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**SEND US YOUR IDEAS AND RECOMMENDATIONS**

The Leadership Conference Education Fund (LCEF) has undertaken a project to examine the dynamics of race relations and intergroup interactions within institutions, seeking to identify strategies that promote intergroup understanding and reduce prejudice. Systemic problems as well as effective programs that promote constructive racial relations within the workplace, education arena and neighborhoods are being explored. Through an extensive literature review, interviews with academics and practitioners, site visits, and a series of multidisciplinary meetings of scholars and practitioners the project will provide up-to-date information on what is known and not known about intergroup relations, and how to promote positive relations within institutions. The meetings will provide a unique opportunity to talk about this issue across disciplines and among scholars and practitioners. The project is funded by the Charles Stewart Mott Foundation.

We would appreciate hearing from our readers about programs within schools (K-12 and higher education), neighborhoods/communities and the workplace whose goals are to improve intergroup relations. **Please send your information (include contact person and telephone number) by fax (202) 466-3435 or by mail to LCEF, 1629 K Street, NW, Suite 1010, Washington, D.C. 20006.**

**LCEF IN COLLABORATION WITH  
LEADERSHIP CONFERENCE ON CIVIL RIGHTS ISSUES REPORT ON  
HATE CRIMES**

The Leadership Conference Education Fund (LCEF) in collaboration with the Leadership Conference on Civil Rights (LCCR) has published **Cause For Concern: Hate Crimes In America**, a comprehensive assessment of the hate crime problem in the United States. The report is the effort of a task force of concerned national groups working together under the auspices of LCEF and LCCR. The report includes the latest national statistics on hate crimes, reveals the human face of the persons targeted for hate violence through brief case studies, and shows how hate crimes divide Americans against one another and distort our entire society. The report was funded by the Levi Strauss Foundation.

CAUSE FOR CONCERN reports on and discusses the church burnings as illustrative of the hate problem of violent crimes against virtually every racial, ethnic, religious, and sexual minority, as well as women. The report also notes that the reaction of some to recent controversies over immigration, welfare and the languages spoken in public places -- issues that go to the heart of America's identity as a caring, diverse and inclusive society -- has increased the incidence of hate crimes against Hispanics, Asian-Pacific Americans, and others who are stereotyped, often inaccurately, as newcomers to this country. Thus hate crimes should be seen as symptoms of a host of social ills. For all the progress our nation has made in civil and human rights, bigotry in all its forms dies hard. And discrimination is a continuing reality in many areas of American life, including the workplace.

In the foreword to the report, Arnold Aronson, President of the Leadership Conference Education Fund, and Dorothy Height, Chair of the Leadership Conference on Civil Rights state:

"Hate crimes are acts of violence directed against people because of their racial, religious, ethnic, gender or sexual identity. They are also acts of violence against the American ideal: that we can make one nation out of many different people.

"That simple but powerful idea is what makes our nation different from others where people persecute each other because of how they look, how they speak, or how they worship God. In our own time, in troubled places such as the former Yugoslavia, the Middle East, Northern Ireland, Rwanda, and Burundi, we are witnessing once again the age-old tragedy of people committing horrific acts of violence against each other because they refuse to look beyond their differences to respect each other's inherent human dignity.

"We are releasing this report in the hope that our own country will overcome the problem of hate crimes and become what we were always intended to be. Let us be the United States of America -- and, in the words that school children repeat each day, "One nation, under God, indivisible, with liberty and justice for all."

Examples of the hate crimes described in the report are:

St. John Baptist Church in Dixiana, South Carolina, founded in 1765, has been the target of attacks throughout its history -- a period that spans the eras of slavery, the Civil War, Reconstruction, segregation, and civil rights. In 1983, while Sunday services were underway, a group of whites shot out the church's windows. Coming back later in the day they scrawled "KKK" on the door, destroyed the piano, smashed the crucifix, tore up the Bibles, scattered beer cans on the pews, and even defecated on the sacrament cloth. Over the next 12 years, more than 200 people were arrested for acts of vandalism against the church. Then, on August 15, 1995, the church was burned down. And, in May, 1996, three white teenagers were arrested and charged with burning down the church.

Freddy's Fashion Mart was a Jewish-owned store in Harlem, New York, that rented space from a black church and sublet some of that space to a black-owned record store. The landlord and owner of Freddy's wanted the Fashion Mart to expand. The owner of the record store didn't want to move and a protest of Freddy's was begun. Some people on the picket line, and their supporters, engaged in anti-Semitic rhetoric. On December 8, 1995, Roland Smith, one of the protesters, entered the store with a gun and lighter fluid. He doused the store and set it on fire. Eight people -- including Smith -- died. Although none were Jewish, anti-Semitism was an underlying factor.

In the summer of 1995, Allen Adams and Ted Page were sentenced to 88 and 70 months in prison, respectively, for their roles in the ethnically motivated shooting of four Latinos in Livermore, Maine. Three of the shooting victims were migrant laborers working at an egg farm, while the fourth was visiting his ailing mother, a migrant worker. The incident began at a store, where the victims were trying to make a purchase. Adams and Page who were also at the store, taunted the victims with ethnic epithets, telling them: "Go back to Mexico or [we'll] send you there in a bodybag." After the victims drove away from the store, Adams and Page chased them by car, firing 11 rounds from a nine millimeter handgun at the victims' automobile. One victim was shot in the arm, while another bullet hit the driver's headrest, just a few centimeters from the driver.

In Jackson Heights, New York, a 24-year-old gay man who was distributing HIV-related information was assaulted with a knife by a 17 year-old male. The victim suffered a severe cut on his elbow requiring medical attention. The perpetrator repeatedly referred to the victim as a "faggot." The case is being prosecuted by the District Attorney's office as a bias crime.

Finally, the report discusses what is currently being done on the federal, state and local levels as well as through private initiatives to promote respect for diversity and to combat crimes based on bias, and includes ten recommendations for additional action by every sector of society. The first recommendation calls on national leaders -- including government, business, labor, religion, and education -- to use their prestige and influence to encourage efforts to promote harmony and combat bigotry. And it encourages the President to hold a White House Conference on racism, bigotry and intolerance to discuss and encourage ways that Americans of all backgrounds can live and work together in peace and partnership. There is historic precedent for a White House Conference. President Lyndon Johnson held a White House Conference -- **To Fulfill These Rights** -- on how to turn equality from a paper promise into a living reality. Thirty years later the theme of the conference might be simply, **To Unite America**.

Single complimentary copies of the report are available while supply allows, by writing to the Leadership Conference Education Fund, 1629 K Street, N.W., Suite 1010, Washington, D.C. 20006.

## **SUPREME COURT HOLDS EX-EMPLOYEES PROTECTED BY TITLE VII**

On February 18, 1997, the Supreme Court ruled that while the term "employees" in section 704(a) of Title VII of the Civil Rights Act of 1964 is ambiguous as to whether it includes former employees, "[I]t being more consistent with the broader context of Title VII and the primary purpose of section 704(a), we hold that former employees are included within section 704(a)'s coverage." The unanimous decision was written by Justice Clarence Thomas, Robinson v. Shell Oil Co., No. 95-1376. The holding reversed the decision of the Fourth Circuit sitting en banc.

### **Background**

Charles T. Robinson, a sales representative, was fired by Shell Oil Company in 1991. Robinson filed a complaint with the U.S. Equal Employment Opportunity Commission. While his suit was pending, he applied for a job with Metropolitan Life Insurance Company, and the Shell Oil Company gave him a negative employment reference. Robinson claimed the negative reference was in retaliation for his complaint and filed a second complaint with EEOC. He later sued in federal court alleging retaliatory discrimination.

The district court, relying on previous Fourth Circuit precedent, dismissed the complaint finding that section 704(a) of Title VII applied only to current employees and not to former employees. On appeal, a divided Fourth Circuit panel reversed. A re-hearing before the Fourth Circuit en banc was granted. The circuit sitting en banc (as a whole) vacated the panel's decision and affirmed the district court's decision. The Supreme Court granted review to resolve a conflict among the circuits.

Title VII prohibits employment discrimination based on a person's race, color, religion, sex, or national origin. The relevant part of section 704 (a) states: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment..."

### **The Opinion**

The nine-page unanimous opinion begins with an analysis of the use of the word "employees" in the statute to determine whether there is clarity or ambiguity as to whether it includes or excludes former employees. The opinion concludes that the language is ambiguous: "Title VII's definition of employee lacks any temporal qualifier and is consistent with either current or past employment." Left with the ambiguity, the Justices conclude:

"Insofar as section 704(a) expressly protects employees from retaliation for filing a 'charge' under Title VII, and a charge under section 703(a) alleging unlawful discharge would necessarily be brought by a former employee, it is far more consistent to include

former employees within the scope of employees protected by section 704(a).

“According to EEOC, exclusion of former employees from the protection of section 704(a) would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.”

### **SUPREME COURT RULES “ENGLISH-ONLY” CASE MOOT**

On March 3, 1997, the Supreme Court in a unanimous decision written by Justice Ginsburg declined to rule on the merits of a constitutional challenge to an Amendment to the Arizona Constitution that establishes English as the official language of the state. The Court dismissed the case because the state employee who challenged the amendment had resigned seven years ago, and thus the issue was moot, Arizonans for Official English v. Arizona, No.95-974. The Court’s ruling set-aside both the Ninth Circuit’s decision and the District Court’s that Arizona could not require state employees to speak only English on the job.

The Court’s decision clears the way for a ruling as to the meaning and effect of the Amendment by the Arizona Supreme Court in a similar challenge before that court.

At the oral argument, on December 5, 1996, the Justices questions made it clear that the case would likely be decided on procedural grounds rather than on the merits thereby leaving the constitutional issues unresolved.

#### **Background**

In 1988, by a margin of 50.5% to 49.5%, Arizona voters added Article XXVIII to the Arizona Constitution declaring English the State's "official" language. Article XXVIII provides that English is “the language of the ballot, the public schools, and all government functions and actions.” A few exceptions allow other languages to be used in protecting the rights of criminal defendants and victims, to protect the public health and safety, to teach a "foreign" language and to comply with federal laws. Twenty-three other states recognize English as their official language.

Following passage of the ballot initiative, Maria-Kelley Yniguez, a state employee, filed suit alleging Article XXVIII violated the First and Fourteenth Amendments of the United States Constitution. In processing medical-malpractice claims, Ms. Yniguez used English when speaking to English-speaking citizens and Spanish when speaking to Spanish-speaking citizens. The District Court issued a judgment in Yniguez's favor, finding the English-only Amendment overly restrictive under the First and Fourteenth Amendments.

When the State decided not to appeal the ruling, Arizonans for Official English (AOE), the principal sponsors of the English-Only proposition, and Robert Park, AOE's President, were permitted by the Court of Appeals to intervene and appeal the judgment. The Ninth Circuit affirmed the lower court's decision, ruling that Article XXVIII violated the First Amendment rights of public employees and elected officials. AOE then appealed to the Supreme Court of the United States.

### The Decision

In dismissing cases as moot, the decision of the Court is usually limited to a few sentences or paragraphs. This case is notable in that Justice Ginsburg authored a 35 page opinion suggesting to some Court observers that she was providing a road map on the handling of challenges to new or previously not authoritatively interpreted state laws by federal courts. The opinion is also clearly critical of the lower courts' handling of the case:

"The Ninth Circuit had no warrant to proceed as it did. The case had lost the essential elements of a justiciable controversy and should not have been retained for adjudication on the merits by the Court of Appeals. We therefore vacate the Ninth Circuit's judgment, and remand the case to that court with directions that the action be dismissed by the District Court. We express no view on the correct interpretation of Article XXVIII or on the measure's constitutionality."

The opinion further states that interpretation of a State statute should begin with the state courts where certification is possible [Federal law provides a process for federal courts to send an unresolved question about a state law to the state court for resolution. State courts must be authorized by state statute in order to respond. Arizona courts have such authority].

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?...When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question...'Normally this Court ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts.'... Arizona's Attorney General, in addition to releasing his own opinion on the meaning of Article XXVIII...asked both the District Court and the Court of Appeals to pause before proceeding to judgment; specifically, he asked both courts to seek, through the State's certification process, an authoritative construction of the new measure from the Arizona Supreme Court." (citations and footnotes omitted.)



## CALIFORNIA'S PROPOSITION 209 CHALLENGED

On November 5, 1996 California voters approved an initiative amending the State Constitution's Article 1, Sec. 31, to prohibit "preferential treatment" based on "race, sex, color, ethnicity or national origin" by the State or any of its subdivisions or instrumentalities in employment, education or contracting programs. Proposition 209 abolishes California's public affirmative action program. It requires that the State deny "preferential treatment" in certain activities to certain persons only. The State or its instrumentalities such as local governments may grant preferential treatment based on characteristics other than "race, sex, color, ethnicity or national origin" on other bases, say, to veterans. "The primary change that Proposition 209 makes to existing law is to close that narrow but significant window that permits the governmental race- and gender-conscious affirmative action programs...that are still permissible under the U.S. Constitution."

The Proposition states the following:

- (a) The state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
- (b) This section shall apply only to action taken after the section's effective date.
- (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
- (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
- (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.
- (f) For purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or government instrumentality of or within the state.
- (g) The remedies available for violations of this section shall be the same, regardless

of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

- (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law of the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

A day after the election, both Gov. Pete Wilson and State Attorney General Lungren instructed state agencies to list and undo state programs of the kind barred by Prop. 209. But on the same day, a group of minority and women's advocacy organizations filed suit in federal court in San Francisco to stop implementation of Prop. 209 on the ground that it violates the U.S. Constitution.

The suit, Coalition for Economic Equity et al. v. Pete Wilson et al., claims that the prohibitory language of Prop. 209 deprives minorities and women of equal protection of the laws as guaranteed by the U.S. Constitution's 14th Amendment and also violates the Supremacy Clause of the U.S. Constitution [valid federal law is the law in every state] and it "conflicts with the federal policy embodied in Titles VI and VII of the Civil Rights Act of 1964, [and] Title IX of the Educational Amendments of 1972...." In December, 1996 the federal court issued a temporary restraining order and subsequently a preliminary injunction against any enforcement of Prop. 209 until a final ruling on the merits of the constitutional challenge to the Proposition.

The court certified the suit as a class action and found that the plaintiffs had established a probability of success on the merits of their 14th Amendment claim. This was because the Proposition barred only minorities and women from obtaining benefits from the State or local governments without first obtaining an amendment to the State Constitution, thus making it harder for them as compared to others to achieve their goals through the political process. Also the court found a likelihood of success on their claim that Prop. 209 violates the Supremacy Clause "because it conflicts with and is thus preempted by Title VI of the 1964 Civil Rights Act". The court also ruled that the plaintiffs had established a real and imminent threat of irreparable injury to their interests or those of their members unless a preliminary injunction were issued.

The defendants have appealed the Preliminary Injunction, and that appeal is pending, as is an intervening defendant's application for a stay of the Preliminary Injunction in both the district court and the federal court of appeals.

A brief has been filed by the plaintiffs in the Federal Court of Appeals for the Ninth Circuit opposing the motion for a stay of the injunction, and at the end of January 1997, a brief amicus curiae also opposing the stay was filed by the United States. The United States' brief succinctly and pointedly addresses two questions. The first question is whether the intervenor-defendant had made the "strong showing required by Supreme Court and ninth circuit precedent that the

intervenor is likely to successfully establish the district court abused its discretion in issuing the preliminary injunction. The Government argued that the district court properly found controlling in this case the two Supreme Court cases on which the district court relied, Seattle School District No. 1 and Hunter v. Erickson, which barred a state from singling out racial and gender issues for special treatment in the political process and thus imposing unusual burdens on the ability of minorities and women to overcome the "special condition" of prejudice.

The second question that the United States addressed is whether the competing equities here justify upsetting the status quo. The United States demonstrated that in this case the balance of hardships and the public interest strongly favor preserving the status quo pending appeal by the traditional method of the district court issuing an injunction barring enforcement of the challenged initiative pending the court's decision on the merits of the complaint.

### **PISCATAWAY AFFIRMATIVE ACTION CASE BEFORE THE SUPREME COURT**

This is the now-famous case, Piscataway Board of Education v. Taxman, No. 96-679 in which a New Jersey school board faced the need to reduce the teaching staff in its high school business education department by one person. The Board found that it had a choice between two tenured teachers equal in seniority and qualifications but one white and the other the only black (or other minority) teacher in that department. It chose to apply its affirmative action program and policy and therefore laid off the white teacher. (The alternative, previously utilized but in situations without this racial element, was a coin toss.) On a charge filed with the EEOC by the white teacher, the United States filed suit in federal district court in New Jersey alleging a violation of Title VII of the 1964 Civil Rights Act, and the white teacher (Taxman) intervened as a plaintiff, complaining under Title VII and also under a comparable state law. (There was no claim of violation of the 14th Amendment's Equal Protection Clause, and any such claim was by then time-barred.)

The district court, acting upon stipulated facts and without a trial, found violations of both Title VII and the New Jersey statute. (There were also disputes between the two sides over damages and the appropriate rate of pre-judgment interest, but the MONITOR will discuss only the liability issue, i.e. the permissibility of the affirmative action application here.)

On appeal to the Third Circuit Court of Appeals, the case was assigned to a panel of three judges. The United States then reversed cause and sought leave to file a brief in support of reversal of the lower court judgment, asserting that "on further review, the United States believes that the district court announced an unduly narrow interpretation of the permissible bases for affirmative action under Title VII, and that the court's opinion conflicts with the Supreme Court's decisions". Shortly before scheduled reargument of the appeal before the panel which had been reconstituted because one of its members had died before the panel reached a decision, the court

denied the United States' request to file the amicus brief in support of reversal and treated the position of the United States at the original argument as a motion to withdraw as a party, which the court granted. After reargument by the two remaining parties, the full court of appeals spontaneously decided to hear the case en banc, a third oral argument took place, and by a vote of 8 to 4 the en banc court affirmed the judgment of the lower court.

A petition for certiorari has been filed by the School Board, supported by briefs amicus curiae of the New Jersey and National School Boards Associations, and opposed by Taxman. On January 21, 1997, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. The Court is expected to act on the petition after receiving the United States' brief later this spring. The positions of the majority and dissent in the Third Circuit, and of the parties on the petition, are set forth below.

### **The Third Circuit**

The majority concluded that the Piscataway plan was non-remedial (was not adopted to address past or present discrimination) and that a non-remedial affirmative action plan cannot justify conduct that would otherwise be proscribed as discriminatory by Title VII. The majority ruled that the Piscataway plan did not satisfy either of the Supreme Court cases (see below) that have upheld affirmative action plans against Title VII challenge, which the majority took as setting the outer limits of permissible affirmative action under Title VII. The opinion states: "The parties have stipulated that neither the Board's adoption of its affirmative action policy nor its subsequent decision to apply it in choosing between [the two teachers] was intended to remedy the results of any prior discrimination or identified underrepresentation of Blacks within the School District's teacher workforce as a whole" (It is undisputed that blacks were not underrepresented within that workforce as a whole). The majority opinion found also that the plan was devoid of benchmarks or standards for determining whether a goal of diversity was met, was not of limited duration and, finally, that the harm imposed upon Taxman by her layoff "unnecessarily trammel[ed]" her interests.

The two Supreme Court cases in question are United Steelworkers v. Weber and Johnson v. Transportation Agency, Santa Clara County, the first decided in 1979 and the second in 1987.

In Weber, the Court for the first time upheld a voluntary race-conscious affirmative action plan challenged under Title VII. The plan, a product of collective bargaining, sought to remedy a plant's traditional pattern of racially segregated jobs by instituting a temporary in-plant craft training program in which 50 percent of the openings were reserved for blacks until the percentage of black craft workers in the plant reached that of blacks in the local labor force. The Court upheld the plan, finding that the plan's purpose "mirrored those of the statute", the Court found that Congress in enacting Title VII did not intend to bar its voluntary adoption (the "first prong" of Weber), and that the plan did not "unnecessarily trammel" the interests of the white employees" who retained their jobs and could apply again for the training program (the "second prong" of Weber).

Eight years later, in Johnson, the Court again approved a voluntary affirmative action plan under Title VII, this one adopted by a public employer. The gender-conscious plan in Johnson was intended to remedy underrepresentation of women in "traditionally segregated job categories" by taking gender into account as a plus factor in making employment and promotional decisions until balance was attained. The plan was approved to offer a promotion to a woman who had a slightly lower score on the paper and pencil test than a man. The plan as described was held acceptable under Weber.

Three judges on the Third Circuit dissented, in an opinion written by Chief Judge Sloviter. The Chief Judge began by stating the narrow question posed by the appeal as "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...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." She answered that the School Board was permitted to follow the second route:

"An examination of the so-called affirmative action policy reveals that it does nothing more than place before the School Board the need to consider minority personnel among other equally qualified candidates for employment decisions.... It was the Board's decision to include the desire for a racially diverse faculty among the various factors entering into its discretionary decision that the majority of this court brands a Title VII violation as a matter of law. No Supreme Court case compels that anomalous result.... [N]o Supreme Court case has ever interpreted the statute to preclude consideration of race or sex for the purpose of insuring diversity in the classroom as one of the factors in an employment decision, the situation presented here."

Then, emphasizing that in both Weber and Johnson the Court had approved the race- and sex-conscious plans considered, the Chief Judge pointed out that the majority treated both cases as if their significance lay "in the obstacle course they purportedly establish for any employer adopting an affirmative action program. **But, as the Justices of the Supreme Court recognized, the significance of each of those cases is that the Supreme Court sustained the affirmative action plans presented, and in doing so deviated from the literal interpretation of Title VII precluding use of race or gender in any employment action.**" (Emphasis in original.) The dissenters in those cases had strongly objected to the departure.

Further, while the Third Circuit majority saw the Supreme Court's "articulation of the factors that rationalized its upholding" of the plans in those cases as establishing limits, the dissent argues that "no language in either Weber or Johnson so states and, in fact, there is language to the contrary." For example, in Weber the Court stated, "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans."

In short, Weber and Johnson do not stand for the proposition that every affirmative action plan that has a purpose other than remedying past discrimination or correcting a manifest imbalance is barred by Title VII.

The dissent then turned to its positive argument for acceptance of the School Board's action here as "permissible" under Title VII. That argument, in a nutshell, is that Title VII is forward- as well as, indeed, even more than, backward-looking. By the term "forward-looking" Judge Sloviter means that the statute's chief aim is to eliminate patterns of conduct that are "potential causes of continuing or future discrimination." Thus, taking the approach of Weber and Johnson as a springboard, the Chief Judge concluded that actions consistent with and in furtherance of the broad statutory goal of eliminating the causes of discrimination are not pro se proscribed by Title VII, among which actions she would include a school board's honest decision to obtain the educational benefit to be derived from a racially diverse faculty. Taxman's layoff was therefore not to be faulted unless it impermissibly trammelled her legitimate interests. Though a layoff is plainly more burdensome for the affected employee than refusal of hiring or promotion, in the circumstances here Taxman did not have a reasonable expectation that she would retain her employment over a person with equal seniority and qualifications. Compare the situation and outcome for the male applicant and complainant in Johnson.

### **Petition for Certiorari and the Opposition**

Emphasizing a conflict in the lower courts as to what is permissible voluntary affirmative action, the petition urged the Court to take this case to answer four questions:

- Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account for purposes other than remedying past discrimination?
- If so, is fostering diversity among a high school faculty a lawful purpose?
- Assuming a lawful purpose, does consideration of race in a layoff decision invariably violate the rights of affected non-minority employees?
- May a district court award full back pay to a Title VII plaintiff who stands no more than an even chance of securing, or retaining, employment?"

The two school board associations' briefs, in supporting a grant of certiorari, focused unsurprisingly on the special concerns of schools policy-makers. The brief in opposition filed by Taxman opposed the Court taking the case on the grounds that the Third Circuit decision was correctly decided under governing Supreme Court decisions and was "a poor vehicle" for addressing the validity of the academic diversity rationale. The brief in opposition also contended that there is no conflict among the circuits.

The MONITOR will report further on this case as further developments take place.

## SUPREME COURT HEARS SEXUAL HARASSMENT CASE

In U.S. v. Lanier, No. 95-1717, the Court faces the question of the scope of the post-Civil War-enacted federal criminal statute known as Sec. 242 that penalizes actions by state officials (actions "under color of law") that willfully deprive any person of any rights, privileges or immunities protected by the Constitution or laws of the United States. In the case now awaiting decision, a federal trial court had found Tennessee Judge Lanier guilty of willful sexual assaults in his chambers (and in some cases while he was wearing his judicial robes) upon several women. One was a woman who was a job applicant and whose child custody case he had decided and which he could alter. Others were women who were his employees, and women, also public employees, whose jobs required that they work with him and meet with him in his chambers.

The federal jury found this state court judge -- member of a politically powerful family in a small community, whose brother was the local state prosecutor -- guilty of two felony and five misdemeanor counts under Sec. 242. The federal judge sentenced him to 25 years in prison, as well as fining him. A unanimous panel of the federal Court of Appeals for the sixth Circuit affirmed the conviction and sentence. But the court of appeals reheard the case en banc and, by a sharply divided vote, reversed and held that Sec. 242 could not be applied in these circumstances, no matter how egregious the state official's conduct, because the Supreme Court itself had never applied the statute previously in cases of sexual harassment or assault. Lacking a clear definition of the right he was violating the court held that defendant's actions were not "willful." The United States appealed the decision.

### **The Briefs:**

The brief for the United States first considered the appeals court's assertion that a prior Supreme Court decision squarely in point was required, absent specification in the statute itself of particular conduct as prohibited. The brief noted that the Court had not so held in its lead case on Sec. 242, Screws v. United States, which had rejected a vagueness attack upon the statute. Rather, the Court there held that 242's element of willfulness requires a specific intent by the defendant to deprive a person of a right "which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." (emphasis added) In Screws there was no limitation to a prior Supreme Court decision on essentially the same facts. What is required, said the U.S. brief, is that the right clearly exists and "the decisional law" from the courts shows the application of the right to the case at hand. The brief then turned to a detailed elaboration of how over time it has been established that for purposes of Sec. 242 there is a right, protected by the Due Process Clause of the 14th Amendment to the Constitution, to freedom from wholly unjustified interference with bodily integrity by a sexual assault by a state official acting under color of law.

The brief of Appellee Lanier did not address the Court of Appeals majority's ruling that only a Supreme Court decision factually on all fours with the criminal action charged in a Sec. 242

case could warrant application of that statute to particular conduct by a state actor under color of law. Rather, Appellee's brief argued at length for the very different proposition that sexual assault by a state judge cannot violate Sec. 242 because such a person is not in any circumstance authorized to use force and therefore forcible rape or his/her lesser sexual battery in coercive circumstances cannot ever be "under color of law."

As the United States pointed out in reply, this issue was not decided by the court of appeals and was not presented by the petition for certiorari and in any event, as the United States went on to show, was "without merit:" there was substantial evidence to support the jury's conclusion that the judge used his state-given power to assault his victims and then to intimidate them into silence, a conclusion that the jury reached after being given the unexceptionable instruction that "under color of law" means "[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law...." And even if the judge's motivation were relevant, which it was not, his actions were abuses of his authority over his victims as employer, interviewer and court supervisor.

The judge's brief further argued that his actions here could not constitute deprivations of due process of law because his victims were not in custody as are persons arrested, imprisoned or otherwise restrained in a state institution. Thus, argued the judge, abusive actions by a state actor by force, no matter how egregious, cannot violate Sec. 242. This is not an accurate statement of existent case law and, in the United States' words "is almost the reverse of the correct view."

The United States' position was supported by several amicus curiae briefs, and oral argument was heard by the Supreme Court in early January. Decision is expected before the end of the Court's term in late June or early July, 1997.

### **SUPREME COURT HEARS ORAL ARGUMENT IN SECOND ROUND OF LITIGATION IN GEORGIA REDISTRICTING CASE**

On June 29, 1995, in Miller v. Johnson the Supreme Court found that "race was...the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black population...As a result, Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." The Court went on to hold that compliance with the Voting Rights Act "standing alone" was not sufficient to establish a compelling state interest and affirmed the decision of the three-judge court that held the plan unconstitutional.

On remand from the Court, the Georgia legislature failed to agree on a revised plan and



the task of redrawing the map then went to the three-judge federal district panel. The plan drawn by the panel eliminated the African-American majority in two of the three districts, decreasing the percentage in the 11th from 60.4 to 10.8 and in the 2nd from 52.3 to 35.1. The Atlanta-based 5th district retained its African-American voting age population of 57 percent.

The U.S. Solicitor General and other parties to the case filed appeals with the Court on a number of grounds including failure to comply with the "one-man, one-vote" constitutional requirement, and that the plan violates the Voting Rights Act and is unconstitutional as it went too far in reducing the number of majority-minority districts from three to one.

Democratic Representatives Cynthia McKinney who represented the 11th and Sanford Bishop who represented the 5th both won reelection in November 1996 under the court-ordered plan.

### Oral Argument

Oral argument in the case (a consolidation of three cases) was held on Monday, December 9, 1996. The parties were represented by Seth P. Waxman, U.S. Deputy Solicitor General for the U.S. Government; Laughlin McDonald of the ACLU for the Abrams appellants, a group of black voters; Michael Bowers, Attorney General of Georgia on behalf of the state, the Miller appellees; and A. Lee Parks on behalf of the Johnson appellees, white voters who challenged the majority black districts.

The argument focused on (1) whether the district court had abused its power in eliminating two of the three majority-minority districts given that the state legislature's original plan in 1991 (prior to review by the Department of Justice (DOJ) and DOJ's instructions to the legislature to draw a third redistricting plan) had contained two majority-minority districts, and (2) that the DOJ had in this round of litigation provided the district court with an "illustrative plan" that included a second compact majority-minority district in the east-central part of the state with "no arms, no tentacles, no claws, no land bridges."

Attorney Waxman began by stating that the three-judge district court created a new apportionment plan with one majority-minority district after the Georgia legislature was unsuccessful in drawing a new plan following this Court's remand of Johnson v. Miller. He continued quoting from the court's opinion: "if Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the court would have included one since the Georgia legislature probably would have done so." Waxman continued that "a reasonably compact district can be drawn in East Central Georgia without neglecting, subverting, or subordinating Georgia's traditional districting principles and, thus the District Court erred in two fundamental respects:

1. It failed to respect as required by Upham v. Seamon and White v. Wesier, the Georgia

legislature's desire as expressed in word and deed for a second majority-minority district.

2. It failed to recognize that section 2 of the Voting Rights Act required creation of a second district in East Central Georgia to remedy unlawful vote dilution.

Justice Kennedy began the questioning by stating that the government's questioning whether it was proper to reduce the majority black districts from three to one begins with consideration of a plan that has been ruled unconstitutional. Why would that be your starting point, Justice Kennedy asked. Waxman responded that Upham and White provide that a district court, in remedying an unconstitutional plan enacted by the legislature, must make the minimum number of changes necessary to remedy the constitutional violation but should otherwise adhere to the expressed intent and desire and policies of the state legislature.

Justice Scalia interjected that "the minimum number of changes in this case of three majority-minority districts where two have been ruled unconstitutional is to eliminate the two." Waxman responded that given the legislature's desire to have two majority-minority districts, the issue is whether that was possible consistent with traditional districting principles. Justice Scalia asserted that to the extent the legislature expressed the goal of having two it was because of DOJ's insistence -- "It might be called an extracted desire." Waxman responded that the pressure from DOJ was to create three districts, and that the original Georgia plan had two majority-minority districts. Justice Scalia suggested that the court record said that the original Georgia legislature's plan had been affected by DOJ pressure. Waxman said that the record suggested the contrary: "Counsel for the state of Georgia said before the Supreme Court [in the first round of litigation] 'There was a consensus politically, before the DOJ got involved, in the state of Georgia to try and draw a majority-minority district in East Central Georgia and extensive evidence to support that conclusion.'" Justice Scalia retorted that Waxman's response proves nothing: "The consensus could have been that if they didn't draw two districts, DOJ will not preclear the plan." According to Justice Scalia, the issue is what was the uncoerced desire of the Georgia legislature as to a second district.

Waxman was then asked if it was now his position that at least one district in the 1991 plan was unconstitutional. Waxman answered in the affirmative in light of Supreme Court decisions in Miller v. Johnson [Georgia], Bush v. Vera [Texas], and Shaw v. Hunt [North Carolina].

A Justice said: "All of this is irrelevant, if the purpose you start out with is creating a majority-minority district then no matter how tidy it's no good. The district court said it is unconstitutional, it is racial gerrymandering." Waxman said that the test the District Court applied is not the test this Court has adopted in Miller v. Johnson and Bush v. Vera. This Court has said that a legislature may take race into account; may intentionally create majority-minority districts if race were not the predominant reason, Waxman stated. He continued: "the test is whether the legislature subordinated, substantially disregarded or neglected traditional race-neutral districting principles. If you look at the 11th district we [the DOJ] drew, it respects five of

the six traditional principles that the court enunciated in its opinion as well or better than the court's plan." A Justice interjected that the opinion of the District Court is that if race is the driving force then it is the predominant factor even if other factors are accommodated. Waxman repeated that that position cannot be reconciled with the articulation of the law that this Court set forth in Miller v. Johnson and Bush v. Vera.

Laughlin McDonald began his argument for the Abrams appellants by stating that one fundamental error of the District Court's opinion is thinking that every aspect of the 1992 plan was unconstitutional and that, accordingly, the court could proceed in drawing a remedial plan to ignore the least change principle of Upshaw v. Seamon. The court's plan, he continued, is "maximally disruptive -- it totally ignores the policy choice of the general assembly about the placement of the 11th and the racial composition, and also failed to apply the standards of section 2." A Justice asserted that if that were so, the state would be arguing what you are arguing, but they are on the other side. McDonald responded that the state was seeking an end to litigation by asking for affirmance, but the general assembly itself clearly articulated what the state policy was in 1991 when it enacted the first plan.

A Justice said that "the District Court found that the 1991 plan and the state's efforts afterward were not state policy but the result of coercion by the Department of Justice and that to rule in favor of the appellants this Court would have to find that clearly erroneous." McDonald challenged whether that was the District Court's finding and said that the plaintiffs submitted no evidence that the 1991 plan was unconstitutional and the Court made no finding. He continued that the issue of coercion on the part of DOJ is relevant to the second and third plans but that no such finding was made about the first plan. He continued that the state decided to draw two majority-minority districts based on a myriad of facts and circumstances:

- o the large black membership in the general assembly urged adoption
- o the trauma of 1972 and 1982 in attempting to get preclearance of the congressional plan; the 1972 plan was an open racial gerrymander; the 1982 plan was a total embarrassment and humiliation for the state which had nothing to do with the DOJ as the district court denied preclearance
- o the state had been plagued with section 2 vote dilution litigation
- o since 1970, 46 cities and 56 counties have been sued under section 2 on vote dilution grounds and in almost every one a remedial plan was adopted.

McDonald was then asked his opinion of the DOJ illustrative plan. He replied the plan was an example of what the court could do and was obligated to do -- "it shows you can adopt a remedial plan that contains two reasonably compact districts that do not subordinate traditional redistricting standards."

McDonald was asked whether his position was that it is okay that the legislature set out to create a second majority-minority district. McDonald said that it was okay so long as the legislature didn't subordinate traditional redistricting principles to race -- the state can make a determination to be inclusive and create two majority-minority districts. He continued that not a single county included in the state's 1991 11th congressional district was in the court-ordered 11th district. Justice Scalia asked what difference that made given that the 11th district (1991) was unconstitutional -- "that district was created by the legislature in pursuit of an unconstitutional objective." McDonald responded that it was possible to correct the features of the 1991 plan that were identified as being unconstitutional and not totally ignore the policy choice of the general assembly as to where the district should be located. A Justice said that the problem was that the policy choice was to create specifically, without any other considerations, a majority-minority district. McDonald said the legislature did not plan to create an unconstitutional district, it wanted to create a constitutional district but failed, and that the record shows that it is possible to create a second majority-minority district that is constitutional.

McDonald ended his argument by saying that the Court should reverse and remand the case with instructions to adopt a remedial plan that applies the least change standard of Upham and Seamon, that also complies with section 2 and that it is their position that such a plan would contain two majority-minority black districts.

General Bowers, appearing for state, said the question is whether the district court abused its discretion in redrawing or fixing Georgia's basically unconstitutional congressional districts, and whether there is any room for the state between what this Court has said is the limit in congressional district drawing in Johnson v. Miller and what DOJ is urging upon this Court as mandated by section 2 of the Voting Rights Act. "This is another attempt at maximization on the part of DOJ," he asserted.

Justice Souter interjected that there is a different argument for maximization here [maintaining as many majority-minority districts as possible] -- the Upham and Seamon argument and that the latest expression of state intentions, untainted by coercion from the Justice Department, was that there be two majority-minority districts. And that's not maximization, Justice Souter said, that's a kind of least change principle, and I take it you would say that the 1991 plan is not a valid statement of the state's desire.

Bowers said that the 1991 plan of the legislature is valid in some respects, but that you can't draw a compact 11th majority-minority district in the 1991 plan because you're joining disparate and distinct minority populations -- urban South DeKalb County and rural East central Georgia. He was asked wasn't it correct that the Abrams least change plan and the DOJ illustrative plan avoided those pitfalls to which he responded in the negative. Bowers continued that the state's demographer had said "point blank" that it is impossible to draw a second minority district in the area because the minority population was not compact enough -- the Gingles principle was not satisfied.

Justice Breyer asked Bowers if it were constitutional for the legislature to draw a district on the basis of race where the legislature reasonably feels it is necessary to prevent a violation of section 2 of the Voting Rights Act, to which Bowers responded in the affirmative. The questioning continued: "if the legislature tried to do that in 1991, and if you believe courts should pay attention to legislatures and give them lots of leeway, then why shouldn't the panel have tried to carry out the legislature's primary intention, giving it that leeway to draw those two district boundaries in a way that would reasonably have prevented a violation of the Voting Rights Act." Bowers responded that there was no evidence that the district was required to do so, to which Justice Breyer responded that there was lots of evidence. Bowers continued to dispute this, to which Justice Breyer asked so your view is that it would be appropriate to affirm by saying this is the only thing the court could have done because it was required as a matter of law? Bowers said that was correct and that this holding would give leeway between what DOJ is suggesting under section 2 and what this Court found under the 14th Amendment.

Parks, appearing for the Johnson appellees, concluded the argument by stating that the answer to Justice Souter was that the District Court found it could not create a second majority-minority district without violating Miller as it would subordinate traditional districting policies and the consideration of race would be predominant. "The state legislature said it would draw two majority-minority districts to elect blacks to office and that is infected with proportionality," he said.

Parks then asserted that the legislature never took the position that more than one district was required, never accepted DOJ's position that there was a fair question on this issue; the legislature took the position that as long as the district was not bizarre in shape, diversity in the delegation was a policy choice for the legislature in drawing a second district. "That is different from saying they thought section 2 [of the VRA] required it," he said. A Justice responded that one determines the legislature's motive by and large by what they do and asked: "Are we supposed to look at Congress' motive for doing something in relation to the voters threat not to vote for them or the threat of a lawsuit? We look to what they did." Parks said that was true, but that this is an extraordinary case with the state confessing what happened.

A Justice questioned whether every plan that any legislature adopted thinking it was necessary under section 2 is open to relitigation on the question of whether it really violates section 2 -- "what would be left of the legislature's power to create voting districts if we accepted that argument?" Parks responded that it argues for accepting the district court opinion as it stands as a surrogate for the legislature -- "the court can make the best judgment call that section 2 did not require this and the record shows that Georgia was not focused on section 2 -- there were totally different reasons for adoption of the plan."

Justice Ginsburg said the district court seemed reticent to create a second minority district because it would be set in stone. Parks responded that with the concern of retrogression under the VRA, the district would be "eternal." He was asked whether the legislature could change the plan and eliminate the district to which he responded in the negative -- "it could never be

eliminated but there would not be a problem [with the legislature] adding one. "As the district court said 'were we to take a step not required by the Voting Rights Act -- the court leaves a political footprint on Georgia never to be washed away.'" Parks continued that the district court "put in place a caretaker plan, they did no harm with it and said to leave it to the legislature to change it if it desires." A Justice said but if the court's analysis of the demographics is correct, the legislature cannot create a second majority-minority district. Parks responded that the legislature can do what it chooses. To which a Justice responded - it cannot violate the Constitution. Parks said that was correct and that constitutionally they could not create a second district.

A decision in the case is expected before the end of the Court's term in late June or early July, 1997.

## UPDATES FROM RELATED REDISTRICTING CASES

### TEXAS

Following the Supreme Court's decision on June 13, 1996 in Bush v. Vera that Texas' three majority-minority congressional districts were unconstitutional racial gerrymanders, a three judge district court on August 6, 1996 drew an interim congressional plan for the 1996 elections that altered thirteen of the state's 30 congressional districts including the three majority-minority districts, two of which -- the 18th and 30th -- remained majority-minority. A new time-table was set for the fall 1996 elections with an open primary on November 5 and runoffs in those districts where no candidate got a majority of the votes. Runoffs were not needed in any of the majority-minority districts challenged in the suit and the three incumbents were all reelected, Representatives Sheila Jackson Lee (18th), Eddie Bernice Johnson (30th) and Gene Green (29th).

### NEW YORK

On February 26, 1997, a three-judge federal panel on a motion for summary judgment ruled that the majority-Hispanic 12th congressional district in New York City was unconstitutional because race and ethnicity were predominant in drawing the district, Diaz v. Silver. Noting that a computer program was used to include people with Hispanic surnames on voter registration lists the panel said that "the 12th congressional district as a majority Latino district would never have been created" if not for explicit racial and ethnic criteria. The opinion states:

"Not only was race the predominant factor in the referees' creation of their redistricting plan, it was also paramount to the Legislature's enactment of the plan....As a result of Department of Justice's interpretation of the Voting Rights Act, race became the predominant factor used by the referees in creating the 12th Congressional District and by the Legislature in adopting the referees' plan."

The job of redrawing the district lines now falls to the state legislature which has until July 30 to approve a new plan that Governor George E. Pataki will sign. If the legislature does not

meet the deadline, the three-judge court could appoint its own experts to draw up a plan. The incumbent, Representative Nydia M. Velazquez (D), has stated she will appeal the decision to the Supreme Court.

## ILLINOIS

After a three-judge panel ruled in 1996 that the 4th congressional majority-Hispanic district was constitutional, King v. State Board of Elections, the decision was appealed to the Supreme Court and the Court vacated and remanded the case for further consideration in light of the Court's decisions in Bush v. Vera and Shaw v. Hunt. The lower court has set a briefing schedule with the brief for appellants (MALDEF et al) filed the end of February. A decision is expected this summer.

## FLORIDA

In 1996, a divided three-judge district court panel ruled the predominantly African-American 3rd district a racial gerrymander and unconstitutional, and ordered the state legislature to redraw the district, Johnson v. Mortham. The new state plan's 3rd district adopted in 1996 has an African-American population of 46.5 percent and an African-American voting age population of 42 percent. Rep. Corrine Brown (D) stated that she considered the district "viable to run in" and won reelection in 1996.

## NORTH CAROLINA

On remand from the Supreme Court's ruling that the 12th majority-minority district was a racial gerrymander and unconstitutional, Shaw v. Hunt, the lower court allowed the 1996 elections to proceed under the invalidated districts given the time constraints. A plan proposed by State Senate Democrats would reduce the African-American population in the 12th district to 47 percent and of the registered voters to 45 percent. The African-American population in the other majority-minority district (the 1st) would be 50.1 percent of the population and 45 percent of registered voters. The legislature has until April 1 to approve a plan or the federal court will impose one.

## SOUTH CAROLINA

The sixth congressional district which is majority African-American and represented by Democratic Representative James Clyburn was challenged in December 1996 by the same lawyers who led the challenges of majority-minority districts in Louisiana and Virginia. The ACLU and the Louisiana state Senate have filed motions to intervene as defendants.

## VIRGINIA

On February 7, 1997, a three judge panel struck down the 3rd congressional district which is majority African-American and represented by Democrat Bobby Scott, Moon v. Meadows. The plan is before the state legislature for redrawing.

On March 1, the Commonwealth of Virginia filed a notice of appeal with the U.S. Supreme Court asserting that Virginia had a compelling state interest in drawing the majority-minority district, that being compliance with the Voting Rights Act.

## EMPLOYMENT NON-DISCRIMINATION ACT

After a near victory in the United States Senate in the 104th Congress, supporters of the Employment Non-Discrimination Act, a bill which would prohibit employment discrimination on the basis of sexual orientation, are optimistic about the possibility of enacting the anti-discrimination legislation in the 105th Congress. Winnie Stachelberg, Legislative Director of the Human Rights Campaign, noted, "The prospects for ENDA have improved markedly compared to two years ago...we begin the 105th Congress with 47 confirmed ENDA votes in the Senate" and "close to 150 votes for ENDA" in the House.

Still, supporters of the measure admit they face an uphill struggle to enact the legislation as simply getting a vote on the measure will prove difficult. During the 104th Congress, backers of the bill seized upon the opportunity presented by the Defense of Marriage Act to force a vote on the bill. Whether a similar "window of opportunity" will present itself in the 105th Congress remains to be seen. Also unclear as we went to press was whether an identical version of the bill would be introduced or whether minor technical changes would be made. Senators James Jeffords (R-VT) and Edward Kennedy (D-MA) are expected to introduce the legislation in the Senate however, it was unclear who will introduce the measure in the House.

A detailed legislative history of ENDA in the 104th Congress follows.

### ENDA IN THE 104TH CONGRESS

In what civil rights leaders are proclaiming as a symbolic first step towards emancipating gay and lesbian Americans from legal discrimination, the Senate voted on ENDA on September 10, 1996. Although the measure was defeated, 49-50, the surprisingly narrow margin was regarded as a major victory by the bill's supporters.

"Few American people thought we would come this far, this fast," said Senator Edward Kennedy at a press conference following the vote. Senator Kennedy, who authored the anti-



discrimination bill, assured its supporters that the vote was "really a victory," adding, "I'm absolutely convinced this bill will be a first order of business in the next Congress."

Contributing to the significance of the near-victory was the presence of major civil rights leaders in the reception room just off the Senate floor at the time of the vote. AFL-CIO President, John Sweeney; President of the National Organization for Women, Patricia Ireland; and Dorothy I. Height, President of the National Conference of Negro Women and Chair of the Leadership Conference on Civil Rights were among the many civil rights advocates present for the vote. Their presence symbolized that freeing gays and lesbians from employment discrimination is widely accepted within the civil rights community as an unfinished battle in the historic struggle for equality before the law for all Americans.

Senator Kennedy explicitly noted the connection between the current fight to end workplace discrimination against homosexuals and past campaigns for African Americans when he read excerpts from a letter written to senators by Coretta Scott King which stated, "Lesbians and gays supported the African-American freedom struggle. None of us who achieved that freedom should turn our back on this next phase of the movement for freedom and dignity."

ENDA prohibits discrimination on the basis of an individual's sexual orientation in hiring, firing, promotions, compensation, and other employment decisions. Polls show that over 80 percent of Americans believe job discrimination based on sexual orientation is unfair, yet no federal law currently protects individuals from this kind of discrimination. In forty-one states across America, it is perfectly legal for individuals to be fired simply for being gay or lesbian.

The Senate vote was even closer than the 49-50 margin indicates. The only senator not voting was Senator David Pryor (D-AR) who was at the bedside of his seriously ill son. Senator Pryor had previously pledged his support for the bill. Had he voted in the affirmative, Vice President Al Gore, who was in Pennsylvania on the day of the vote, was poised to fly back to Washington to cast the tie-breaking vote in favor of ENDA. President Clinton and Vice President Gore were on the telephone lobbying undecided Senators right up to the floor vote. Even if the Senate had approved the measure, the likelihood of enacting ENDA into law was bleak as the bill faced formidable opposition in the House.

When ENDA was introduced in June of 1994, its supporters thought it was unlikely the bill would be considered in the Republican-controlled 104th Congress. However, when the Senate scheduled a vote on the anti-gay marriage bill known as the Defense of Marriage Act (DOMA), civil rights leaders strategized that offering ENDA as an amendment would likely decrease the chances of passing DOMA significantly.

This strategy abruptly changed when Senate Majority Leader Trent Lott (R-MS) and Senator Kennedy exchanged procedural threats which hampered Senator Kennedy's ability to propose ENDA as an amendment to DOMA. Enraged at the Republicans' attempt to thwart the anti-discrimination bill, Senator Kennedy threatened to attach ENDA to every appropriations bill,

effectively deadlocking the Senate through the end of the fiscal year. Facing a situation which would bring the Senate to a virtual standstill, Senator Lott agreed to a compromise giving Republicans a freestanding vote on DOMA and Senator Kennedy a freestanding vote on ENDA.

The compromise worked to the advantage of ENDA's supporters as many senators supportive of ENDA indicated they would be reluctant to vote for it as an amendment to DOMA. Speaking to the compromise that was worked out, Sen. Kennedy said, "This is the best way to do it. We didn't want it on DOMA, we wanted it as a freestanding bill. This is the way we wanted it." In the end, eight Republicans joined forty-one Democrats in voting for ENDA.

Opponents of the legislation argued ENDA would result in unnecessary lawsuits filed by employees against employers and that employers should have the right to refuse an applicant or dismiss an employee based on sexual activity. In the debate on the Senate floor, opponents also suggested that religious values in the United States would be compromised if the bill were enacted despite the fact that ENDA explicitly exempts all religious corporations, associations, societies, and religiously affiliated educational institutions from its provisions.

Impassioned speeches were made by both supporters and opponents of ENDA on the Senate floor prior to the vote. Recognizing the critical importance of the vote, Senator Carol Moseley-Braun (D-IL) stated, "Americans should not be held back by conditions that have nothing to do with merit, or talents and abilities . . . if there is any objective that should command complete American consensus, it is ensuring that every American has the chance to succeed -- and that, in the final analysis, is what this bill is about." Senator James Jeffords (R-VT), a lead sponsor of the measure in the Senate, noted, "...the feeling is when someone wants to work someplace, they ought to be able to get a job."

Majority Leader Trent Lott (R-MS) in his opposition to ENDA stated that a vote for ENDA would amount to the Federal Government endorsing a homosexual lifestyle. "Under ENDA, the antidiscrimination apparatus of the Federal Government...would treat sexual orientation like race. It would scrutinize employment practices, require remedial hiring or promotion, and treat negative attitudes in this area as workplace harassment."

## **LEADERSHIP CONFERENCE ON CIVIL RIGHTS ISSUES VOTING RECORD FOR THE 104TH CONGRESS**

The Leadership Conference on Civil Rights has released its Voting Record for the 104th Congress rating both the House and Senate on key legislative floor votes on civil rights and social and economic justice issues of concern to LCCR member organizations.

Six Democratic Senators received perfect scores (100%): Senators Edward Kennedy (MA), Frank Lautenberg (NJ), Patrick Leahy (VT), Daniel Patrick Moynihan (NY), Paul Sarbanes (MD), and Paul Wellstone (MN). The six top ranking Republicans are: Senators Jim Jeffords (VT) with 70 percent; Mark Hatfield (OR), Olympia Snowe (ME) and Arlen Specter (PA) with 65 percent, and Senator Chaffee with 55 percent. Thirty-six Senators received scores of 80% or better and 36 received scores of 20 percent or lower.

In the House 132 Representatives received a score of 80 percent or better with 40 receiving a perfect score of 100 percent. On the other end 170 Representatives received voting scores of 20% or below.

Included among the votes analyzed in the report is the final vote on the Overhaul of the Welfare System in both the Senate and House. The final conference report on the bill that was voted on as part of the Budget Reconciliation Package provided for the reduction of spending over six years by about \$54.1 billion, mostly by cutting aid to legal immigrants through scaling back food stamp and Supplemental Security Income (SSI) spending. The bill ends the federal guarantee of welfare benefits, give states broad discretion over their own programs through block grants, generally requires welfare recipients to work within two years of receiving benefits and limits recipients to five years of welfare benefits. The bill imposes tighter eligibility standards on low-income children seeking SSI and food stamp benefits due to disability. The bill also denies most legal immigrants SSI and food stamp benefits and gives states the option to further restrict access to Medicaid, Temporary Assistance for Needy Families (TANF), and other programs. LCCR strongly opposed ending the federal guarantee of welfare benefits to those in need and the denial of SSI and food stamp benefits to legal immigrants. The conference report was adopted by the House on July 31, 1996 by a vote of 328-101, and by the Senate on August 1, 1996 by a vote of 78-21.

Another issue considered in the voting record is affirmative action. In the Senate during the 104th Congress there were several failed attempts to limit federal affirmative action by attaching anti-affirmative action riders to appropriation bills. The "Equal Opportunity Act" introduced by Senator Robert Dole which would have eliminated all federal affirmative action programs died in committee. The voting record includes the vote on Senator Phil Gramm's (R-TX) amendment to the Legislative Branch Appropriations to prohibit any money in the bill from being used toward federal contracts based on the race, color, national origin or gender of the contractor. The amendment was rejected on July 20, 1995 by a vote of 36-61.

The Equal Employment Opportunity Act introduced in the House by Charles Canady (R-FL) was also not considered by the full House. The only affirmative action measure considered in the House, which is included in the Voting Record, was a vote to end a Federal Communications Commission program that sought to increase the number of minority owned television and radio stations and thus provide "a diversity of expression over the airwaves" by giving a tax break to companies that sell such businesses to minorities. Representative Jim McDermott (D-WA) offered an amendment to narrow, rather than eliminate, the tax benefits for the sale of broadcast

licenses to minorities to transactions under \$50 million and to require minority broadcasters to hold the property for three years. The amendment failed 191-234. LCCR supported the amendment.

Copies of the report are available by writing to the Leadership Conference on Civil Rights, 1629 K Street, NW, Washington, D.C. 20006.

## **CENSUS 2000 APPROACHES**

The 2000 decennial census is three years away, and several key decisions affecting the accuracy and utility of the count must be made by the 105th Congress.

### **Background**

The United States Constitution requires the Congress to provide an "actual enumeration" of the "whole number of persons within each state," every ten years and the 2000 census will be the twenty-second national count. While the primary reason for the collection of census data is the apportionment of representation in Congress, the data also provide the statistical basis for government planners, policy advocates and private industry to shape future domestic policy. Some of the policy decisions affected by census data include:

- the number of congressional representatives apportioned to each state;
- the number of electoral college votes designated to each state;
- congressional as well as state and local redistricting; and,
- compliance with various civil rights statutes like the Voting Rights Act of 1965, affirmative action, employment, housing, lending, environmental racism, and education anti-discrimination laws.

These data also serve as the basis for the annual distribution of billions of dollars in government funds. Among the issues of concern to the civil rights community are: 1). the habitual census undercount of people of color and low income people; 2). the possible addition of a new "multiracial" category; and 3). whether the funds appropriated to conduct the census will be adequate.

### **Sampling and the Undercount**

One of the most significant issues yet to be resolved regarding the 2000 census is whether sampling techniques will be employed for the first time to achieve a more accurate demographic count of all the nation's people. Counting every individual residing in the United States is a very

difficult endeavor and while the census historically undercounts the population in general, people of color and poor individuals are disproportionately more likely to be undercounted.

The 1990 undercount of racial and ethnic minority groups, referred to as the “differential undercount,” was the highest ever recorded. The estimated “differential undercount” was 4.9 percent for Blacks, 5.2 percent for Hispanics, 3.1 percent for Asian Pacific Islanders, and 5.0 percent for Native Americans, while Caucasians were undercounted by only 1.7 percent. There are several reasons why people of color and the poor are consistently and disproportionately undercounted by the census including:

- mail and door-to-door collection methods have lower response rates in lower income areas;
- lower education levels, illiteracy, or difficulty with the English language affect the ability of many individuals to understand the census;
- a general misunderstanding of the importance of census participation; and,
- distrust or suspicion of government leading to the fear that the census may be used by immigration and/or law enforcement officials to deport or incarcerate or may disqualify one for social welfare programs.

The issue of the undercount was addressed by the Supreme Court in 1996 in Department of Commerce v. New York. A unanimous Court ruled that the Secretary of Commerce was not required to statistically adjust the 1990 census, despite the effect of the undercount on minorities and the poor, and the availability of adjustment and sampling techniques to provide a more accurate count. The Court reasoned that the Secretary’s decision not to adjust “was well within the constitutional bounds of discretion over the conduct of the census provided to the Federal Government.” The Commerce Secretary’s decision not to adjust the 1990 census set the stage for the current debate.

Following the 1990 census, Congress directed the Census Bureau to develop methods to improve the accuracy of the census while also reducing its costs. On February 28, 1996, the U.S. Department of Commerce and the Bureau of the Census unveiled “The Plan For Census 2000,” which calls for sampling procedures to be used in two separate instances: (1) to sample and estimate the 10 percent of the population that fails to respond in the actual enumeration and (2) to use a separate sample of houses to estimate those persons missed in the actual enumeration and the sample for nonresponse and revise them accordingly.

Hearings were held on this matter in the 104th Congress. Among those supporting the use of sampling and statistical techniques to supplement an aggressive direct enumeration effort were three panels of experts convened by the National Academy of Sciences who testified that some form of sampling was the only way to reduce the differential undercount while concomitantly containing the costs of the census. In addition, Dr. Barbara Bryant, Director of the Census Bureau under President Bush, asserted in her testimony that the census had reached the limits of what could be done with traditional methods.

Representative Thomas F. Petri (R-WI) testified against using sampling to adjust the final count, stating, "To rely on sampling rather than the final census count would be comparable to changing election returns if they are at variance with public opinion polls." Rep. Petri introduced legislation in the 104th Congress preventing the Census Bureau (or any federal agency collecting data) from employing sampling methods to determine the total population of the states. While no action was taken on the legislation, a spokesman from his office said the Congressman would introduce similar legislation in the 105th Congress.

In the end, in 1996, the House Committee on Government Reform & Oversight recommended against the use of sampling for the 2000 census in its report on the issue, entitled, Sampling and Statistical Adjustment in the Decennial Census: Fundamental Flaws (House Report 104-821). While the Committee's recommendation is legally non-binding, it represents the first time a House of the Congress has gone on record in opposition to the use of sampling to adjust the census undercount.

### **The Addition of a Multiracial Category**

The most controversial matter regarding the 2000 census is whether a new "multiracial" or "multiethnic" category will be added to the racial and ethnic classification question. Since 1977, the Office of Management and Budget (OMB), the federal agency responsible for determining racial and ethnic classifications, has recognized Hispanic as one ethnic category, and Black, White, American Indian or Alaskan Native, and Asian or Pacific Islander as the four racial categories that make up the U.S. population.

The argument for including a multiracial category has been advanced primarily by Project RACE, a national organization advocating on behalf of multiracial children. Susan Graham and Chris Ashe founded the organization in 1991 after realizing "there was no place for their multiracial children on the 1990 census." At a hearing before the House Subcommittee on Census, Statistics, and Postal Personnel, Ms. Graham noted her son was considered "White" on the U.S. Census, "Black" at school, and "Multiracial" at home, all at the same time. She claims a multiracial category is needed to reflect changing American demographics, and provide a recognized identity for those individuals who are of mixed parentage. Omission of such a category, she claims, violates the Equal Protection Clause of the Fourteenth Amendment.

While sympathetic to these sentiments, civil rights advocates contend adding a "multiracial" category would further erode representation and political influence for people of color and low-income individuals. Studies show a switch in data classification from "Black" to "multiracial" would be disastrous to the goal of equal protection before the law because of the important role census data play in ensuring compliance with the Voting Rights Act of 1965, affirmative action, and other anti-discrimination laws. Moreover, opponents note a majority of all Americans are technically multiracial and/or multiethnic. Adding such categories would only generate confusion by constructing a category a majority of Americans could check.

By early this Summer, OMB will determine whether a new, "multiracial" category will be included. In the meantime, Representative Thomas F. Petri (R-WI) introduced legislation he sponsored last Congress, H.R. 830, which would require a "multiracial" or "multiethnic" category in Federal agency collection of data on race and ethnicity. The bill was referred to the Committee on Government Reform and Oversight.

## **Funding**

The funding appropriated for collection of the census ultimately will determine the success of the 2000 census. As politics continues to play a significant role in congressional decision making, the 2000 census has become a major pawn. The Census Bureau's plan has a \$4 billion price tag for the decade-long census cycle. Further adjustments in sampling could reduce the cost to \$3.7 billion. However, the Congress appears to be intent on preventing the Census Bureau from using sampling to adjust the count thereby adding millions of dollars to the overall cost. This budgetary situation has led the 2000 census to be designated on the General Accounting Office's (GAO) "High-Risk Series," which is a report produced at the beginning of each Congress designating those Federal activities and programs GAO believes have a high risk of failure.

At a recent budget hearing before the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, Frank DeGeorge, Inspector General at the Commerce Department, noted sampling must be part of the design in order to stay within budgetary constraints. He also stressed the importance of adequately funding census activities now, calling the Bureau's request for a significant increase in funds an "investment" in a good census.

Additional hearings on all of these matters are scheduled for the second week in March. The MONITOR will keep you posted as updates become available.

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