are:

- 1) Whether a state constitutional provision declaring English the official language of the State and requiring English to be used to perform official acts violates the Free Speech Clause of the First Amendment to the U.S. Constitution.
- 2) If not, whether a government employee has a Free Speech right to disregard the official language of her employer and choose the language in which to perform official actions.

#### Public Officials Weigh In On the Issue

Some prominent Republicans are on record opposing making English the official language of the nation. Governor Christine Todd Whitman (R-NJ) has stated, "I don't think we need any laws that say English is the only language of the United States." Senator Pete Domenici (R-NM) similarly has said: "So-called 'English-only' initiatives are not what New Mexicans want, and I've joined them in this view."

### **SUPREME COURT RULES IN CENSUS CASE**

On March 20, 1996, the Supreme Court ruled 9-0 in Department of Commerce v. City of New York (No. 94-1614) that the Secretary of Commerce was not required to adjust statistically the 1990 census, despite the Department's admitted undercount of the overall population and the disproportionate undercount of certain racial and ethnic minority groups. The Court additionally held that the Secretary's decision was consistent with the Census Act (13 U.S.C. 141), and that this decision was not subject to strict scrutiny, i.e., must be narrowly tailored to address a compelling state interest.

#### **BACKGROUND**

The Department of Commerce is required by the U.S. Constitution to conduct a population count of the United States every ten years. The task of counting the population is delegated to the Bureau of the Census, a branch of the Department of Commerce which takes instruction from the Secretary of Commerce in regard to the method of conducting the census count. The significance of the census count is

manifold. The results of the census are used:

- o to apportion the Members of the House of Representatives (Article I, Sec. 2, Clause 2),
- o to determine the number of votes each state receives for the election of the President via the electoral college (Article II, Sec. 1, clause 2),
- o to aid the federal government in dispensing funds through federal programs to the states, and
- o to assist states in drawing intrastate political districts.

Since its inception, the census' goal of achieving "actual enumeration", that is, an exact count of the population, has never been realized. Moreover, the population has been consistently undercounted. For example, "in 1970 the Census Bureau concluded that the census results were 2.7% lower than the actual population."

In addition to the overall undercount of the population, there frequently has been a disproportionate undercount of racial and ethnic minorities, called the differential undercount.

"Since at least 1940, the Census Bureau has thought that the undercount affects some racial and ethnic minority groups to a greater extent than it does whites. In 1940, for example, when the undercount for the entire population was 5.4%, the undercount for blacks was estimated at 8.4%. Forty years later the evidence of an ever-present differential undercount persists. The 1980 census reveals that the overall population undercount was 1.2% and the undercount for blacks were 4.9%. . . [T]he Secretary estimated that in the 1990 census blacks had been undercounted by 4.8%, Hispanics by 5.2%, Asian/Pacific Islanders by 3.1% and American Indians by 5.0%, while non-blacks had been undercounted by 1.7%; thus, the black/non-black differential undercount was estimated to be 3.1." (Respondents' Brief on the Merits before the Supreme Court).

The differential undercount occurs for several reasons:

- 1) the Census Bureau fails to include many of the addresses of minority households located in inner cities on the census mail-out list;
- 2) the complexity of the questionnaire discourages a response from individuals with limited education;
- 3) language difficulties also discourage some minorities from completing the

census questionnaire; and

4) the census' reliance on door-to-door visits for inner cities promotes an undercount largely because addresses in the projects and multi-unit structures are hard to find and because fear of crime discourages the census counters from conducting the census interview.

The Census Bureau recognized the problems of a persistent, overall undercount and differential undercount in the census. Accordingly, prior to the 1990 Census, the Census Bureau initiated efforts to correct the census undercount by organizing two task forces: the Undercount Steering Committee (USC) and the Undercount Research Staff (URS) who were responsible for planning the undercount research and conducting the research respectively.

The task forces, with the approval of the Director of the Census Bureau, recommended the use of a statistical adjustment, called the Post Enumeration Survey (PES), a post-census method which USC and URS believed would reduce the overall undercount and a disproportionate undercount of racial and ethnic minorities. Despite the recommendation of the task forces, the Secretary of Commerce declined to adjust the 1990 Census.

In opposition to the Secretary's decision not to adjust, on November 3, 1988, the City and State of New York, California, and several other cities brought suit to compel the Department of Commerce and the Bureau of the Census to require a statistical adjustment of the 1990 Census in order to decrease the "anticipated undercount" of the overall population and a disproportionate undercount of ethnic minorities. The state of New York claimed that the decision violated the equal representation rights enumerated in Article I, Section 2, clause 3, and the Fourteenth and Fifth amendments to the Constitution.

## LOWER COURT ACTION

On April 13, 1993, the Secretary's decision not to adjust the census count was upheld by the district court. The district court found that "for most purposes the recommended [statistical adjustment] resulted in a more accurate- or to be statistically fashionable, a less inaccurate count than the original census." Nevertheless, the district court also "found that the [Secretary's] guidelines permitted [him] to ignore all comparisons of accuracy favoring the adjusted counts if the Secretary could identify any comparison as to which there remained uncertainty." The Secretary questioned the distributive accuracy of a statistically adjusted census. He claimed that an unadjusted census count would prove more distributively accurate than a statistically adjusted census count.

On August 8, 1994, a divided panel of the Second Circuit Court reversed the district court's decision to uphold the Secretary's decision to adopt the unadjusted census count. The Second Circuit court found that the Secretary's decision not to adjust should be subject to heightened scrutiny both because "the Secretary's decision impacted a fundamental right, the right to have one's vote counted, and because the decision had a disproportionate impact upon certain identifiable minority groups." The Court of Appeals sent the case back to the lower court to allow the Secretary to prove that his decision was "necessary to the achievement of a legitimate governmental purpose." One judge dissented on the ground that the majority's decision contravenes federal law.

## OPINION

The unanimous opinion of the Supreme Court, reversing the Court of Appeals, was delivered by Chief Justice Rehnquist on March 20, 1996. The opinion states:

"In conducting the 1990 United States Census, the Secretary of Commerce decided not to use a particular statistical adjustment that had been designed to correct an undercount in the initial [population count]. The Court of Appeals for the Second Circuit held that the Secretary's decision was subject to heightened scrutiny because of its effect on the right of individual respondents to have their vote counted equally. We hold that the Secretary's decision was not subject to heightened scrutiny, and that it conformed to applicable constitutional and statutory provisions. We conclude that [the Secretary's] decision not to adjust the 1990 census was consonant with, . . . the text and history of the Constitution. The Secretary of Commerce, to whom Congress has delegated its constitutional authority over the census, determined that in light of the constitutional purpose of the census, an actual Enumeration- would best be achieved without the PES-based statistical adjustment of the initial [population count]. We find that conclusion entirely reasonable. Therefore, we hold that the Secretary's decision was well within the constitutional bounds of discretion over the conduct of the census provided to the Federal Government. The judgment of the Court of Appeals is reversed."

## SUPREME COURT SET TO RULE IN SEX DISCRIMINATION CASE

On Wednesday, January 17, 1996 the Supreme Court heard oral argument in United States v. Commonwealth of Virginia, (No. 94-1941), which challenges the constitutionality of gender-based exclusion from publicly funded institutions of higher learning. The issues in this case are whether publicly funded, single-sex institutions of higher learning violate the Equal Protection Clause of the Fourteenth Amendment, and "whether a State that provides a rigorous military-style, public educational program for

men can remedy the denial of the same opportunity to women by offering them a different type of single-sex, educational program deemed more suited to the typical woman." The applicable constitutional provision in this case is the Equal Protection Clause of the Fourteenth Amendment which provides that, "[no] State shall deny to any person within its jurisdiction the equal protection of the laws".

## **BACKGROUND**

The Virginia Military Institute founded in 1839, maintains a male-only admissions policy and employs what it calls the "adversative" method that "requires that the student discipline himself, to endure pain, physical and psychological." Another goal of the adversative method is "to cause students to question their past convictions, values and experiences and thereby to prepare them to accept the values and behavior taught by VMI." The method is known for its extensive physical training program and its intensive mental challenges. The United States filed suit challenging the constitutionality of the male-only admissions policy and the absence of a comparable program for women.

The district court found that Virginia's single-sex educational program in general was justifiable, but questioned the absence of a similar program for women. The Fourth Circuit Court of Appeals affirmed the lower court decision, holding that VMI had effectively justified its single-sex program, but held that VMI lacked adequate justification for the absence of a comparable program for women. The case was sent back to the district court with instruction to create an acceptable remedy. Subsequently, Virginia created the Virginia's Women's Institution for Leadership (VWIL), a single-sex college program for women, at the private, all-female, Mary Baldwin College. Following the creation of VWIL, the lower court and then the Fourth Circuit Court of Appeals approved the constitutionality of Virginia's higher education system of single-sex institutions. The courts held that VWIL and VMI comply with the Equal Protection Clause of the Constitution on grounds that "the differences between the two institutions are justified pedagogically and are not based on stereotyping."

## **SUMMARY OF ARGUMENTS PRESENTED**

In briefs filed before the Supreme Court, the United States contends that the Commonwealth of Virginia's creation of VWIL is "a constitutionally inadequate remedy" that maintains VMI's male-only admissions policy and offers women a "separate, different, and unequal" alternative. The United States additionally argues that the only adequate remedy is to terminate VMI's male-only admissions policy because it deprives women of the VMI educational experience, the alumni support base, and the "prestige of a VMI degree". The appropriate standard of review is strict scrutiny, the United States says, because "differences in treatment based on sex are inherently suspect". Currently, gender classifications are subject to an intermediate level of scrutiny. Changing the level

to strict scrutiny would mean that gender classifications must be narrowly tailored to meet a compelling state interest and would more likely be held to violate the Constitution. Finally, the United States asserts that the validity of the VMI standard should be judged by the standard set in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982), which prohibits any state from discriminating on the basis of gender in the enrollment process of an institution of higher education without an "exceedingly persuasive justification."

In response to the petitioners' challenge, the Commonwealth of Virginia claims that single-sex educational programs afford "substantial pedagogical advantages to many young men and women". Virginia further claims that both VMI and VWIL advance "important and legitimate state objectives" and offer male and female college students a "comparable" educational opportunity. The Commonwealth of Virginia asserts that VWIL's design is based on "observable psychological and sociological norms" not stereotypes. The Commonwealth of Virginia additionally asserts that the petitioners' proposal to apply strict scrutiny lacks justification and was not presented before the lower courts.

## ORAL ARGUMENT

The Supreme Court heard the oral argument on Wednesday, January 17, 1996. Paul Bender, Deputy Solicitor General of the Justice Department, began by speaking of the importance of a VMI education and the essence of the adversative method: "During the 150 years or more of VMI's existence, it has developed what everyone concedes is a unique adversative method of education...[that] was developed in an all-male context, and... is stereotypically a male form of education. It emphasizes adversity, it emphasizes competition, it emphasizes standing up to stress, it emphasizes the development of strong character in the face of adversity, of self-reliance, of self-confidence."

Bender was asked to explicate his "understanding of [the district court and court of appeals decisions] as to the extent to which the adversative method would be altered and affected by admission of women." He replied that there was no general agreement on what would have to be changed by the admission of women, and that some have asserted that the adversative method would have to be changed. But he added, "that is something that I don't think is true. You can only reach that conclusion that a change would have to be in the adversative method by accepting certain stereotypical characters of men and women."

In response to a question of his definition of a stereotype, Bender asserted: "It means what the experts really said, which is not that all women can't [survive the VMI adversative method], but that most women can't . . . and we are willing to accept the finding that most women can't do this. . . the question is whether, because most women



can't do it . . . the state is constitutionally entitled to exclude all women".

In his comparison of gender stereotypes to racial ones, Bender told the court that "just as in the area of race, an institution would not be able to remain uniracial by saying, if you let black people into VMI, white students would not feel comfortable in applying the adversative method to them, or the other way around, if you let white students into an all-black institution that has an adversative method, black people will not feel comfortable in applying the adversative method to them".

On the question of strict scrutiny, Bender said that while "heightened scrutiny was often applied in gender discrimination cases, our submission here is that the kind of discrimination that occurs in this case, which is offering a distinctly different opportunity to men and women based on gender alone, should be subject to strict scrutiny." Bender contended that, "the current system precludes women from getting "the distinctive honor of receiving a degree from VMI" which "has developed a reputation for producing tough leaders." Bender further contended that "it is inappropriate to say to a particular woman who says I want [VMI] training, 'you can't have it solely because you're a woman.'"

Theodore Olson, on behalf of Virginia, began his argument by asserting that the issue is whether the states can support single-sex education. Olson posited that the existence of one single-sex program does not automatically mean that a program is necessary for the other gender. For example, if test scores prove that male children are performing 50% below females in math, then there is a need to create a program for the gender category that needs assistance. Olson maintained that in such a situation, funds would be wasted by creating a math program for the gender category that performs well in math.

When challenged to show how VMI's combination of a single-sex education and the adversative method is valuable to the State interest, Olson explained: "as this Court has said, the most important function that a State can perform is educating its young citizens. Now, as a matter of educating young citizens and performing that important governmental function, single-sex education should be an important part of that..."

He continued that Virginia asserts that the adversative method which emphasizes "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values" is essential to the VMI educational experience. However, he asserted, experts don't think it would be as effective for women.

A decision from the Supreme Court is expected by the end of this term.

## UPDATE ON VOTING RIGHTS REDISTRICTING

Lower court decisions have been issued in several redistricting cases and Supreme Court review has been requested.

### FLORIDA

The legal controversy over redistricting has become such a tangle that federal courts are now striking down their own plans. On April 17, 1996, a divided three-judge district court panel for the Northern District of Florida ruled that the state's majority African-American third district created by a similar three-judge panel was a racial gerrymander and thus unconstitutional, Johnson v. Mortham, No. 94-40025. The court ordered the state legislature to redraw the third district. On May 2, the state legislature agreed on a slightly revised plan that eliminated the western areas of the 3rd district and reduced its African-American population from 55 to 46.5 percent and its African-American voting age population from 51 to 42 percent. As the MONITOR went to press, Governor Lawton Childs was expected to sign the legislation. Some of the parties in the case, including the plaintiffs, have indicated that they are planning to pursue an appeal of the legislature's plan to the Supreme Court and request a stay. Rep. Corrine Brown has said publicly that she considers the new district a viable district in which to run.

### Background

In 1992, the state legislature was unable to agree on a congressional redistricting plan. A federal three-judge panel then developed its own plan which included three new majority African-American districts including the challenged third district, (DeGrandy v. Wetherell). An additional majority Hispanic district was also drawn, giving Dade County two majority Hispanic districts. A group of residents in the 3rd district sued claiming that the district was unconstitutional because it segregated voters on the basis of race and was not narrowly tailored to further a compelling state interest. On November 20, 1995, a new three judge panel, which included two of the three DeGrandy judges, granted the plaintiffs' motion for summary judgment on the grounds that the DeGrandy panel "lacked the constitutional authority to adopt a permanent redistricting plan" and that District 3 was drawn for predominantly race-based reasons and thus was subject to strict scrutiny. A trial was held in February 1996 on the question of whether District 3 met the strict scrutiny standard.

In its April 17 ruling the majority found that the plan was subject to strict scrutiny because "race was the predominant motivating factor in the drawing of district three..." The court proceeded to evaluate the plan by the strict scrutiny test of whether the plan meets a compelling state interest and if so whether it is narrowly tailored. The court for purposes of analysis in this case assumed that compliance with the Voting Rights Act is a compelling state interest, but concluded that the evidence in this case does not support a

finding that a Voting Rights Act violation existed. The court said:

"In sum, to state a 'strong basis in evidence' that a Section 2 violation has occurred, there must be some indication that past discrimination has actually hampered the ability of minorities to participate in the political process...through interaction with a 'certain electoral law, practice, or structure'...There is insufficient evidence to support such a finding in this case."

Further, the court found "no evidence of any current voting practice, or procedures which denies or impairs the right to vote of African-Americans" and thus ruled that the court that drew the plan lacked a compelling interest in remedying the effects of past discrimination. The panel while recognizing that having held the plan unconstitutional, it need not proceed to an analysis of whether it was narrowly tailored did so "to insure that our analysis is complete, recognizing that there may be further judicial review of this matter." The panel found that less race-based plans were available and that the plan was "unduly burdensome on the rights of innocent third parties." The panel reasoned:

"The DeGrandy court's adoption of a plan that pulled widely separated groups of African-American voters together to form District Three, while enhancing the proportional voice of African-American voters statewide, not only denied equal access to the political process to white voters within District Three, but also to African-American voters outside of District Three...Many of these voters may have been able to better form coalitions with persons placed in District Three. Instead, sacrificing their equal rights to vote may well have been the price of attaining fair representation for African-Americans statewide. In fact, the Special Master noted that the redistricting plan creating District Three had a retrogressive effect on some covered Section 5 counties, but discounted that finding because 'the overall plan substantially strengthens minority representation in Florida'."

Judge Joseph Hatchett in his strong dissent asserted:

"The Majority finds that the DeGrandy v. Wetherell court did not have a compelling interest for creating Congressional District 3...and that District 3 was not narrowly tailored. The majority concludes that the DeGrandy court erred in finding as compelling interests compliance with the Voting Rights Act and remedying the effects of Florida's past discrimination against African-Americans. In reaching its conclusions, the majority strips the DeGrandy plaintiffs of a remedy and even more strange fails to provide a remedy to the plaintiffs in this case. In formulating this untenable result, the majority has (1) infused issues into the case that neither the plaintiffs nor defendants raised; (2) totally disregarded relevant precedent; (3) rewritten the requirements for claims under Section 2 of the Voting Rights Act; (4) ensured that the application of strict scrutiny is not only

'strict in theory' but 'fatal in fact;' and (5) based many of its legal conclusions on internally inconsistent rationales. The majority's opinion in this case bears a striking resemblance to the sentiments that compelled the passage of the Fourteenth Amendment and the Voting Rights Act; namely, that African-Americans and other minorities are susceptible to exclusion from full participation in the political process."

The dissent also asserts that the principles established by the Supreme Court in Shaw v. Reno and Miller v. Johnson apply to plans developed by state legislatures and not to plans developed by courts such as that in this case. Judge Hatchett wrote:

"While I do not suggest that federal courts may disregard the Constitution in crafting remedies for Voting Rights Act and constitutional violations, I do not believe that the same vigorous standards applied to legislative bodies in enacting redistricting plans apply equally to federal courts enacting remedial redistricting plans.... In addition, the Supreme Court suggested that remedial plans need not always be limited to the least restrictive means of implementation recognizing 'that the choice of remedies to redress racial discrimination is a balancing process left within the appropriate, constitutional or statutory limits to the sound discretion of the trial court..."

"I continue to believe that DeWitt v. Wilson provides a more appropriate framework for reviewing a court drawn plan.... In DeWitt, a three-judge federal court found that a 1992 redistricting plan that the California Supreme Court developed was constitutional notwithstanding the court's consideration of race in drawing the lines...In reaching that result, the court stated that 'we conclude that in the context of redistricting, where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, that strict scrutiny is not required'...The Supreme Court summarily affirmed DeWitt the same day it issued its opinion in Miller v. Johnson...The majority has misapplied Shaw and Miller."

## LOUISIANA

As reported in the last MONITOR, on January 5, 1996, a three-judge 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 the drawing of the majority African-American 4th district represented by Democrat Cleo Fields, and ordered its own plan be adopted. That plan eliminated the majority African-American 4th district. On March 13, 1996, an application for a stay of the order was filed with the Supreme Court. Since then, the state legislature has voted to ratify the court's plan and the Governor is expected to sign the legislation. The plan will then go to the

Department of Justice for preclearance. Some civil rights advocates have suggested that the Supreme Court may be waiting for review from DOJ before acting on the request for a stay.

## GEORGIA

In Georgia, the redrawn plan of the district court reduced the African-American voting age population in Rep. Cynthia McKinney's 11th district from 60.4 to 10.8 percent. She is running in the Democratic primary in the 4th district which is approximately 34 percent African-American. Rep. Sanford Bishop is running for reelection in the 2nd district whose African-American population dropped from 57 percent to 35 percent under the redrawn map. On February 6, 1996, the Supreme Court refused to grant a stay of the new map until the Court had considered a formal appeal. The U.S. Solicitor General and other parties to the case have filed appeals with the Court on a number of grounds including failure to comply with the "one-man, one-vote" requirement and that the new plan which reduced the number of African-American districts from three to one goes too far and is unconstitutional and in violation of the Voting Rights Act.

## ILLINOIS

In Illinois, a three-judge federal panel ruled that the 4th congressional district which is majority Hispanic is constitutional. While the panel recognized that "racial considerations predominated over all other factors in the configuration of the 4th congressional district," it held that the district was narrowly tailored to address the compelling state interest of remedying past discrimination. The panel described the district as an "uncouth configuration; a Rorschach ink blot turned on its side; a wobbly eighth note; an unusually shaped bar bell," but upheld it, writing:

"Where the drawing of irregular lines is required to remedy established violations of the Voting Rights Act, the court need not flinch from its obligation to do so with a bold and deliberate pen."

The plaintiffs in the case have filed a notice of appeal to the Supreme Court, but have not yet filed a jurisdictional statement.

**DON'T MISS ONE ISSUE OF THE CIVIL RIGHTS MONITOR  
SUBSCRIBE TODAY!!!!**

**YES, I WANT THE Civil Rights Monitor \_\_\_\_\_ \$35.00/Year**

I would like to make an additional contribution to the work of the Leadership Conference Education Fund (LCEF) in the amount of \$ \_\_\_\_\_. Your contribution is tax deductible.

Name	Title	Organization
------	-------	--------------

Address	City/State	Zip Code
---------	------------	----------

Mail to: LCEF, Suite 1010, 1629 K Street, N.W.  
Washington, DC 20006

**LEADERSHIP CONFERENCE EDUCATION FUND**

Suite 1010

1629 K Street, N.W.

Washington, DC 20006      (202) 466-3434

Karen McGill Lawson, Executive Director

The CIVIL RIGHTS MONITOR is published by the Leadership Conference Education Fund, Inc., an independent research organization that supports educational activities relevant to civil rights. The MONITOR is written by Karen McGill Lawson. The article on English-Only Initiatives was written by Brian Komar, Research Assistant. Demetria Edwards, Intern, wrote the articles on the Census and Sex Discrimination Cases before the Supreme Court. Typing and layout are performed by Charlotte Irving. William L. Taylor, Vice President of the Leadership Conference Education Fund, serves as Senior Editor. Janet Kohn, Attorney, LCCR and AFL-CIO, also provides editorial assistance. Arnold Aronson is President of LCEF. Other board members are Barbara Arnwine, Mary Frances Berry, Ricardo Fernandez, Ralph G. Neas, Carolyn Osolinik, William Robinson, Muriel Morisey Spence, Patrisha Wright, and Kenneth Young.