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Civil Rights Monitor

AFFIRMATIVE ACTION UPDATE

Introduction

The attack on affirmative action, which just months ago was touted by Republican strategists as the key to victory in California and the 1996 Presidential election, has been fading as a national issue as the November elections approach. Republican congressional leadership announced it would not bring up the Equal Opportunity Act which would eliminate all federal affirmative action programs. House Republicans instead are opting to curb affirmative action only in federal contracting. Rep. Jan Meyers (R-KS) has introduced legislation targeting the Small Business Administration's Section 8(a) program for elimination. She did so while the Clinton Administration pressed forward in reforming affirmative action by proposing in late May changes to federal procurement.

Meanwhile, California remains the only state where voters will vote on an anti-affirmative action initiative in November as every other state effort to eliminate or reform affirmative action has failed, at least for the current year.

In the courts, the affirmative action picture remains murky. The Supreme Court in June refused to review a Fifth Circuit U.S. Appeals Court's decision that ruled race could never be used as a factor in a University's admissions process. Also, the U.S. Third Circuit Court of Appeals ruled in Taxman v. Piscataway Board of Education that a school district facing layoffs should not have used race as a primary factor in determining who to dismiss.

The MONITOR provides an overview of all these issues with the following Affirmative Action Update.

Congressional Update

The House Judiciary Committee was scheduled to mark-up H.R. 2128, the Equal Opportunity Act of 1996, on two separate occasions, but as the MONITOR went to press had not done so. On each occasion, the Judiciary Committee had several other bills to mark-up and never made it to the Equal Opportunity Act. At each of the mark-ups, Rep. Charles Canady (R-FL), the bill's chief sponsor, was poised to offer an amendment in the nature of a substitute (the Canady substitute) that would have made it illegal for the federal government to engage in efforts to increase minority and female participation in any program involving federal contracting or subcontracting if such efforts include the use of "set-asides, numerical goals, timetables or other numerical objectives."

The Canady substitute, while narrower in scope than the original bill, would require the dismantling of federal affirmative action contracting and subcontracting programs conducted by the Small Business Administration and other federal agencies that have programs to increase opportunities for women and minority-owned businesses to compete for and perform federal contracts. In addition, the bill appears to extend beyond the award of federal contracts and subcontracts and to prohibit the federal government from requiring or encouraging affirmative action by federal contractors. This would eviscerate Executive Order 11246, the Executive Order program that requires federal contractors to analyze their workforce, set goals and timetables for hiring and promoting women and minorities, and make "good faith efforts" to meet them. Also, by eliminating all affirmative action programs regarding federal contracting, the bill overturns two decades of Supreme Court decisions on affirmative action that have held that federal programs involving race-conscious measures are legal so long as they are "narrowly tailored" to serve a "compelling" government interest.

In August, Rep. Jan Meyers (R-KS) introduced H.R. 3994 "The Entrepreneur Development Program Act of 1996," that would eliminate the 8(a) program of the Small Business Administration (SBA). The 8(a) program is a business development program designed to help eligible small firms reach a point of self-sufficiency and competitive viability. To join the program, such firms must demonstrate a potential for success and must be owned (at least 51%) and operated by American citizens who are both socially and economically disadvantaged. By law, individuals who are members of certain groups (African Americans, Asian Americans, Hispanic Americans, and Native Americans) are presumed to be "socially and economically disadvantaged."

Recent studies indicate that the "socially disadvantaged" presumption is accurate. For example, preliminary results of an Urban Institute disparity study indicate that in each of the industry groups examined by researchers minority-owned contractors are underutilized by state and local governments. Disparity studies indicate the difference between the number of

qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the government or by the government's prime contractors. The Supreme Court ruled in its 1989 Croson decision that such disparities can give rise to an inference of discrimination that can serve as the foundation of race-conscious measures in procurement that meet the "strict scrutiny" standard.

Administration's Proposed Reforms to Affirmative Action in Federal Procurement

Over a year ago, President Clinton ordered the Department of Justice (DOJ) to launch a review of all federal affirmative action programs in the wake of the June, 1995 Adarand v. Pena decision, in which the Supreme Court ruled that all racially- conscious affirmative action programs were subject to the constitutional standard of strict scrutiny. Consistent with the President's "Mend it, Don't end it" approach outlined in a speech at the National Archives in July, 1995, the Department of Justice has begun to make changes to the nation's federal affirmative action programs. Last October, a billion dollar Department of Defense program referred to as the "Rule of Two" was suspended indefinitely because, as one senior administration official put it, "Justice could not defend the program because no lawyer there thought it is defensible under Adarand." Under the rule, if at least two qualified small, disadvantaged businesses expressed interest in bidding for a contract, only disadvantaged businesses could compete for it. The rule had been challenged in federal court in New Mexico where approximately 20% of the contractors were minority. Most recently, on May 23rd of this year, the DOJ published in The Federal Register proposed reforms to affirmative action in the area of federal procurement. Individuals had until July 22nd to send comments to the Department.

The proposed changes relate to the race-conscious affirmative action measures in federal procurement that target assistance to small minority-owned businesses, commonly referred to as Small Disadvantaged Businesses (SDBs). Included in the proposed reforms are new certification and eligibility requirements as well as the establishment of benchmarks to ensure that race-conscious procurement is used only in areas where discrimination has deprived minority firms of the opportunity to compete for contracts.

Certification and Eligibility Reform

Applicants to SDB programs will be required to verify their eligibility by submitting a form to the procuring agency. The certification must come from a Small Business Administration (SBA)-approved organization and must verify that the individual claiming ownership and control of the company is socially and economically disadvantaged as defined by SBA regulations. Members of designated racial and ethnic groups presently are presumed by statute to be socially and economically disadvantaged. Rather than changing those presumptions for the minority applicants, the DOJ proposal lowers the eligibility threshold for nonminority applicants. Whereas nonminority applicants previously had to meet a "clear and convincing" evidence standard, under the proposed reforms nonminority applicants would now only have to meet a "preponderance" of the evidence standard. DOJ notes this change should open SDB participation to more women and

nonminorities.

Benchmarks

In order to ensure that race-conscious procurement is used only in those federal contract areas where discrimination has prevented qualified minority firms from competing for contracts, DOJ has proposed the establishment of national and regional benchmarks for each industry in which the government contracts. These benchmarks would estimate the level of minority contractors that would exist absent the effects of racial discrimination and they would be determined by the availability of minority firms in the industry adjusted for discrimination when discrimination has suppressed the supply of minority firms.

If it is established that minority participation falls below the benchmark for a given industry, price and/or evaluation credits would be authorized for the review of bids by SDB's and by prime contractors committed to subcontract with SDB's. Once SDB participation reaches the benchmark, the price and/or evaluation credits would end.

State Roundup

Over the past year and a half, nineteen state legislatures have considered various measures aimed at repealing or curbing affirmative action policies within the state. In addition, in seven states (California , Colorado, Florida, Illinois, Massachusetts, Oregon, and Washington) there have been moves to place anti-affirmative action initiatives on the November ballot. Despite these efforts, no state legislature has passed a bill eliminating or significantly scaling back affirmative action and Californians will be the only voters to vote on the issue this November, as each of the other six initiatives failed to collect the requisite number of signatures. Call LCEF for a detailed state-by-state analysis of anti-affirmative action initiatives.

Judiciary Update

Supreme Court Denies Review of Hopwood Case

Before adjourning for its summer recess, the Supreme Court refused to grant review of Texas et al. v. Cheryl J. Hopwood et al., thereby leaving intact a Fifth Circuit U.S. Appeals Court panel's ruling that the University of Texas Law School's affirmative action admissions program amounted to unconstitutional discrimination against whites. Supporters of affirmative action noted that the Justices' denial of the case was not a judgment on the merits of affirmative action in higher education nor did it in any way signify that the Fifth Circuit's decision would become the law of the land.

The Supreme Court did not take the usual step of simply rejecting a petition without explanation. Justices Ginsburg and Souter issued an opinion explaining that the case did not present a live controversy because the Law School already had changed the part of its admissions

policy that had been contested and all parties involved in the case acknowledged that the challenged 1992 admissions policy was unconstitutional and would not be re-instated. The Law School had established separate processes for reviewing minority and nonminority applications, a practice prohibited in University of California Regents v. Bakke, 438 U.S. 265 (1978). In asking the Supreme Court to review the lower court's decision, the petitioners, therefore, were not asking the Justices to overrule the lower Court's decision, but rather the rationale that Court used in its opinion. As Justice Ginsburg noted, "[T]his Court, however, reviews judgments, not opinions."

In handing down its decision, the Fifth Circuit had stated that race could never be considered a factor in a University's admissions process, even to serve the state's interest in diversity. The panel wrote:

> "We agree with the plaintiffs 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....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-conscious 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."

This rationale would overturn the Supreme Court's 1978 decision in Bakke, in which the Supreme Court ruled 5-4 that the use of race as a criterion in admissions decisions in higher education was constitutionally permissible. With the Supreme Court's refusal to hear this case, the question whether or not Bakke will remain the law of the land is deferred to another day.

Many higher education officials across the nation, particularly in the states covered by the Fifth Circuit, expressed their disapproval at the Court's refusal to review the decision. The decision leaves some institutions of higher learning facing a difficult situation. Louisiana State University Law School, for example, remains under a counter-vailing court order requiring them to take race into account to increase the enrollment of blacks at the school. Raymond Lamonica, Vice Chancellor at the Law School noted: "We will follow the court order until steps are taken, if ever, to change it."

Elaine Jones, Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., (LDF) made the following comments in a statement released to the press:

"I am greatly dismayed by the decision of a panel of three lower court judges striking down the affirmative action program of the University of Texas Law School, a program which was created by order of the United States Department of Health, Education, and Welfare in order to remedy a history of discrimination against African Americans. Most disturbing is the fact that the three judges refused to follow the law of the land as established by the United States Supreme Court in the Bakke case. LDF and its clients strongly believe that the three judges erred in invalidating the flexible consideration of race as one factor in the admissions decision of a law school with a long tradition of exclusion of African American and Mexican American students and with current admissions policies that are not merit-based and that without affirmative action would severely perpetuate the effects of the State's regrettable past."

U.S. Appeals Court Strikes Down Affirmative Action in Piscataway

The United States Court of Appeals for the Third Circuit, sitting en banc, ruled 8-4 that the Piscataway Board of Education focused too heavily upon race when faced with the difficult decision of having to cut one business teacher from its ranks. The decision of whom to let go came down to a choice between two candidates, Sharon Taxman who is white and Debra Williams who is black. Beyond the color of their skin, the two instructors were assessed as being equally qualified, having equal seniority, and alike in ability and enthusiasm. Citing its policy of seeking a diverse workforce, the school board decided to keep Mrs. Williams. Theodore Black, President of the Piscataway School Board said in a disposition, "I believe by retaining Mrs. Williams it was sending a very clear message that our staff should be culturally diverse."

The majority opinion, written by Judge Mansman states:

"It is clear that the language of Title VII is violated when an employer makes an employment decision based upon an employee's race. The Supreme Court determined in United Steelworkers v. Weber, 443 U.S. 193 (1979), however, that Title VII's prohibition against racial discrimination is not violated by affirmative action plans which first, "have purposes that mirror those of the statute" and second, do not "unnecessarily trammel the interests of the [non-minority] employees," id. at 208.

"We hold that Piscataway's affirmative action policy is unlawful because it fails to satisfy either prong of Weber. Given the clear anti-discrimination mandate of Title VII, a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster."

Despite its rejection of the school district's implementation of its diversity policy in this instance, the majority writes:

"While we have rejected the argument that the Board's non-remedial application of the affirmative action policy is consistent with the language and intent of Title VII, we do not reject in principle the diversity goal articulated by the Board. Indeed, we recognize that the differences among us underlie the richness and strength of our Nation. Our disposition of this matter, however, rests squarely on the foundation of Title VII. Although we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures."

Chief Justice Sloviter was one of the four dissenters and wrote:

"...the narrow question posed by this appeal can be restatedas whether Title VII requires a New Jersey school or school board, which is faced with deciding which of two equally qualified teachers should be laid off, to make its decision through a coin toss or lottery, a solution that could be expected of the state's gaming tables, or whether Title VII permits the school board to factor into the decision its bona fide belief, based on its experience with secondary schools, that students derive educational benefit by having a Black faculty member in an otherwise all-White department. Because I believe that the area of discretion left to employers in educational institutions by Title VII encompasses the School Board's action in this case, I respectfully dissent."

HOUSE PASSES BILL REPEALING LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT AND ESTABLISHING ENGLISH AS THE OFFICIAL LANGUAGE OF THE UNITED STATES GOVERNMENT

Introduction

As reported in the last MONITOR, several bills requiring the federal government to conduct its "official" business only in English have been introduced in the 104th Congress. A bill originally sponsored by the late Rep. Bill Emerson (R-MO), H.R. 123, "The Language of Government Act," was marked-up before the House Economic and Educational Opportunities Committee in late July.

At the markup, Rep. Randy "Duke" Cunningham (R-CA) offered an amendment in the nature of a substitute that added provisions which would repeal the language assistance provisions of the Voting Rights Act. These minority language provisions previously were a part of freestanding legislation, H.R. 351, "The Bilingual Voting Requirements Repeal Act," introduced by Rep. John Porter (R-IL). The House of Representatives passed H.R. 123 on August 1 despite a White House letter to Speaker of the House Newt Gingrich (R-GA) expressing President Clinton's opposition to the bill. Meanwhile, S. 356, The Language of Government Act, is pending before the Senate Government Affairs Committee; however, it does not contain provisions repealing the bilingual language assistance provisions of the Voting Rights Act. Whether the

Senate will consider the House version or S. 356 remains unclear.

Background on Language Assistance Provisions of Voting Rights Act

(See the last MONITOR for a discussion on the various "English- Only" initiatives before the 104th Congress).

The Voting Rights Act of 1965 originally was enacted to address Southern resistance to voter registration and participation by African Americans. In 1975, Congress expanded the Voting Rights Act by adding sections 203 and 4(f) to include language minorities after finding that the denial of the right to vote among limited English-proficient citizens was "directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation." Sections 203 and 4(f) of the Voting Rights Act provide remedies for systematic discrimination against language-minority citizens. Congress has reauthorized the language assistance provisions twice, in 1982 and most recently in 1992, both times in overwhelming bipartisan fashion with Presidents Ronald Reagan and George Bush signing the extensions into law.

Rep. John Porter (R-IL) introduced, H.R. 351, "The Bilingual Voting Requirements Repeal Act," which would repeal Sections 203 and 4(f) and other anti-discrimination provisions of the Voting Rights Act for language minorities.

Bilingual Voting Rights Provisions

(The sections borrows heavily from testimony given by Karen Narasaki, Executive Director of the National Asian Pacific American Legal Consortium, before the House Judiciary Committee's Subcommittee on the Constitution, April 18, 1996).

Section 4(f)

Section 4(f) is linked to the Act's provisions that target jurisdictions with histories of preventing African Americans and other minorities from voting through the use of exclusionary "tests or devices" such as literary tests. Under the provisions of this section, an English-only election constitutes an exclusionary "test or device" for which the special remedy of language assistance is required.

A State or political subdivision is covered by Section 4(f) if:

(i) over 5% of the voting-age citizens were, on November 1, 1972, members of a single language minority group; (ii)regis-tration and election materials were provided only in English on November 1, 1972; and (iii) less than 50% of citizens of voting age were registered to vote or voted in the November 1972 Presidential election. Section 4(b), 42 U.S.C. 1973b(b) (1975).

This section is subject to many of the general provisions of the Act, including the requirement that any changes in voting procedures in a covered jurisdiction be precleared by the U.S. Department of Justice before they are implemented. Jurisdictions subject to Section 4(f) include the States of Alaska, Arizona, and Texas, as well as counties in California, Florida, Michigan, New York, North Carolina, and South Dakota.

Section 203

Section 203 is expressly predicated upon rights guaranteed by the Fourteenth and Fifteenth amendments (i.e., equal protection and the right to vote without regard to race, color, or previous conditions of servitude, respectively). To satisfy its purpose, Section 203 prohibits discriminatory practices and procedures that effectively exclude language minorities from participating in the electoral process and provides for appropriate remedies.

Section 203 defines "language minorities" or "language minority group" as persons who are American Indian (Native American), Asian American, Alaskan Natives, or of Spanish heritage. The discriminatory practices include, among other things, unequal educational opportunities resulting in high illiteracy rates and low voter participation.

Unlike Section 4(f), Section 203 coverage is not based upon a one-time finding of discriminatory voting practices in a particular election year. Rather, after each decennial census count, States and political subdivisions move into and out of Section 203 coverage depending upon the demographic changes in the voting population of the jurisdiction. The formulas used to determine coverage strike a balance so that jurisdictions are not required to provide bilingual voting assistance unless there is a significant population of covered language minorities.

Less than four years ago, Congress passed the Voting Rights Language Assistance Act of 1992 (the "1992 Amendments") with overwhelming bipartisan support, 236 votes in the House of Representatives and 75 in the Senate. In doing so, Congress reauthorized Section 203 for fifteen years and expanded its scope by adopting additional coverage formulas. Prior to 1992, Section 203 prohibited English-only elections and required language assistance only in those jurisdictions, as determined by the Director of the Census, that:

(i) more than 5% of the voting age citizens are [a] members of a single language minority and [b] do not speak or understand English adequately enough to participate in the electoral process; and (ii) the illiteracy rate of this group is higher than the national illiteracy rate.

With the 1992 Amendments, Section 203 coverage now also exists where the illiteracy rate of the group in question is higher than the national illiteracy rate and:

(II) more than 10,000 of the citizens of voting age of such political subdivisions are members of a single language minority and are limited English proficient; or (III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the

American Indian or Alaskan native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient.

The additional method of calculating coverage by a population benchmark number addressed the inequities created by applying the 5 percent formula to counties of vastly different sizes. It ensured that more jurisdictions, such as Los Angeles County, with numerically large limited-English proficient populations and high illiteracy rates would be covered by Section 203 even if the percentage of the group was low. The coverage formula for Native Americans ensured that all parts of a reservation were covered even if parts of the reservation fell into different counties.

General Anti-Discrimination Provisions Repealed by H.R. 351

H.R. 351 goes further than repealing sections 203 and 4(f), and also repeals the provision of the Voting Rights Act that bars states from discriminating against language minorities at the ballot box. The provision H.R. 351 would repeal reads:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."

In addition, H.R. 351 would delete from the Voting Rights Act important enforcement tools that have benefited language minority citizens victimized by such discrimination since 1975. Among these tools are those that: (i) authorize the appointment of federal examiners to enforce voting guarantees, (ii) authorize the courts to order suspension of tests and devices that abridge the right to vote, and (iii) require preclearance of changes in voting qualifications and procedures by covered jurisdictions to ensure that the changes are not discriminatory.

Congressional Action

A single hearing on H.R. 351 was held before the House Subcommittee on the Constitution on April 18, 1996. Testifying at the hearing were several Representatives, the Assistant Attorney General for Civil Rights, and non-governmental advocates and opponents of the legislation. Supporters of H.R. 351, several of them children of immigrants or immigrants themselves, testified that bilingual assistance is expensive, not utilized when offered and discourages immigrants from learning the English language. Frances Fairey, Registrar of Voters in Yuba County, California noted, "I find no fault with the feeling of compassion, but I have been Registrar for sixteen years and only once ha[s] my office handed Spanish literature to anyone.

Jim Boulet Jr., Executive Director of English First, said in a statement, "The record shows that bilingual ballots are both ineffective and expensive. The state of Hawaii spent $40,000 to produce a facsimile ballot in a single language. The ballot was used four times -- a cost of

$10,000 per ballot. A personal interpreter and a chauffeur-driven limousine ride to the polls would have been cheaper for Hawaii taxpayers." John Silber, President of Boston University, testified that when his father came to this country from Germany in the early 1900's, he embraced his new country and culture. Silber said:

> "Like all immigrants seeking naturalization, he was of course required to demonstrate his proficiency in English. It would never have occurred to him or to any of the millions of other immigrants speaking many different languages to seek accommodations such as ballots in their native tongue. He, like them, had freely chosen to live in a country where the language was English. He had freely chosen to become an American -- not a German-American but simply an American."

Opponents of H.R. 123 cited studies rebutting many of the claims advanced by supporters of the bill. Karen Narasaki, Executive Director of the National Asian Pacific American Legal Consortium (NAPALC), testified that providing language assistance is not difficult or costly and has increased voter participation among language minorities. She referred to a Government Accounting Office (GAO) study which found that the average cost for language assistance for the 1984 general elections was 7.6% of the overall election costs. Ms. Narasaki also cited the rise in requests for bilingual voting materials as evidence that voters need and demand this assistance and that providing these materials was increasing the number of Asian Pacific American citizens exercising their right to vote. Whereas in November 1993, the Los Angeles County Registrar received 6,227 requests for bilingual voting materials in Chinese, Japanese, Tagalog, and Vietnamese, that number increased to 9,803 for the March 1996 primary election.

Deval Patrick, Assistant Attorney General, Department of Justice, underscored the bipartisan tradition of support for the language assistance provisions when he testified:

> "I come before you today to reiterate the [Justice] Department's longstanding support for the minority language provisions of the Voting Rights Act, and to oppose H.R. 351 in the strongest terms. The initial enactment of the minority language provisions with the support of the Ford Administration and the subsequent extensions of those provisions with the support of the Reagan and Bush Administrations enjoyed strong bipartisan support in Congress. The Clinton Administration proudly joins this bipartisan tradition. The interest in a vital democracy -- through access to the ballot box -- knows no party."

While supporters of the bill were quick to point out that Los Angeles had to provide election materials in five different languages, they neglected to mention that the City Council of Los Angeles has taken a position in opposition to H.R. 351. James Seeley, Chief Legislative Representative for the City of Los Angeles, sent a letter to the members of the House Judiciary Committee expressing the City Council's opposition to H.R. 351.

H.R. 351 was reported out of the House Constitution Subcommittee on May 23 by a 5-2 party-line vote. The House Judiciary Committee reported the bill 17-12 on July 16 with Rep.

Steve Schiff (R-NM) the lone Republican voting against the bill.

On July 24th, the House Economic and Educational Opportunities Committee marked-up H.R. 123, The Language of Government Act. At the markup, Rep. Randy "Duke" Cunningham (R-CA) offered an amendment in the nature of a substitute that made minor technical changes to the underlying bill as well as adding provisions that would repeal the language assistance provisions of the Voting Rights Act (essentially H.R. 351). The version of H.R. 123 reported out of the Committee therefore combined the "English-Only" legislation with the legislation repealing the bilingual language assistance provisions of the Voting Rights Act.

Floor Action

The House of Representatives voted on H.R. 123 on August 1. Prior to final passage, Rep. Jose Serrano (D-NY) offered an "English-Plus" amendment to express the sense of the Congress that the U.S. Government should pursue policies that: promote English as the common language of the United States; encourage all U.S. residents to become fully proficient in English by expanding educational opportunities and information resources; encourage U.S. residents to learn or maintain skills in a language other than English; continue to provide services in languages other than English; and oppose restrictions on languages other than English. The amendment failed and after a similar motion to recommit the bill to Committee failed, the combined version of H.R. 123 was passed by the House of Representatives by a 259 to 169 vote. Eight Republicans voted against final passage: Reps. Bonilla (TX), Bunn (OR), Diaz-Balart (FL), Morella (MD), Ensign (NV), Ros-Lehtinen (FL), Schiff (NM), Skeen (NM).

The matter is still pending in the Senate with further action in this Congress uncertain.

ISSUES AFFECTING GAYS AND LESBIANS

Introduction

Issues affecting the gay and lesbian community have become increasingly visible in public policy circles. In May, the Supreme Court ruled in Romer v. Evans et al. that a Colorado anti-gay constitutional amendment was prohibited by the U.S. Constitution. While the Supreme Court's decision was touted as a great victory for gay-rights activists, it also generated a back-lash against the gay and lesbian community. One repercussion of the Court's decision is the passage in the Congress of legislation against same-sex marriages. Legal experts anticipate that Hawaii will be the first state to legitimize same-sex marriages. To try to ensure that other states are not forced by the Full Faith and Credit Clause of the U.S. Constitution to recognize such unions and to prevent same-sex partners from receiving certain federal benefits, legislation known as "The Defense of Marriage Act" has been passed by Congress. The Act defines marriage in federal law

as "a union between one man and one woman." President Clinton has stated that he will sign the legislation, a move that has angered gay-rights advocates.

The MONITOR provides a review of the latest activity begin-ning with the Supreme Court's ruling in Romer v. Evans et al.

Supreme Court Finds Colorado's Amendment 2 Unconstitutional

Giving gay-rights advocates an important legal victory, the Supreme Court on May 20, ruled 6-to-3 that an anti-gay amendment to Colorado's Constitution, known as Amendment 2, was prohibited by the Constitution. In delivering the opinion of the Court, Justice Anthony M. Kennedy wrote, "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.... This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." The opinion was, explicitly, grounded in the first Justice's Harlan's dissent in Plessy v. Ferguson, the 1896 decision in which the court gave its blessing to racial segregation.

Background

In November, 1992, 53.4 percent of Colorado voters approved the anti-gay ballot initiative which became known as Amendment 2 from its placement on the ballot. The initiative amended the Colorado Constitution's Bill of Rights to read as follows:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation
>
> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shallenact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Amendment 2 thus repealed existing ordinances and policies in Colorado that protected gay and lesbian persons from discrim- ination on the basis of sexual orientation or activity, and also prohibited the future passage of such anti-discrimination measures by or within the state as long as Amendment 2 remained in the Constitution.

State Court Action in Colorado

Less than two weeks after the initiative passed, a legal team opposing Amendment 2, consisting of the ACLU of Colorado, the National ACLU Lesbian and Gay Rights Project, and the Lambda Legal Defense and Education Fund filed a complaint, Evans et al. v. Romer, in

Denver District Court, claiming the amendment was unconstitutional. The plaintiffs in the case included nine Colorado residents, the cities of Boulder, Aspen and Denver and the Boulder Valley School District. The defendants were the official representatives of the State of Colorado, Gov. Roy Romer and Attorney General Gale Norton (Gov. Romer previously had denounced the initiative).

On January 15, 1993, the day Amendment 2 was to have gone into effect, District Court Judge Jeffrey Bayless granted an injunction against enforcement of the initiative until trial on its merits stating that Amendment 2 would likely be ruled unconstitutional. The Colorado Supreme Court subsequently upheld the injunction, 6-to-1 and review was denied by the U.S. Supreme Court.

A trial on the merits was held in October of 1993. Judge Bayless ruled in December that there was no compelling state interest for such a law, and consequently that the amendment was unconstitutional. The State appealed the ruling to the Colorado Supreme Court, which affirmed the lower court's decision, 6-to-1.

U.S. Supreme Court

The U.S. Supreme Court heard oral argument on October 10, 1995 and handed down its 6-to-3 decision affirming the State Supreme Court's decision on May 20, 1996. While the Supreme Court affirmed the lower court's ruling, it did not adopt the Colorado Court's application of a heightened scrutiny standard to determine that Amendment 2 was not narrowly tailored to serve a compelling state interest. Instead, the Court ruled that Amendment 2 was not rationally related to a legitimate government purpose and was facially discriminatory.

The opinion of the Court, written by Justice Kennedy, and joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer, rejected the State's principal argument that Amendment 2 puts gays and lesbians in the same position as all other persons by denying them special rights. Justice Kennedy went on to observe the "sweeping and comprehensive" changes in legal status effected by Amendment 2 that were noted by the State Supreme Court so that, "[h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres." The opinion states that,

> "...we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they

already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civil life in a free society."

In its decision, the majority cited Hunter v. Erickson, a 1969 Supreme Court decision striking down an Ohio enactment requiring a referendum to be conducted on any local fair housing ordinance. Although minorities were not entitled to have such an ordinance enacted, the state could not, consistent with the Fourteenth Amendment, make it harder for them to achieve their goals through the legislative process than for others.

In a stinging dissent, Justice Antonin Scalia, joined by Chief Justice Rehnquist and Justice Thomas, noted his belief that Amendment 2 simply prohibited "special treatment of homosexuals, and nothing more." Referring to a 1986 Supreme Court ruling (Bowers v. Hardwick) in which the U.S. Supreme Court upheld a state's right to make homosexual conduct a crime, Justice Scalia wrote, "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct."

Stripped of the aspersions cast on the majority opinion, the essence of Scalia's view of the case may be found in his concluding paragraph:

> "Today's opinion has no foundation in American constitu-tional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent."

Reactions

Gay-rights advocates were jubilant after the Court's decision. Elizabeth Birch, Executive Director of the Human Rights Campaign, the largest national lesbian and gay political organization in the nation, called the Court's decision "an outstanding moral victory" that "merely ensures that Colorado -- and every other state -- cannot pass laws to deny gay and lesbian Americans equal access to the democratic process."

Supporters of Amendment 2, on the other hand, were dismayed. Will Perkins, Chairman of the Board of Colorado for Family Values, stated:

> "Three years ago the citizens of Colorado voted to protect the liberties of those who hold traditional views of sexuality. They hated no one, but merely wanted to keep government out of the business of legislating private decisions and historic controversies. Today our

nation's highest court ruled that citizens do not have the right to protect those freedoms. Those forces bent on forcing a deviant lifestyle down the throats of the American people have moved a long step forward in making government their pet bully."

DEFENSE OF MARRIAGE ACT

Introduction

Following the Supreme Court's decision, some in and outside Congress moved swiftly to enact the Defense of Marriage Act, which would, for the first time in the nation's history, define marriage in federal law.

The House overwhelmingly passed the Defense of Marriage Act (DOMA) on July 12th after a passionate debate and the bill was passed by the Senate on September 10 by a vote of 85-14. A bipartisan group of Senators had announced its intentions to add to the bill, as an amendment, a measure protecting gays and lesbians from public and private employment discrimination, Employment Non-Discrimination Act (ENDA). After some political maneuvering the Senate agreed to an "up and down" vote on ENDA after the vote on DOMA. While ENDA was defeated 49-50, it was hailed by many as a victory to have it considered on the floor of the Senate, and for it to almost pass the bill on a first vote. President Clinton has said he will sign the DOMA legislation, according to a statement released by the White House, which explains that the President "has long opposed same-sex marriage."

(The next MONITOR will include an article on the ENDA "victory.")

Background

Currently no state in the union recognizes same-sex marriages. However, gay rights lawyers appear to be on the verge of winning the right of homosexuals to marry in Hawaii. Three gay couples have filed a lawsuit, Baehr v. Miike, contending that the state of Hawaii discriminated on the basis of sex when it denied them marriage licenses because they were not of the opposite sex. The Hawaiian Supreme Court ruled that the state may not deny same-sex couples marriage licenses without a "compelling" reason and the case has been remanded to the lower court for a trial which is to begin in September. If the plaintiffs are successful, other states might be compelled to recognize the legal marriage of another state through the Full Faith and Credit Clause of the United States Constitution which provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

The stated purpose of the Defense of Marriage Act is "to define and protect the institution of marriage." The legislation would define marriage as the "legal union between one man and one woman" and define "spouse" as "a person of the opposite sex who is a husband or a wife." The measure would allow states not to recognize a same-sex marriage licensed by another state by adding a section to the federal Full Faith and Credit statute (28 U.S.C. ***1738) that allows states not to recognize the public acts of another State if they relate to that State's recognition of a same-sex marriage. The bill would also deny partners in same-sex unions eligibility for a variety of federal benefits, such as survivor benefits under the federal veterans or social security programs or to file joint tax returns.

Opponents of the Defense of Marriage Act contend the legislation raises significant constitutional problems because the provision amending the Full Faith and Credit statute directly contradicts the first sentence in the Constitution's Article IV Sec 1. Supporters of the legislation, however, contend that this added provision is a constitutional "exercise of Congress' power" as permitted by the same section of the Constitution.

Professor Chai Feldblum of the Georgetown University Law Center notes that the first sentence says "every state is required to recognize the official public acts and proceedings of other States." She adds that "there is no way this second sentence could be read to mean: States have to recognize the official acts of other States, except when Congress passes a statute to say they don't have to. That would effectively allow any Congressional statute to amend the Full Faith and Credit clause of the Constitution -- without going through the bother of a constitutional amendment. That cannot be a correct reading of this sentence." (emphasis in original)

The correct interpretation of the second sentence, according to Professor Feldblum, is that "Congress may pass implementing legislation to carry out, for practical purposes, the logistics of the constitutional mandate. Specifically, Congress may pass laws to establish the manner is which the acts or proceedings of a State may be proved, and the specific effects in the States the recognition of such acts or proceedings will have as a practical matter." (emphasis in original).

In addition, some argue that states would not be required "to give full faith and credit" to the acts of another state that offended the first state's public policy under the "public policy" exemption.

House Action

The Defense of Marriage Act, H.R. 3396, was introduced on May 7th by Representative Bob Barr (R-GA) and was referred to the Constitution Subcommittee of the Judiciary Committee. A single hearing was held on the bill on May 15th. Testifying at the hearing were various state legislators, academics, journalists, and civil rights advocates.

Terrence Tom, Hawaii State Representative, testified that the gay rights lawyers' strategy of using the Full Faith and Credit Clause to supersede the public policy of the other forty-nine

states by forcing them to recognize Hawaii same-sex marriage licenses was undemocratic. He said:

> "If inaction by the Congress runs the risk that a single judge in Hawaii may re-define the scope of legislation throughout the other forty-nine states, failure to act is a dereliction of the responsibilities you are invested with by the voters."

At both the subcommittee and the full committee mark-ups, there was tremendous debate as to how same-sex marriages pose a threat to "traditional marriages" between one man and one woman. Supporters of the bill argued that the legislation was needed to protect the institution of marriage from the "assault by the homosexual extremists." Rep. Barney Frank (D-MA), an opponent of the bill and an openly gay member of Congress, questioned supporters about whose marriage is threatened by a same-sex union, stating: "How does the fact that I love another man and live in a committed relationship with him threaten your marriage? Are your relationships with your spouses of such fragility that the fact that I have a committed, loving relationship with another man jeopardizes them?"

Ironically, the Defense of Marriage Act was marked-up by the full Judiciary Committee the same day as the Church Arson Prevention Act of 1996, the legislation responding to the recent church burnings. During debate on the latter bill, several Democratic Committee members noted how government actions can help create an environment of hatred. Referring to the Defense of Marriage Act, Rep. Patricia Schroeder (D-CO) said, "If you think there's not hate in this country, you're going to love this bill."

House floor debate on the bill began on Thursday evening, July 11th and the bill passed the following day by a vote of 342 to 67. Despite the lopsided outcome, the debate became intense at times as supporters of the bill quoted the Bible to support their notion that homosexuality is "perverse" and that marriage, "a God-given principle, is under attack." Rep. Tom Coburn (R-OK) said the issue at hand was homosexuality, noting, "The real debate is about homosexuality and whether or not we sanction homosexuality in this country.... Homosexuality is immoral.... it is based on perversion and is based on lust."

Opponents of the measure, including Rep. Steve Gunderson (R-WI) the only openly gay Republican in Congress, spoke of fairness and election year politics. Rep. Gunderson asked, "Why are we so mean? Why must we attack one element of our society for some cheap political gain?" Added Representative John Lewis, a veteran of civil rights struggles, "I will not turn my back on another American. I will not oppress my fellow human being. I have fought too hard and too long against discrimination."

Representative Barney Frank (D-MA)offered two amendments that would have diluted the adverse effects of the bill. Neither one passed. The first sought to amend the portion of the bill which defines marriage for federal purposes as a legal union between a man and a woman. The second would have voided the law in those instances where a state had approved same-sex

marriage through such democratic means as state legislation or a ballot initiative.

Senate Action

The Defense of Marriage Act, S. 1740, was introduced by Senator Don Nickles (R-OK) on May 8th and was sent to the full Judiciary Committee for consideration. A hearing on the bill was held July 11th and Senator Edward Kennedy (D-MA) was successful in extending the scope of the hearing to include ENDA, the Employment Non-Discrimination Act which bars both private and public employers from firing or refusing to hire individuals solely on the basis of their sexual orientation. A bipartisan group of senators including Sen. Kennedy, Sen. James Jeffords (R-VT), and Sen. Joseph I. Lieberman (D-CT), announced their intention to introduce an amendment on the Senate floor to attach ENDA to the Defense of Marriage Act.

Among those who testified in support of the Defense of Marriage Act at the hearing were Sen. Nickles, the chief sponsor of the bill, and Gary Bauer, President of Family Research Council. Mr. Bauer asserted that, "the decline of marriage has spawned America's most destructive social problems including sexually transmitted diseases, alcohol and drug abuse, educational failure, community decline, and ... a frightening epidemic of crime which has changed the way we live."

Mitzi Henderson, President of Parents, Family and Friends of Lesbians and Gays (P-FLAG) was among those who testified against the bill and suggested that forbidding same-sex unions would do nothing to strengthen the institution of marriage. Henderson noted:

> "I appreciate honest attempts to strengthen the American family, but let's not cheapen the concerns of American families by pretending that passing a bill that does nothing will help a single family...My marriage does not need to be defended. My husband and I do not need your help to cherish one another, and to respect our vows of more than 40 years. What my family needs is a more tolerant America."

The Senate Judiciary Committee never marked-up the bill, however, after days of negotiations among party leaders, an agreement was reached which provided for straight "up or down" votes on both DOMA and ENDA. The bills were voted on on September 10, with DOMA passing 85-14 and ENDA failing 49-50.

Public Opinion

A recent poll of 1,022 Americans conducted by the Mellman Group indicates that there is no clear consensus on the Defense of Marriage Act. Slightly more than one-third of those polled (37 percent) support the federal law and slightly less than one-third (29 percent) are opposed to the legislation. Roughly one-third (34 percent) remain undecided. Men are slightly more likely than women to support the legislation.

The polling data also demonstrates the lack of consensus when the question is framed, "Is the Defense of Marriage Act Necessary?" Thirty-nine percent of Americans think the legislation is unnecessary, 31 percent say its necessary and more than 30 percent are not sure of the importance. Regardless of views as to the legislation's necessity, there is a consensus that this issue should not be a priority. Only 13 percent of those polled said that "passing this law should be an important priority" and only 17 percent said a candidate's vote against the Defense of Marriage Act would be a "very convincing" reason to vote against that individual.

CHURCH ARSON PREVENTION ACT ENACTED INTO LAW

In response to the rash of arsons that have destroyed more than 66 Black churches in the past 18 months, the United States Congress acted swiftly to pass unanimously the Church Arson Prevention Act of 1996, S. 1890 and H.R. 3525, and on July 3, 1996, President Clinton signed the bill into law (PL 104-155). The bill, introduced in the House on May 23, 1996 by Representatives Henry Hyde (R-IL) and John Conyers (D-MI) and on June 10, 1996 in the Senate by Senators Lauch Faircloth (R-NC) and Edward Kennedy (D-MA), seeks to give Federal authorities adequate tools "to prosecute and bring to justice people who burn, desecrate, or otherwise damage religious property" and reauthorizes the Hate Crimes Statistics Act to the year 2002.

PROVISIONS OF THE ACT

While current federal law makes such acts criminal, this act strengthens the law in the following ways:

Prohibition of Violent Interference with Religious Worship

The Act provides that the crime of "intentionally defac[ing] or destroy[ing] any religious real property because of race, color, or ethnic characteristics of any individual associated with that religious property" is subject to federal authority, and increases the prison sentences for committing such crimes from 10 to 20 years.

Additionally, if in the course of the crime any person suffers bodily harm including a "public safety officer" who performs duties as a result of the crime, the bill increases the prison sentence to a maximum of 40 years, and also authorizes the imposition of a fine.

The statute of limitations for prosecuting, trying, or punishing any person for any "noncapital offense" is extended from 5 to 7 years after the date the offense was committed.

Loan Guarantee Recovery Fund

This provision provides for the utilization of previously appropriated funds to establish a recovery fund to be administered by the U.S. Department of Housing and Urban Development and authorizes HUD to make guaranteed loans to financial loan institutions in order to aid charitable organizations (501(c)(3)) that have been victimized by acts of "arson or terrorism."

Compensation of Victims, Requirement of Inclusion in List of Crimes Eligible for Compensation

This provision allows for persons injured by acts of arson to receive compensation through the Victims of Crime Act of 1984.

Authorization for Additional Personnel to Assist State and Local Law Enforcement

This section provides for the appropriation of additional monies to the Department of Treasury and the Department of Justice (including the Community Relations Service) in fiscal year 1996-1997 to increase "the number of personnel, investigators, and technical support personnel" who will be responsible for "investigat[ing], prevent[ing], and respond[ing]" to potential church arsons or terrorist acts.

Reauthorization of Hate Crimes Statistics Act

The bill also reauthorizes the Hate Crimes Statistics Act to the year 2002. The Hate Crimes Statistics Act requires the Department of Justice to collect data on crimes which "manifest prejudice based on race, religion, sexual orientation, or ethnicity." Its authorization had expired in 1995.

Sense of the Congress

Finally, the act "commends those individuals and entities that have responded with funds to assist in the rebuilding of places of worship that have been victimized by arson; and encourages the private sector to continue these efforts so that places of worship that are victimized by arson can return to their pre-arson status."

Expressions of Outrage

There have been many expressions of outrage about the church arsons. Wade Henderson, Executive Director of the Leadership Conference on Civil Rights stated:

> "The fires that have consumed or damaged over 80 African-American churches in the South are more than horrific acts of desecration. They are a painful reminder of extreme

racial conflict in American life which has yet to be fully resolved. They are also an attack on religious freedom, which is at the foundation of American democracy. [The LCCR is] pleased by the bipartisan response in Congress particularly with the introduction and swift action on the Church Arson Prevention Act."

Representative Henry Hyde (R-IL) said:

"The arson of a place of worship is repulsive to us as a society. When the fire is motivated by racial hatred, it is even more reprehensible. . . [W]e in Congress are unanimous in our condemnation of those who would express their hatred by destroying or damaging religious property. While we may not be able to legislate this problem away, we can ensure that those who commit these crimes are swiftly and firmly punished."

Senator Carol Moseley-Braun (D-IL) delivered the following comments on the floor of the Senate:

"We can take action in this U.S. Congress, the Senate and the House, and the President can take action. We can all come together through our Government to take leadership in showing that in this America this kind of criminality will not be tolerated, but we can only do that, and it only takes real meaning when we are joined in our official capacity by individual, unofficial action, when the churches themselves come together to participate in ceremonies and services and marches and demonstrations in favor of unity and in favor of love.... Now is the time for good people to stand up and say: 'The America that we know and the America we believe is in an America that cherishes the value of brotherhood and love and unity.'"

SUPREME COURT AGAIN STRIKES DOWN MAJORITY-MINORITY CONGRESSIONAL DISTRICTS

On June 13, 1996, the Supreme Court in redistricting cases from Texas and North Carolina ruled that four majority-minority districts were unconstitutional racial gerrymanders. In its 5-4 decisions, the Court affirmed its earlier decisions in redistricting cases that strict scrutiny is triggered (as in Shaw v. Reno (Shaw I)) when the shape of the district is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races without regard for traditional redistricting principles." Alternatively, the court will apply strict scrutiny (as in Miller v. Johnson) when race is the "dominant and controlling rationale subordinating traditional race-neutral principles." Applying this standard in the Texas and North Carolina cases, the Court found that the districts were not narrowly tailored to serve a compelling state interest and thus violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

BUSH v. VERA, No. 94-805

Background

Following the 1990 Census and reapportionment, Texas gained three additional congressional districts largely because of the growth of minority populations in Houston and Dallas. The state legislature, in its efforts to comply with the Voting Rights Act, redrew the congressional district lines in a manner that created three majority-minority districts in Texas: District 30, a new majority-African-American district in Dallas County which elected Rep. Eddie Bernice Johnson, a Democrat who is African-American; District 29, a new majority-Hispanic district in the Houston metropolitan area that elected Rep. Gene Green, a Democrat who is not Hispanic; and District 18, a reconfigured majority-African-American district adjacent to District 29 that is now represented by Sheila Jackson Lee, a Democrat who is African-American. The legislature's plan was precleared by the Department of Justice and the 1992 congressional elections were held under the plan, with the indicated results.

Subsequently, the plan was challenged in federal court by six Texas voters, all but one of whom resided in Districts 18, 29 or 30. They alleged that 24 of Texas' 30 congressional districts were racial gerrymanders and thus violated the Fourteenth Amendment to the Constitution. 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 "in appearance and in reality...racially gerrymandered" and thus unconstitutional. The Governor of Texas, private intervenors, and the United States as intervenor appealed the case to the Supreme Court, and oral argument was held on December 5, 1996.

Opinions:

There was no majority opinion in the case. Justice O'Connor announced the judgment of the Court and wrote a plurality opinion joined by Chief Justice Rehnquist and Justice Kennedy. She also filed a separate concurring opinion as did Justice Kennedy. Justice Thomas filed an opinion concurring in the judgment, which Justice Scalia joined. Justices Stevens and Souter filed separate dissenting opinions both of which were joined by Justices Ginsburg and Breyer.

Plurality Opinion

Justice O'Connor's plurality opinion begins with a discussion of standing and states that all but one of the plaintiffs have standing as they live in Districts 18, 29 or 30. She then turns to a discussion of whether the districts are subject to strict scrutiny, beginning with a statement that strict scrutiny does not apply merely because the districts were created "with consciousness of race," nor does it apply to all instances of "intentional creation of majority-minority districts." The standard is triggered, she asserts, as the Court said in Shaw I, when the shape of the districts is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races without regard for traditional redistricting principles" or as outlined in Miller, when race

was the "dominant and controlling rationale subordinating traditional race-neutral districting principles."

In this case, while recognizing that protection of incumbent members of Congress was a major consideration in drawing the districts, the Court concludes, as had the district court, that race was the predominant factor, thus triggering strict scrutiny. Justice O'Connor then turns to the question of whether the districts meet the strict scrutiny test, i.e., are narrowly tailored to meet a compelling state interest, and answers in the negative. She begins with a discussion of the three compelling reasons put forth by the appellants:

o to avoid liability under the "results" test of section 2 of the Voting Rights Act

o to remedy past and present racial discrimination

o to comply with the nonretrogression principle of section 5 of the Voting Rights Act (in the creation of District 18 only)

As to the first asserted reason Justice O'Connor dismisses section 2 compliance as a compelling interest in this case, stating:

> "If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, section 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in section 2 requires the race-based creation of a district that is far from compact.

In reviewing the second asserted reason, the state's interest in remedying discrimination, the Justice argues that "specific identified discrimination" is required and there must be a strong basis in evidence that remedial action is necessary. In this case, she asserts the only current problem cited is "alleged vote dilution" and as with the section 2 claim, such claims "will not justify race-based districting unless 'the state employs sound districting principles, and...the affected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority.'"

The state's argument that the reconfiguring of district 18 was justified by the need to comply with section 5 of the Voting Rights Act is dismissed by Justice O'Connor with the assertion that the goal of section 5 in requiring resubmission to the Department of Justice of new electoral arrangements, is to prevent retrogression in the position of minorities. Here, Justice O'Connor says, district 18 provides for "substantial augmentation" of the African-American population in the district and thus their political influence.

Concurring Opinions

Justice O'Connor also wrote a separate concurring opinion to make clear that she still believes that state districting arrangements can be justified by a need to comply with the results test of Section 2. She continues that it would be irresponsible for states to disregard the section 2 results test, given the history of Supreme Court cases interpreting and enforcing the obligations of section 2 and "assuming but never directly addressing its constitutionality."

She then provides a framework for complying with section 2 and eliminating "unnecessary race-based state action."

1. Strict scrutiny is not triggered unless race subordinates traditional redistricting criteria for its own sake or as a proxy;

2. section 2 may require the creation of majority-minority districts when the three Gingles principles are present, i.e., (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;

3. a state's interest in avoiding liability under section 2 is a compelling state interest;

4. a district that "substantially addresses" the potential section 2 liability and "does not deviate substantially from a hypothetical court-drawn section 2 district for predominantly racial reasons" will be deemed narrowly tailored; and

5. bizarrely-shaped and non-compact districts "that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district for predominantly racial reasons, are unconstitutional."

She concludes:

"As the disagreement among Members of this Court...shows, the application of the principles that I have outlined sometimes requires difficult exercises of judgment. That difficulty is inevitable. The Voting Rights Act requires the States and the courts to take action to remedy the reality of racial inequality in our political system, sometimes necessitating race-based action, while the Fourteenth Amendment requires us to look with suspicion on the excessive use of racial considerations by the government. But I believe that the States, playing a primary role, and the courts, in their secondary role, are capable of distinguishing the appropriate and reasonably necessary uses of race from its unjustified and excessive uses."

Justice Thomas, who concurred in what therefore became the Court's judgment but not in its reasoning, wrote a separate opinion joined by Justice Scalia. These two justices disagree with Justice O'Connor's assertion that strict scrutiny does not apply to all government classifications in which race is a factor. The concurrence says:

> "I am content to reaffirm our holding in Adarand that all racial classifications by government must be strictly scrutinized and, even in the sensitive area of state legislative redistricting, I would make no exception."

Justice Kennedy also wrote a concurring opinion saying that the portion of the plurality opinion that states that strict scrutiny does not apply in all cases is dicta, i.e., unnecessary to this holding.

Dissenting Opinions

There are two dissenting opinions: one by Justice Stevens and a second by Justice Souter. Justices Ginsburg and Breyer joined both dissents.

Justice Stevens begins by stating that the entire map is a political gerrymander, not a racial one, and that the Court's decision focuses exclusively on race and ignores the political and geographic factors considered in drawing the districts. He concludes that even if strict scrutiny applies to the districts they should be held constitutional because race was used "only to the extent necessary to comply with the state's responsibilities under the Voting Rights Act while achieving other race-neutral policies and geographical requirements." He states:

> "[T]he Court has with its 'analytically distinct' jurisprudence of racial gerrymandering [Shaw I] struck out into a jurisprudential wilderness that lacks a definable constitutional core and threatens to create harms more significant than any suffered by the individual plaintiffs challenging these districts."

Justice Stevens also makes a distinction between the plan a court may put in place and one a state legislature may adopt:

> "The fact that non-compact districts may be unacceptable judicial remedies does not speak to the question whether they may be acceptable when adopted by a state legislature. Because these districts satisfy the State's compelling interest and do so in a manner that uses racial considerations only in a way reasonably designed to ensure such a satisfaction, I conclude that the Districts are narrowly tailored."

In conclusion, Justice Stevens writes:

> "The history of race relations in Texas and throughout the South demonstrates overt evidence of discriminatory voting practices lasting through the 1970's.... Even in recent

years, Texans have elected only two black candidates to statewide office; majority-white Texas districts have never elected a minority to either the State Senate or the United States Congress.... One recent study suggests that majority-white districts throughout the South remain suspiciously unlikely to elect black representatives.... And nationwide, fewer than 15 of the hundreds of legislators that have passed through Congress since 1950 have been black legislators elected from majority-minority districts.... while only three were elected from majority-white districts.

"Perhaps the state of race relations in Texas and, for that matter, the Nation, is more optimistic than might be expected in light of these facts. If so, it may be that the plurality's exercise in redistricting will be successful. Perhaps minority candidates, forced to run in majority-white districts, will be able to overcome the long history of stereotyping and discrimination that has heretofore led the vast majority of majority-white districts to reject minority candidacies. Perhaps not. I am certain only that bodies of elected federal and state officials are in a far better position than anyone on this Court to assess whether the Nation's long history of discrimination has been overcome, and that nothing in the Constitution requires this unnecessary intrusion into the ability of States to negotiate solutions to political differences while providing long-excluded groups the opportunity to participate effectively in the democratic process. I respectfully dissent."

Justice Souter in his dissent questions, as he has since Shaw I, just what this cause of action requires in districting cases. He writes that the majority has not identified the injury that plaintiffs must suffer or described "the elements necessary and sufficient to make such a claim."

He continues:

"States seeking to comply in good faith with the requirements of federal civil rights laws 'now find themselves walking a tight-rope: if they draw majority black districts they face lawsuits under the equal protection clause; if they do not, they face both objections under section 5 of the Voting Rights Act and lawsuits under section 2'.... The States, in short have been told to get things just right, no dilution and no predominant consideration of race short of dilution, without being told how to do it. The tendency of these conflicting incentives is toward stalemate, and neither the moral force of the Constitution nor the mercenary threat of liability can operate effectively in this obscurity."

Justice Souter, like Justice Stevens, also argues that it is desirable for the States to continue to have greater flexibility than federal courts have in enforcing section 2, and asserts that by repairing Shaw I through adopting specific requirements as to district shape "the Court would be reducing the discretion of a State seeking to avoid or correct dilution to the scope of a federal court's discretion when devising a remedy for dilution...."

In concluding his criticism of Shaw I and its progeny, and calling for their abandonment, Justice Souter wrote:

> "It is difficult to see how the consideration of race that Shaw condemns (but cannot avoid) is essentially different from the consideration of ethnicity that entered American politics from the moment that immigration began to temper regional homogeneity. Recognition of the ethnic character of neighborhoods and incumbents, through the application of just those districting principles we now view as traditional, allowed ethnically identified voters and their preferred candidates to enter the mainstream of American politics...and to attain a level of political power in American democracy. The result has been not a state regime of ethnic apartheid, but ethnic participation and even a moderation of ethnicity's divisive effect in political practice. For although consciousness of ethnicity has not disappeared from the American electorate, its talismanic force does appear to have cooled over time....
>
> "There is, then, some reason to hope that if vote dilution is attacked at the same time that race is given the recognition that ethnicity has historically received in American politics, the force of race in politics will also moderate in time.... This possibility that racial politics, too, may grow wiser so long as minority votes are rescued from submergence should be considered in determining how far the Fourteenth and Fifteenth Amendments require us to devise constitutional common law to supplant the democratic process with litigation in federal courts. It counsels against accepting the profession that Shaw has yet evolved into a manageable constitutional standard, and from that case's invocation again today I respectfully dissent."

SHAW v. HUNT (SHAW II) No. 94-923

Background

As the result of reapportionment after the 1990 Census, North Carolina gained one congressional seat for a total of twelve. The state legislature adopted a congressional redistricting plan in late 1991 that created one majority African-American congressional district in the northeast portion of the state (District 1). Acting under section 5 of the Voting Rights Act, the Department of Justice rejected the plan, stating that the state legislature could have drawn a second majority African-American district in the southcentral to southeast portion of the state. Subsequently, the state legislature drew a second majority African-American district in the northcentral portion of the state along Interstate 85 (District 12), and the revised map was precleared by DOJ.

Districts 1 and 12 have roughly the same proportion African-American population, 57 percent of the total population and 53 percent of the voting-age population. The 1st district is represented by Democrat Eva Clayton and the 12th by Democrat Melvin Watt, both of whom are African-American.

This is the second time a challenge to North Carolina's 12th congressional district has been before the Supreme Court. In 1993, the Court ruled in Shaw v. Reno (Shaw I) that plaintiffs challenging the creation of the majority-African-American district had "stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment" and remanded the case to the lower court. After a six day trial, the district court on August 1, 1994, ruled that the state's plan survived strict scrutiny as it was narrowly tailored to serve the compelling state interest of compliance with the Voting Rights Act. The Supreme Court reversed the district court decision.

The Opinions

Chief Justice Rehnquist wrote the opinion of the Court which was joined by Justices O'Connor, Scalia, Kennedy and Thomas. The Court held that the state's redistricting plan was a violation of the Equal Protection Clause as it was not narrowly tailored to serve a compelling state interest. The opinion examines the appellees' assertion that three separate compelling state interests should sustain District 12:

o eradication of the effects of past and present discrimination

o compliance with section 5 of the Voting Rights Act

o compliance with section 2 of the Voting Rights Act

In discussing point 1, Justice Rehnquist argues that to serve as a compelling state interest, the discrimination to be eradicated must be specific and identifiable and that "a generalized assertion of past discrimination in a particular industry or region is not adequate because it 'provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.'" The Chief Justice writes that there was little evidence to suggest that in drawing the lines the legislature considered evidence of discrimination "beyond what individual members may have recalled from personal experience."

The majority without deciding whether compliance with the VRA is a compelling state interest, which the District Court had held, said that "creating an additional majority-black district was not required under a correct reading of section 5 and that District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding section 2 liability." As to section 5, the majority concluded that North Carolina's first plan was an improvement on the situation that existed previously and that:

> "North Carolina's...plan even if it falls short of what might be accomplished in terms of increasing minority representation, cannot violate section 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution."

As to section 2 liability, the Court assumes for purposes of argument that avoiding such liability is a compelling state interest and that the state legislature "had a strong basis in evidence" to conclude that creation of a second African-American district was necessary to avoid the liability, but concludes that:

> "District 12 could not remedy any potential section 2 violation... [A] plaintiff must show that the minority group is 'geographically compact' to establish section 2 liability. No one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race...Therefore where that district sits 'there neither has been a wrong nor can be a remedy.'"

As to the argument raised by the appellees and accepted by the District Court that a State may in its efforts to avoid section 2 liability draw a majority-minority district anywhere in the state, the majority says:

> "We find this position singularly unpersuasive. We do not see how a district so drawn would avoid section 2 liability. If a section 2 violation is proven for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice'.... The vote dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State.... To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not."

Dissenting Opinions

Justice Stevens begins his dissent, which is joined in part by Justices Ginsburg and Breyer, by stating:

> "...I am convinced that the Court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided. A majority's attempt to enable the minority to participate more effectively in the process of democratic government should not be viewed with the same hostility that is appropriate for oppressive and exclusionary abuses of political power."

The opinion then discusses in some detail his view that the Court "has failed to supply a coherent theory of standing to justify its emerging and misguided race-based districting jurisprudence." This part of his opinion is not joined by Justices Ginsburg and Breyer. He asserts that the plaintiffs "have surely failed to prove the existence of such injuries to the degree that we normally require at this stage of the litigation."

As to the merits, Justice Stevens argues that the facts of this case should not trigger strict scrutiny review as established in Miller (race must be the predominant factor overriding traditional districting principles). He continues that the Court's holding that race was the predominant factor is based on (1) the state's admission that its "overriding" purpose was to create two majority African-American districts and (2) the non-compact shape of district 12. As to point 1, he says that the state's intention does not shed any light on whether traditional districting principles were subordinated nor does the shape of the district since there is neither federal requirement, or a North Carolina state requirement that districts be compact.

Further, he asserts that the North Carolina legislature could have simply adopted the map recommended by the DOJ, but chose instead to draw district 12 to protect incumbents and to maintain the rural and urban communities of interest in the state. He then cites the plurality opinion in Bush v. Vera that "an otherwise compact majority-minority district that is misshapen by nonracial, political manipulation" should pose no constitutional problem, and asserts that district 12 fits this description and thus should be upheld.

The opinion adds that the history of discrimination (present and past) in North Carolina politics, the desire to avoid litigation to overcome the DOJ's objection, and to avoid section 2 liability are all compelling state interests. As to the majority opinion's reasoning that even if the state met the compelling interest prong, the district was not narrowly tailored because district 12 was not located in the section of the state that could have given rise to section 2 liability, Justice Stevens says:

> "The Court's analysis gives rise to the unfortunate suggestion that a State which fears a section 2 lawsuit must draw the precise district that it believes a federal court would have the power to impose. Such a proposition confounds basic principles of federalism, and forces States to imagine the legally 'correct' outcome of a lawsuit that has not even been filed."

In conclusion, Justice Stevens writes:

> "It is, of course, irrelevant whether we, as judges, deem it wise policy to create majority-minority districts as a means of assuring fair and effective representation to minority voters. We have a duty to respect Congress' considered judgment that such a policy may serve to effectuate the ends of the constitutional Amendment that it is charged with enforcing. We should also respect North Carolina's conscientious effort to conform to that congressional determination. Absent some demonstration that voters are being denied fair and effective representation as a result of their race, I find no basis for this Court's intervention into a process by which federal and state actors, both black and white, are jointly attempting to resolve difficult questions of politics and race that have long plagued North Carolina. Nor do I see how our constitutional tradition can countenance the suggestion that a State may draw unsightly lines to favor farmers or city dwellers, but not

to create districts that benefit the very group whose history inspired the Amendment that the Voting Rights Act was designed to implement.

"Because I have no hesitation in concluding that North Carolina's decision to adopt a plan in which white voters were in the majority in only 10 of the State's 12 districts did not violate the Equal Protection Clause, I respectfully dissent."

Justice Souter, joined by Justices Ginsburg and Breyer filed a one sentence dissent stating: "My views on this case are substantially expressed in my dissent to Bush v. Vera.

SUPREME COURT RULES THAT VMI MUST ADMIT WOMEN

Waving signs that read "Men of Quality Respect Women's Equality" and "Better Late than Never", women of all ages congregated on the steps of the United States Supreme Court on June 26, 1996 to celebrate the Supreme Court's 7-1 ruling in United States v. Virginia (No. 94-1941). The court held that the male-only admissions policy at the Virginia Military Institute violates the equal protection clause of the Fourteenth amendment and that Virginia's creation of Virginia's Women's Institution for Leadership(VWIL) at Mary Baldwin, a private, all-female college, was an inadequate attempt to remedy the Constitutional violation. Justice Thomas did not participate because his son attends VMI.

Background

As reported in the last Civil Rights Monitor (Vol. 8 No.4), 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." This method entails extensive physical training and mental challenges. The United States filed suit challenging the constitutionality of the male-only admissions policy (particularly in the absence of a comparable program for women). The district court found Virginia's single sex-program in general justifiable, but questioned the absence of a comparable program for women. The Fourth Circuit Court of Appeals affirmed the lower court decision, holding that VMI lacked adequate justification for the absence of a comparable program for women. The case was remanded to the lower court for an acceptable remedy. Subsequently, the state created the Virginia Women's Institution for Leadership (VWIL). The lower court and the Fourth Circuit Court of Appeals held that the creation of VWIL was an acceptable remedy in compliance 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." The United States appealed to the Supreme Court.

Opinions

In deciding U.S. v. VMI the Court relied on the standards and applied remedies established in several prior cases. In Mississippi University for Women, 458 U.S. 455, at 724 (1982) the Supreme Court established the necessary requirements to justify "gender-based government action". The Court placed the burden of justification entirely on the State by holding that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." That standard resulted in a ruling requiring the admission of a male to a previously women-only state nursing school program. In Reed v. Reed (1971)the Supreme Court held unconstitutional Idaho's Code which stated that among "several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females."

The Court sought guidance from Milliken v. Bradley (1977) and Louisiana v. U.S. Court (1965) when reviewing the appropriate remedy for gender discrimination. According to Milliken, an appropriate remedy is one that "closely fit[s] the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination]'". The Court in Louisiana v. U.S. (1965) ruled that the appropriate remedy for any "unconstitutional exclusion" must "eliminate [so far as possible] the discriminatory effects of the past" and "bar like discrimination in the future."

The opinion of the Court was delivered by Justice Ginsburg and joined by Justices Stevens, O'Connor, Kennedy, Souter, and Breyer. Justice Ginsburg wrote:

> "We find no persuasive evidence in this record that VMI's male-only admission policy 'is in furtherance of a state policy of diversity.' No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. A purpose genuinely to advance an array of educational options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan -- a plan to 'afford a unique educational benefit only to males.' However 'liberally' this plan serves the State's sons, it makes no provision whatever for her daughters. That is not *equal* protection."

In its consideration of Virginia's proffered attempt to protect VMI as male-only by establishing VWIL, the Court described the inadequacies of the program at Mary Baldwin College:

> "VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed.... Instead, the VWIL program 'deemphasize[s]' military education, and uses a 'cooperative method' of education 'which reinforces self-esteem.'
>
> "In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor

can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network....

"In sum, Virginia's remedy does not fix the constitutional violation; the State has shown no 'exceedingly persuasive justification' for withholding from women qualified for the experience premier training of the kind VMI affords."

In conclusion the opinion states:

"Measuring the record in this case against the review standard...we conclude that Virginia has shown no 'exceedingly persuasive justification' for excluding women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. Because the remedy proffered by Virginia--the Mary Baldwin VWIL program--does not cure the constitutional violation, i.e., it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case..."

Rehnquist's Concurrence

Concurring in the judgment, Chief Justice Rehnquist wrote separately to express his disagreement with the Court's 'exceedingly persuasive justification' test. Although the Court used the "important governmental objective" standard,(an intermediate standard of review between "strict scrutiny" and "rational basis"), Justice Rehnquist maintained that the Court's additional use of the "exceedingly persuasive justification" test "introduces an element of uncertainty respecting the appropriate test." Justice Rehnquist suggested that the Court should have "...adhered more closely to [the Court's] traditional 'firmly established,' standard that a gender-based classification must bear a close and substantial relationship to important governmental objectives."

Scalia's Dissent

In one of his most scathing opinions thus far, Justice Scalia did not hide his contempt for the majority:

"Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half.... As to precedent it drastically revises our established standards for reviewing sex-based classifications. And as to history: it counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government....

"[T]he rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. Indeed, the Court indicates that if any program restricted to one sex is 'uniqu[e],'

it must be opened to members of the opposite sex 'who have the will and capacity' to participate in it. I suggest that the single-sex program that will not be capable of being characterized as 'unique' is not only unique but nonexistent."

Reactions

Pleased by the Supreme Court's ruling, major women's organizations weighed in with their praise.

The National Women's Law Center (NWLC), which filed the lead amicus brief on behalf of twenty-eight women's and civil rights organizations "applauded" the decision. Marcia Greenberger, co-president of NWLC said:

> "By rejecting the use of old-fashioned stereotypes about women to justify the continued exclusion of women from important educational opportunities, the Supreme Court set an important precedent for advancing women's legal rights. Stereotypes that rest on fixed notions of women's abilities have no place in public education and cannot be used to limit women's opportunities at VMI or elsewhere.... The Court saw through Virginia's attempt to hide behind the skirts of women's colleges. Women's colleges are designed to assist women in overcoming persistent barriers which have limited their full participation in society.... In requiring VMI to admit women based on their merit, the Supreme Court recognized this reality and reaffirmed its commitment to meaningful equal protection under the law".

While pleased by the Court's ruling, the National Organization of Women (NOW), considers the VMI decision a "mixed bag victory" because the Court "did not take this opportunity to extend a strict scrutiny standard to sex discrimination." In response to the VMI decision NOW Executive Vice President Kim Gandy announced:

> "We're hailing a victory on VMI, specifically, but protesting only a slight tightening, at best, of the legal standards for sex discrimination, generally.... We had hoped the Supreme Court would use this case to finally raise sex discrimination to the same level of constitutional scrutiny as race.... I am black and I am female, and I can tell you that my sex affects me as much as my race. You can't separate the two and shouldn't apply a different standard to the two. This ruling is a mixed bag for women."

Judith L. Lichtman, President of the Women's Legal Defense Fund and Vice-Chair of the Leadership Conference on Civil Rights said:

> "[The Court's] ruling is a tremendous and historic victory for American women. The Court has now made clear that states can never deny girls and women the same access to education that boys and men have.... [The Court's] ruling is a long overdue vote of

confidence in young women who want to serve their country, and in all women and girls who choose the challenges and privileges that for too long have been reserved only for men and boys."

As the MONITOR went to press, VMI officials had announced their intent to comply with the decision and integrate VMI. At the same time, some alumni had expressed an interest in converting the institution to private status and maintaining its all male policy. The Citadel in South Carolina, the only other male-only military institution, has also announced its intent to become co-ed in response to this decision.

SUPREME COURT RULES AGAINST DISCRIMINATION CLAIM IN CRACK COCAINE CASE

On May 13, 1996, the Supreme Court ruled 8-1 in United States v. Armstrong et.al. (No. 95-157) that Armstrong and other defendants had no grounds to obtain discovery of certain Government materials to support their claim of selective prosecution based on race, because the defendants failed to show that "the Government declined to prosecute similarly situated suspects of other races."

Background/Lower Court Action

After being indicted in federal court for federal criminal offenses involving conspiracy to distribute crack cocaine (cocaine base), and federal firearm offenses, Armstrong and the other defendants filed a motion for discovery and/or dismissal of the indictment, alleging that they were selected for prosecution because they are African-American. Discovery is the process of obtaining information which by right can be requested from another party prior to trial. The discovery motion sought to ascertain the following information:

- "The race of other individuals prosecuted for crack distribution either under federal statutes or under state statutes applicable to the distribution of cocaine base;
- "the race of individuals who had been arrested in federal or joint federal-state investigations;
- "the race of individuals who 'use, distribute, or possess with intent to distribute cocaine base,' and
- "the standards regarding which crack cases will be accepted for federal prosecution and when such cases will be referred or left to the state authorities for prosecution."

In support of their motion, the defendants submitted an affidavit showing that in every one of the 24 crack distribution and conspiracy cases closed by the prosecutor's office during 1991, the defendant was black.

The prosecutors opposed the discovery motion, asserting that defendants had neither alleged nor demonstrated "that the Government...acted unfairly or...prosecuted non-black defendants or failed to prosecute them."

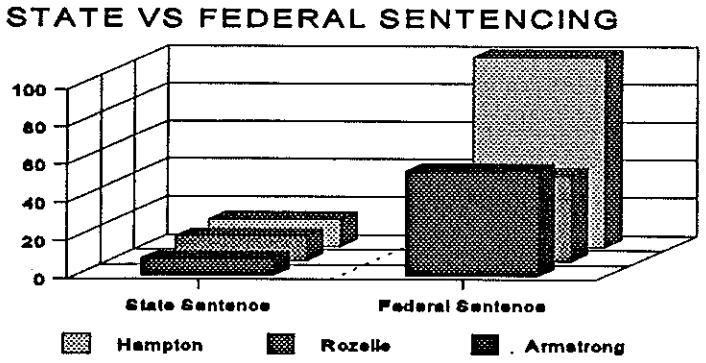
The District Court granted the discovery motion and instructed the Government to "provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, identify the race of the defendants in those cases, identify what levels of law enforcement were involved in the investigations of those cases, and explain its criteria for deciding to prosecute those defendants for federal cocaine offenses." The Government asked the District Court to reconsider its discovery order positing that they were not singling out blacks for cocaine prosecution. They submitted an affidavit in which an Assistant U.S. Attorney stated that the decision to prosecute in these crack related cases met the general criteria for prosecution of such cases: more than 100 grams of crack, multiple sales involving multiple defendants, suggesting "a fairly substantial crack cocaine ring."

The Government also cited a 1989 Drug Enforcement Administration report which found that, "large-scale, interstate trafficking networks controlled by Jamaicans, Haitians, and Black street gangs dominate the manufacture and distribution of crack."

The defendants responded with an affidavit from the Board of Directors of the Los Angeles Criminal court Bar Association Indigent Defense panel claiming that "there are an equal number of Caucasian users and dealers." Additional evidence submitted by defendants showed that persons convicted of Federal crack violations are issued more severe sentences than if convicted of possession of powder cocaine. The Anti-Drug Abuse Act of 1986 considers one gram of crack as the equivalent of 100 grams of powder cocaine, and thus possession of 50 grams of crack cocaine and 5,000 grams of powder cocaine are subject to the same sentence - a minimum ten year prison sentence.

The defendants also pointed out the differences between potential state and federal sentences for possession of crack cocaine; they claimed that the Government's decision to pursue federal charges "was a momentous one" in that "the minimum and maximum sentences imposed by federal law are far higher than those established by California law. This unexplained difference between state and federal crack cocaine sentences further convinced the defendants that they had been selectively prosecuted. In response to the defendants' claims, the district judge reviewed the criteria used in deciding whether a crack cocaine case would be filed in a state versus a federal court. The chart below illustrates the differences between the defendants' potential state and federal crack cocaine sentences. For example, if Armstrong's case was filed in state court he could receive a maximum of 9 years in prison; however, in federal court, the minimum sentence is 55 years and the maximum sentence is life in prison. (Please note: These sentences below include

"enhancements, as provided by law, for prior convictions and for firearms violations.")



The District Court denied the Government's motion for reconsideration. The Government refused to comply with the discovery order and the case against Armstrong was dismissed.

Court of Appeals (Ninth Circuit)

A divided three-judge panel of the Court of Appeals for the Ninth circuit reversed the lower court decision and held that the respondents failed to meet the requirements to obtain discovery which must "provide a colorable basis for believing that others similarly situated have not been prosecuted." The Court of Appeals then voted to rehear the case en banc and affirmed the lower court ruling holding that the burden of proof does not lie with the defendant, i.e., "a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated." The Government appealed to the Supreme Court.

Supreme Court

The Supreme Court in a majority by Chief Justice Rehnquist with Justices O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer all agreeing in the result, reversed the Ninth Circuit ruling and remanded the case to the lower court. The Court held that for a defendant to be entitled to discovery based on a claim of selective prosecution because of race, he or she must meet the threshold requirement of showing that the Government did not prosecute "similarly situated suspects of other races."

The Rehnquist opinion rests on two bases: first, his reading of the scope of Federal Rule of Criminal Procedure, Rule 16, which governs discovery in criminal cases and second, requirements for a selective-prosecution claim established by Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) and Ah Sin v. Wittman 198 U.S. 500 (1905).

Rule 16 provides, in pertinent part:

> "Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents,...in the custody or control of the government, and which are **material to the preparation of the defendant's defense** or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

According to the Court, "material to the preparation of the defendant's defense" refers to information the defendant could use to "refute the Government's arguments that the defendant committed the crime charged." Armstrong and other defendants were not challenging the criminal charge of possession of crack cocaine, i.e., "the case-in-chief". The respondents were requesting information to prove that they were selectively prosecuted because of their race. The Court held that "Rule 16...authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case-in-chief, but not to the preparation of selective-prosecution claims." The Court posits that a selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.

The requirements for selective prosecution established by Yick Wo and Ah Sin respectively assert that: 1) "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose'"; and 2) to establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.

The Court criticized the Court of Appeals for reaching its decision in part on the "presumption that people of *all* races commit *all* types of crimes..." The Court goes on to cite United States Sentencing Commission statistics' which show that "more than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black,...93.4% of convicted LSD dealers were white,...and 91% of those convicted for pornography or prostitution were white,..."

The opinion states in pertinent part:

> "In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents.... We think the required threshold- a credible showing of different treatment of similarly situated persons- adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution."

Souter, Ginsburg and Breyer Concurrences

Justice Breyer, concurring in part and concurring in the judgement, agreed that the defendants' discovery request failed to "satisf[y] the Rule's requirement that the discovery be 'material to the preparation of the defendant's defense.'" Breyer, however, expressed his disagreement with the Court's interpretation of Federal Criminal Procedure 16:

> "I write separately because, in my view, Federal Rule of Criminal Procedure 16 does not limit a defendant's discovery rights to documents related to the Government's case-in-chief.... A 'defendant's defense' can take many forms, including (1) a simple response to the Government's case-in-chief, (2) an affirmative defense unrelated to the merits (such as a Speedy Trial act claim), (3) an unrelated claim of constitutional right, (4) a foreseeable surrebuttal to a likely Government rebuttal, and others. The Rule's language does not limit its scope to the first item on this list. To interpret the Rule in this limited way creates a legal distinction that, from a discovery perspective, is arbitrary. It threatens to create two full parallel sets of criminal discovery principles. And, as far as I can tell, the interpretation lacks legal support."

Justices Souter and Ginsburg concurred separately in two opinions making similar points to Justice Breyer's about Rule 16.

Stevens' Dissent

Justice Stevens disagreed with the "Court's apparent conclusion that no inquiry was permissible." Justice Stevens maintains:

> "The District Judge's order should be evaluated in light of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions. First, the Anti-Drug Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called "crack" cocaine. Those provisions treat one gram of crack as the equivalent of 100 grams of powder cocaine. The distribution of 50 grams of crack is thus punishable by the same mandatory minimum sentence of 10 years in prison that applies to the distribution of 5,000 grams of powder cocaine....
>
> "Second, the disparity between treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct....
>
> "Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black."

In response to the question of whether the respondents had a right to discovery, Justice Stevens asserts:

> "I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in order to receive mere discovery in cases like this one. Certainly evidence based on a drug counselor's personal observations or on an attorney's practice in two sets of court, state and federal, can 'ten[d] to show the existence' of a selective prosecution.
>
> "Even if respondents failed to carry their burden of showing that there were individuals who were not black but who could have been prosecuted in federal court for the same offenses, it does not follow that the District Court abused its discretion in ordering discovery. There can be no doubt that such individuals exist, and indeed the Government has never denied the same. In those circumstances, I fail to see why the District Court was unable to take judicial notice of this obvious fact and demand information from the Government's files to support or refute respondents' evidence.... But as discussed above, in the case of crack far greater number of whites are believed guilty of using the substance. The District Court, therefore, was entitled to find the evidence before her significant and to require some explanation from the Government."

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