

From Rodney King to Katrina

2

Priming the Pump

3

Creating Access to Enhance Diversity

8

High Court Changes Affecting Civil Rights

10

GOAL IX

To promote full and equal participation in the legal profession by minorities

AMERICAN BAR ASSOCIATION COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION Volume 11, Number 4

To our readers:

This is the first issue of the ABA Commission on Racial and Ethnic Diversity in the Profession's newsletter for the new bar year. As we resume publishing the Goal IX Newsletter in a hard copy format, the Goal IX Newsletter will continue to be disseminated electronically and made available for downloading from the Commission's website. However, we hope the hard copy format will allow for a more thorough distribution of this publication. As we launch this renewed format that includes articles from our sister entities within the ABA Diversity Center: the Council on Racial and Ethnic Justice and the President's Advisory Council on Racial and Ethnic Diversity in the Profession, we hope that you will find the new Goal IX Newsletter informative, and enjoyable and we welcome your feedback.



Diversity Now, and for the Future at the ABA

Dennis W. Archer
Chair, ABA Center on Racial and Ethnic Diversity

As lawyers, we must affirm that we have not yet reached the point of complete unity and equality within our profession and within the justice system. Our challenge is to overcome the barriers to the advancement of lawyers of color that have been consciously or unconsciously erected in the past that still remain. In today's world, public confidence in our profession — and the justice system as a whole — is largely tied to whether law firms and practicing lawyers reflect the full diversity of our society.

The American Bar Association must utilize the resources of our membership and staff to bring both the association and the profession into a new era of inclusion and opportunity. The ABA Center for Racial and Ethnic Diversity was

continued on page 4

New Beginnings: Building on the Past...



Kay H. Hodge
Chair, ABA Commission on Racial and Ethnic Diversity in the Profession

As I begin my service as Chair of the Commission, I am acutely aware of the fact that this Commission has had incredible leadership in the past — Dennis Archer, Robert Grey, Bernice Donald, Jose Gaitan, Charisse Lillie and Lawrence Baca. I am honored to follow. I hope that as Chair, I will be able to enhance the Commission's stature as the preeminent source of diversity information and effective programming that helps attorneys of color/minority attorneys succeed in this profession.

The ABA's Commission on Racial and Ethnic Diversity in the Profession has the responsibility of leading the effort to achieve Goal IX — the full and equal participation of minority lawyers in our profession and in the Association. Over the past 20 years, the Commission has worked to

continued on page 4



From Rodney King To Katrina: A Look at The Lifespan of the Council on Racial & Ethnic Justice

Harold D. Pope, III
Chair, Council on Racial &
Ethnic Justice

The existence of the Council began with Rodney King (1992) and has continued through Hurricane Katrina (2005). It is amazing how this small entity (11 members and 1 staff) accomplished so much with so little.

The aftermath of both the Rodney King incident and Hurricane Katrina were strikingly similar. Many innocent people were being thrust into a catastrophic environment where they had very little control. There were angels and evil doers. The cities of Los Angeles and New Orleans were up for grabs. There was chaos, violence, death, lives in jeopardy and no one knew what to do to help or to stop the rioting. Those of us who viewed from a distance felt powerless.

The Rodney King incident was the catalyst that created the Council. It was created as a way to examine the prevalence of racial and ethnic bias in the American justice system. The Council spent its first two years strategizing and forming important alliances and coalitions. The first major event for the Council was **"Achieving Justice in a Diverse America: A Summit on Racial and Ethnic Bias in the Justice System."** This phenomenal Summit was held in 1994 under the leadership of Judge Nathaniel Jones, the Council's first chair. The essence of the Summit was captured in two videotapes and a report.

Once the Summit was held, the Council evolved into a catalyst for ABA entities, bar associations, civil rights entities and community organizations. From 1994-1995 the Council held a total of 11 roundtables in key

locations and major cities. During this time period the Council helped to focus the country's attention on the impact of racial profiling on people of color.

Paulette Brown became the chair of the Council in 1998. The Council was simultaneously holding CLE panels, planning a huge national conference and sponsoring programs on color/racial profiling. Two highly successful Think Tanks Meeting were held in Los Angeles and Philadelphia in 1998. **"The First National Conference on the Impact of Race & Ethnicity on the Justice System"** held in 1999 was a remarkable success and it provided the Council with a blueprint for its future projects: **Data Collection on Color/Racial Profiling, Friends of the Council and Technology Think Tank Conference.**

Kurt Schmoke became the chair of the Council in 2000 and several key partnerships were formed. The **"Campaign to Promote Racial Justice"** was a highly successful partnership with the National Bar Association, and the National League of Cities; a major collaboration between the presidents of the ABA and NBA culminated in the publishing of **"Justice By Gender: The Lack of Prevention, Diversion and Treatment for Girls in the Juvenile Justice System"**; a dynamic program in partnership with several national civil rights entities explored the intersection of technology, voting, and access to the justice system titled **"Enhancing Access to the Justice System Through Technology: Would Technology Have Changed the Outcome of the Vote in Florida?"**; a resolution (in co-sponsorship with the

national bars of color) to the ABA House of Delegates that was successfully passed (**Electronic Court Interpreters** required in all jurisdictions); **The 2nd National Conference on the Impact of Race and Ethnicity on the Justice System** was held in 2002; and the **Tulia, Texas Project** in which the Council assisted the Legal Defense Fund in freeing 46 residents who were racially profiled and incarcerated on drug charges.

During Charles Morgan's tenure in 2002, the Council re-structured its activities and focused its efforts on Indigent Defense. Two national Roundtables were held that focused on the glaring deficiencies in indigent defense systems throughout the U.S. A Report was published titled **"The National Conference on Indigent Defense: A Roundtable Discussion on Successful Models for Achieving State Reform."**

In 2003, the Council was asked to spearhead **President Dennis Archer's "Diversity in the Legal Profession: Opening the Pipeline Conference."** This highly acclaimed conference addressed the crucial pipeline issues confronting every segment of the legal profession.

As the current chair of the Council since 2004, there are several major initiatives that have been implemented under my tenure:

- (1) Overrepresentation of Juveniles of Color in the Juvenile Justice System;
- (2) Election Protection Project; and (3) Katrina Project.

continued on page 7



Priming the Pump: Directing Students of Color through the Pipeline to the Legal Profession

Evett L. Simmons

Chair, ABA Presidential Advisory Council
on Diversity in the Profession

An old adage states: You cannot draw water from a well that's gone dry.

When it comes to diversity in its ranks, the legal profession must take heed to this sage axiom. Law firms, corporate legal departments, government, and the judiciary cannot easily recruit attorneys of color who barely exist. Diversity efforts will encounter inherent obstacles as long as there remain too few people of color who decide to enter the profession in the first place.

The ABA's *Presidential Advisory Council on Diversity in the Profession* (www.abanet.org/op/councilondiversity/home.html) focuses on improving diversity in the pipeline to the legal profession. Our charge is to increase the number of people of color on the track to becoming lawyers. This work starts with grade school and consummates with bar passage.

Towards that end, we have launched a major project with the Law School Admission Council. The *ABA/LSAC Pipeline Diversity Directory* (www.abanet.org/op/pipelndir/home.html) is an online resource of pipeline diversity programs, projects, and initiatives from across the country. This Web-based centralized, comprehensive, easily accessible directory of programs will help to encourage and prepare students of color for a career in the legal profession.

Leaks in the Pipeline

Unfortunately, statistics and facts reveal that the profession still has a long way to go to fulfill the goal of full and fair diversity. In fact, there

has been slippage in some areas, for some groups. For example, the pace of African-Americans entering the profession has slowed in recent years. In academic year 2003-04, the percentage of African-Americans enrolled in law school dropped for the second consecutive year. A two-year drop had not occurred in nearly 30 years. That drop brought the percentage of African-Americans in law school back down to 1992-93 levels. The percentage of Hispanic students also dropped in 2003-04, but not as much, while the percentage of Asian-American law students increased.

All minority groups have lower bar passage rates than their White counterparts. A Law School Admission Council report found that 61% of African-Americans passed the bar on their first attempt – of Native-Americans, 66% passed on the first time – for Hispanics, it was 75% and for Asian-Americans it was 81% — all compared to the 92% of Whites that pass the bar on their first attempt.

Most attorneys of color know from personal experience the essential need for enhancing diversity at all levels and along all pipelines leading to the profession. Many minority lawyers have experienced being the “first,” the “only,” and “one of very few” who regularly receive the call to serve as the diversity on a panel, program or publication. They have first-hand familiarity with being stretched too thin, too often. They can readily testify to the seemingly perennial need to increase the pool, the critical mass of attorneys of color in the profession.

Submitting entries to the directory

Everyone in or around the legal profession can help plug the leaks in the pipeline to the profession. We need to find out what programs exist that address this issue. The Presidential Advisory Council on Diversity is soliciting submissions for the *ABA/LSAC Pipeline Diversity Directory* (www.abanet.org/op/pipelndir/home.html). We are looking for two broad types of programs:

- First, programs targeted to students of color that are conducted by any type of *legal* organization—any type of bar association, law school, law firm, corporate counsel, or any other entity within the legal profession.
- Second, programs designed to create new diverse lawyers—no matter what type of organization conducts the program.

For example, a community agency on Chicago's West Side that has hosted a moot court for the past 5 years for middle school students should submit an entry for the Directory. Then, when a Bar Leader in Atlanta receives a call from a local community agency asking what type of program can they offer to middle school students to spark an interest in the legal profession, that Bar Leader can direct them to the online Directory. The Atlanta community group will not need to start from scratch, because it can now use the Directory's search engine to identify other programs that serve middle school students in an inner-city setting.

continued on page 7

Dennis Archer Article

continued from page 1

established three years ago to enhance the ABA's efforts through coordination and utilization of our collective resources.

Key is a clearer articulation of the focus and scope of ABA diversity efforts.

The 2000 census confirmed that there are 1,027,000 lawyers in the United States. Presently, the legal profession is about 90% white. Lawyers of color represent 10% of our profession. We lawyers of color are woefully under-represented in the profession.

The ABA must lead in equality and fairness in our profession.

Diversity has been thought of by others as something that takes away from some to give to others, as if opportunity exists only in finite quantities. In reality, diversity gives to all.

The largest, best-established law firms and corporations must create a working environment with training and access to clients so attractive, that lawyers of color will thrive and be promoted in dramatically increased numbers.

Today we need to encourage students of color in junior high and high school to consider the legal profession. In each of our states, we have benefited from lawyers of color who have made a difference in improving the quality of life within their community, their state and our nation. Young people need to know that there is a positive opportunity awaiting them in our profession.

As lawyers, we are uniquely positioned to ensure the fair administration of justice in America and to work to improve our system whenever possible. We speak not only for the legal rights of citizens, but for the Constitution, for the judicial system and for the rule of law.

These are the issues the Center will focus on this bar year. As the preeminent legal association in the world, the ABA is in a special position to help develop the parameters and goals for increasing diversity within the profession and serve as a guiding force in program development and innovation.

Please stay tuned. There are great and wonderful things ahead of us.

Letter from the Chair

continued from page 1

assist lawyers of color/minority lawyers to succeed within this profession. However, as the Commission's landmark publication, *Miles to Go: Progress of Minorities in the Legal Profession* (December 2004), found there is still much work to be done. Thus, as we celebrate the Commission's 20th year, we must all recommit ourselves to the challenge and promise of Goal IX.

After an extraordinarily exhilarating Fall meeting, the Commissioners, Liaisons, staff, and I reaffirmed our commitment to build on the legacy and strength of the past. We completed the exciting and difficult task of selecting this year's Spirit of Excellence Award recipients. At our Spirit lunch on February 11, 2006 at the Hyatt Regency in Chicago, we honored six who exemplify the very best in our profession and who continue to blaze a trail for other lawyers of color/minority lawyers and to give back to their communities.

Paula E. Boggs, Executive Vice President, General Counsel and Secretary, Starbucks Coffee Company, Seattle, WA

Harry Gee, Jr., Principal, Law Office of Harry Gee, Jr., Houston, TX

Michael D. Marin, Partner, Vinson & Elkins, L.L.P., Austin, TX

Rachel Patrick, Staff Director, American Bar Association, Council on Racial and Ethnic Justice, Chicago, IL

Hon. Ann Claire Williams, United States Circuit Court Judge, United States Court of Appeals, Seventh Circuit, Chicago, IL

Corporate Award:

Roderick A. Palmore, Executive Vice President, General Counsel and Secretary, Sara Lee Corporation, Chicago, IL

Remembering the Way It Was

The Commission also intends to celebrate the life of extraordinary lawyers of color/minority lawyers by beginning an Oral History project. Through the lives of lawyers who struggled to overcome the barriers of discrimination and racism

we will learn about their extraordinary accomplishments and preserve their stories.

Challenging the Way It Is

With the commitment of corporate General Counsels, the Commission's Minority Counsel Program under the able leadership of Stephanie Franklin-Suber and Thomas Mars, Chair of the Corporate Counsel Steering Committee, focuses on getting corporations to use their "buying power" to change the way legal work is assigned within law firms. By encouraging the assignment of minority partners and associates to their work, corporations have begun to force law firms to provide meaningful opportunities to their attorneys of color. Under the leadership of Rick Palmore, General Counsel at Sara Lee, more and more corporations are signing on to the Commission's Call to Action program.

Because the Commission recognizes that many lawyers of color do not practice in large law firm settings, over the coming year, the commission will be developing programs to support minority lawyers practicing in government and solo and small firms. We intend to reach out to the ABA Government and Public Sector Division, General Practice, Solo and Small Firm Division, and any other section or division interested in developing programs that enhance the opportunities and participation of lawyers of color in our profession. We would welcome suggestions for programs, as well as the identification of ABA entities interested in future collaborations.

Measuring Our Progress

Over the coming months, we will be evaluating our existing programs. We want to ensure that our programs are the very best, that they are the most innovative and effective and that they are made available to as many attorneys of color as possible.

After the first of the year, we will be publishing our Goal IX report that evaluates how the ABA and its sections, divisions and forums are doing on diversity. This report will be particularly important as the Commission celebrates its 20th year.

We Want to Hear from You

As we move ahead this year, we want to hear from you about what programs you would like to see the Commission undertake. While we are pursuing promising initiatives and programs, we want to ensure that we listen to you about the needs and areas that you feel should be addressed. Contact us at 312-988-5643.

ABA Midyear Meeting Wrapup

Spirit of Excellence Awards Luncheon

Congratulations to the recipients of this year's prestigious Spirit of Excellence Awards: Paula E. Boggs, Seattle, WA; Harry Gee, Jr., Houston, TX; Michael D. Marin, Austin, TX; Rachel Patrick, Chicago, IL; Hon. Ann Claire Williams, Chicago, IL; and Roderick A. Palmore (Corporate Award), Chicago, IL.



Multicultural Women Attorneys Network (MWAN)

A Joint Project of the ABA Commission on Racial and Ethnic Diversity in the Profession and the ABA Commission on Women in the Profession.

The program began with the keynote speaker, Paula E. Boggs, Seattle WA. Panelists included: Elaine R. Jones, Washington, DC; Kalyn Free, Tulsa, OK; Karen K. Narasaki, Washington, DC; Patricia Mell, Chicago, IL; and Hon. Maria G. Valdez, Chicago, IL.

We would like to give a special thanks to our generous sponsors, Mayer Brown Rowe & Maw, LLP and Schiff Hardin LLP.





From Rodney King To Katrina

continued from page 2

The Overrepresentation of Juveniles of Color Committee held three excellent CLE programs in the past year that focused on the critical issues confronting youths of color in the juvenile justice system. All three programs had similar goals and objectives: how to assist at-risk-youths of color to get out of the system and how to prevent youths from going into the system. *A Report on the Overrepresentation of Juveniles of Color in the Juvenile Justice System* was issued in 2005.

Election Protection Project (2004)

A national partnership was created with the Lawyers' Committee for Civil Rights Under the Law to remove barriers to the electoral process for citizens of color who sought to participate in the 2004 election. The Council spearheaded the Chicago Election Protection Project in co-sponsorship with the ABA Section of Individual Rights & Responsibilities, the Section of Litigation, the Council on Legal Education Opportunities and the Young Lawyers Division. This highly successful Project recruited hundreds of volunteer lawyers and students; planned and conducted CLE training programs for volunteers; assisted in publicizing programs; and monitored on-site election polls.

Katrina Project

The project will focus on assisting, educating and coordinating services and resources with bar associations, interested entities and lawyers that provide or will provide legal assistance to Katrina victims. The Council is undertaking four separate initiatives as part of its Katrina Project. **Educational Programs** -The Project has already held an excellent CLE program at the Association's February 2006 Midyear Meeting titled "**Equity for Racial & Ethnic Victims of Katrina.**" **Third National Conference on the Impact of Race & Ethnicity on the Justice System** - A National Conference will be held in New Orleans in November 2006 that focuses on the re-building of lives, the economy and the city. **Resolution** - A resolution is being drafted to address issues of affordable housing, jobs and

other rebuilding issues confronting those people of color who were ignored. **Resource Guide** - This guide will contain the names and contact information of all organizations, corporations, foundations and entities that are striving to combat racial and ethnic bias that affects the Katrina victims of color.

Katrina impacted and captivated the entire country. As the Council continues to dutifully work to ensure equal access to and fair treatment in the justice system, we are mindful of the fact that the victims of the Katrina Hurricane continue to need our help. The legal profession must make sure that the justice system does work for them.

Priming the Pump

continued from page 3

Within these two very broad categories, we want to include in the Directory every program, project or initiative that targets diverse students or has a large percentage of minority participants. We want the Directory to be as comprehensive as possible—as long as all entries are related to the legal profession and to students of color.

Our students need our support, our hands-on involvement to encourage them and help them prepare to enter law school, stay in law school, earn their J.D. and pass the bar. As we continue to promote diversity programs and services for *practicing* attorneys, we must also concurrently turn our attention and our actions towards increasing diversity in the pipeline to the profession.

The ABA/LSAC Pipeline Diversity Directory had its debut online in November 2005. Our goal is for this Directory to become an invaluable resource not only for students of color, but also for bar groups, law schools, and community agencies to develop and enhance their own pipeline projects. Through active use of this Directory, minority students will gain access to programs and services that will inspire them to pursue a legal career—and equip them for success!



CREATING ACCESS TO ENHANCE DIVERSITY

Marvin E. Johnson

ACCCESS ADR is an initiative to promote greater diversity in the ADR field. This goal is to be achieved by facilitating the development of relationships between users of ADR services and highly experienced mediators from racial and ethnic groups that are under-represented in the ADR field.

ACCESS ADR has an advisory board that presently includes the American Bar Association Section of Dispute Resolution, American International Related Companies, the International Academy of Mediators, the JAMS Foundation, SAFECO, Inc., and Time Warner, Inc. On July 25, 2005, ACCESS ADR selected the inaugural class of ACCESS ADR mediators (Fellows). Three Fellows, Fred D. Butler, Lawrence A. Huerta, and Angelia J. Tolbert, were selected from a nation-wide pool of experienced mediator candidates. The three Fellows, who collectively have more than thirty years of experience in mediating and arbitrating commercial and business-related disputes, will participate in the 12-18 month ACCESS ADR business and professional development program.

Mr. Butler, an attorney living and working in San Francisco California, has had extensive experience as an ADR neutral in such areas as employment, real estate, construction, personal injury and a wide variety of insurance claims. Mr. Butler is on the panels of a number of organizations that provide arbitration and mediation services. The extensive list includes the American Arbitration Association, the National Mediation Board Roster of Arbitrators, and the U.S. Federal and District Courts of California.

Mr. Huerta is an attorney and lives and works in San Diego, California. Mr. Huerta's experience as an ADR neu-

tral includes the areas of employment, real estate, trade secrets, and securities matters. He currently appears on many rosters of neutrals, including the American Arbitration Association, the U. S. Forest Service, and the San Diego County Superior Court.

Ms. Tolbert, based in Little Rock, is an attorney, mediator, and arbitrator. She has extensive experience as an ADR neutral in numerous commercial and business disputes. A sampling of her experience includes service as a mediator in employment disputes, partnership dissolutions, personal injury and malpractice claims, and real estate matters. She is listed on numerous panels of neutrals, including the Arkansas Roster of Certified Mediators for Circuit Courts, the National Association of Security Dealers, and the Equal Employment Opportunity Commission.

The launching of *ACCESS ADR* began with a Fellows orientation program which took place on August 26-27, 2005. The orientation was conducted at the office of the Center for Alternative Dispute Resolution, the administrative home for *ACCESS ADR*.

The orientation provided an opportunity for the Fellows to meet each other as well as the program co-directors and administrators. A key aspect of *ACCESS ADR* is the commitment of the Fellows, not only to their own professional growth and development, but to the development of other mediators from racial and ethnic backgrounds under-represented in the ADR field. During the orientation, the Fellows re-acknowledged the responsibilities that they had agreed to in the *ACCESS ADR* Pledge which they each signed upon being accepted as a Fellow. The Pledge to which they agreed states:



Homer C. LaRue

I understand that my acceptance of the offer to be a Fellow carries with it certain responsibilities. Among my obligations to *ACCESS ADR* is my commitment to participate and to cooperate fully in the various opportunities provided by *ACCESS ADR* for professional development and growth. I also understand that my performance as a mediator will be evaluated by the parties; that the members of the Advisory Board and the Directors shall have the right to review the evaluations; and that I will accept feedback and critique from the Board and the Directors of the Program.

I further acknowledge, understand and accept, without reservation, my obligation to assist in the development and the advancement of other persons of color and/or persons from racial and ethnic backgrounds under-represented in the ADR field. That assistance may take many different forms and shall include, but not be limited to, providing mentoring to future *ACCESS ADR* fellows.

The brief history of *ACCESS ADR* and its role in the effort to increase diversity in the ADR field was a topic of discussion during the orientation. After introducing the Fellows to the *ACCESS ADR* case management system and the *ACCESS ADR* website, they were given an opportunity to provide feedback and to begin the preparation of their *ACCESS ADR* promotional materials.

ACCESS ADR was the outgrowth of a gathering of ADR users and ADR service providers initiated by the ABA Section of Dispute Resolution. The activity entitled, "Forum on Expanding Opportunities for Women and Minorities in Dispute Resolution," took place at the Section's annual meeting in

San Antonio, Texas in 2003. The Forum is now a regular part of the Section's pre-conference activities at its annual meeting.

As ABA Section of Dispute Resolution Council members, we worked with the then Section Director, Jack Hanna, to organize the Forum to create a dialogue between ADR service-users and minority and women ADR service-providers. The Forum dialogue revealed three themes underlying the lack of diversity in the pool of ADR service-providers who are called upon to arbitrate or to mediate the high-stakes or complex commercial disputes.

The first theme was that the ADR user community acknowledged that there was a lack of diversity in the pool of persons whom they regularly called upon for arbitration and/or mediation services, and further acknowledged the need to correct this imbalance. The second was the acknowledgment by the ADR user community that many of those who are responsible for the selection of arbitrators and mediators are lawyers who are responsible for the representation of their clients' interests. As such, they typically avoid selecting an unknown mediator without an assurance that the mediator has the perceived requisite knowledge, skill and experience. To decide otherwise would, in the minds of many lawyers, compromise the interests of their clients, something that their ethical obligations do not permit. That risk-aversion translates into the decision not to call upon the services of a neutral whom the lawyer does not know or one that the lawyer cannot easily learn about from a close colleague. The third element of the theme underlying the lack of diversity was that mediators from racial and ethnic groups that are under-represented in the ADR field, no matter how experienced, are usually unknown to the relatively small group of lawyers who are responsible for selecting arbitrators and mediators.

Before the end of the conference, we had conceived of a project that would bridge the gap between the users of ADR services and experienced mediators from diverse racial and ethnic groups. The envisioned project, which came to be named *ACCESS ADR*, would permit the users of mediation services to obtain an in-depth knowledge of the skills and abilities of highly

experienced mediators from various racial and ethnic backgrounds. The project is supported by an advisory board of ADR users and resource providers. Among other things, the advisory board provides guidance and financial assistance. The board also would determine the criteria for the selection of the mediators who would become *ACCESS ADR* Fellows. The Fellows would be exposed to a group of ADR service users by mediating cases provided by those users for a period of 12-18 months. During that period, each Fellow would be evaluated by the parties for whom the Fellow would have provided mediation services as well as by the advisory board.

The JAMS Foundation and the ABA Section of Dispute Resolution became the initial supporters of *ACCESS ADR*. Subsequently, the JAMS Foundation and the William and Flora Hewlett Foundation awarded grants to assist with the start-up of the program. At the August 2005 ABA Annual meeting in Chicago, *ACCESS ADR* formally announced the inaugural class of *ACCESS ADR* Fellows.

Users of mediation services who are interested in increasing the diversity of their pool of mediators can contact *ACCESS ADR* at accessadr@earthlink.net or (301) 313-0800.

Marvin E. Johnson and Homer C. La Rue are the ACCESS ADR founders and Co-Directors, and are JAMS Resolutions Experts based in the JAMS Washington, D.C. Resolution Center.

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High Court Changes Affecting Civil Rights Eyed Closely by Women and Minorities

Steven Gonzales

Changes to the Supreme Court wrought by the passing of Chief Justice William Rehnquist, and the resignation of Justice Sandra Day O'Connor raise specialized concerns for women and minorities. Lost amid media hype, interest group hysteria, and Washington in-fighting over the more polarizing disputes, lurk constitutional issues that may impose a more long-lasting effect upon the nation.

Among the most prominent themes of the Court in recent years under the late Chief Justice was a revival of state's rights. Certainly reasonable minds may differ whether or not state governments have been unduly weakened by federal power. But few have noticed that under the rubric of "federalism" a majority of the Court has steadily advanced state's rights on different fronts.

The Long-Standing Constitutional Framework

Congress's power to enforce civil rights has rested primarily upon two constitutional provisions. First, is Congress's power to regulate commerce under Article I, Section 8. The second is found in the post-Civil War era Fourteenth Amendment provisions prohibiting the states from denying any person life, liberty or property without due process of law, and from denying any person the equal protection of the laws. U.S. Const. Amendment XIV, Section 1. Congress is specifically empowered to enact legislation enforcing the Fourteenth Amendment by Section 5. U.S. Const. Amendment XIV, Section 5.

Congress has long used Section 5 to confer jurisdiction upon the federal courts to hear actions against state government officials for allegedly violating

a person's federal civil rights, such as in "police brutality" and race discrimination cases. Similarly, Congress based most of the twentieth century's civil rights legislation on its commerce power.

Further, from the late 1930's until approximately the mid 1990's the Court used a relaxed standard of review of commerce clause-based acts. The Court declined to second guess Congress and upheld legislation if it was reasonably related to a legitimate public purpose. With few exceptions, it was very difficult for a constitutional challenge to the legislation to succeed.

Did the Rehnquist Court Weaken the Fourteenth Amendment and the Commerce Clause?

Given the almost 100 years supporting the above constitutional analysis, the prospect of reversing the predominance of federal power was small. The commerce clause was used as the basis for most civil rights acts, and Section 5 of the Fourteenth Amendment was used to permit federal suits against states alleging abridgments of federal civil rights. Together, these two constitutional provisions accounted for most of the federal civil rights legislation of the twentieth century.

But a majority of the Rehnquist Court, citing state's rights and federalism, found creative ways to employ formerly obscure parts of the Constitution to strike down civil rights legislation intended to limit state action or permit federal actions against the states - the Tenth and Eleventh Amendments. The typical practicing lawyer may perhaps be forgiven if he or she is puzzled by these comparatively esoteric constitutional provisions. The fact is there was very little

case law concerning both for nearly two hundred years! But that changed in the 1990's.

The Tenth Amendment states the "powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States." In several cases the Rehnquist Court interpreted that Amendment to prohibit Congress from enacting legislation that "commandeers" state legislative and executive authority. Thus, for example, in an opinion written by Justice O'Connor in *New York v. United States*, 505 U.S. 144 (1992), the Court struck down portions of a national nuclear waste disposal act because it was found to intrude on states rights by essentially forcing certain regulations on the states.

Similarly, in a line of cases beginning with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), authored by Chief Justice Rehnquist, the Court held the Eleventh Amendment restricts Congress's power under both the commerce clause and the Fourteenth Amendment. The Eleventh Amendment essentially confers sovereign immunity on the states from federal court actions. Since the Eleventh Amendment trumps the power of Congress under the commerce clause, it performed an "end around" the long-standing "reasonable relation" test. The extent of the weakening of Congressional commerce power is unclear, given more recent cases seemingly reverting to the more traditional view.

Potentially even more the far-reaching, the Eleventh Amendment was held by the Rehnquist Court to require Congress to jump through several hoops before exercising its Fourteenth

Amendment Section 5 power to authorize federal actions against a state, alleging it deprived a person of his or her federal civil rights. Congress must first build a record of abuses or at least a strong possibility of abuse, by the states of specific civil rights, and then write a law providing a "congruent and proportional" remedy, in order to not run afoul of the Eleventh Amendment.

The Next Court

Before the Civil War, the slave states cloaked their rhetoric in the language of "state's rights." After the victory of the North and passage of the Fourteenth Amendment in 1868 that Amendment stood as a pillar of protection, ensuring individual liberty, indeed human rights, transcended "state's rights." The Fourteenth Amendment is so fundamental to the rights of minorities, women, and for that matter, in the matchless utterance of the Amendment itself, "any person," that it can fairly be argued there is no other single part of the Constitution more crucial. America simply would not be America without it.

In many ways, this dispute is the same 19th century dispute cloaked in new terminology. Ironically, the often heard rage against "activist judges" does not seem to apply to Supreme Court doctrine grafting limitations onto the Fourteenth Amendment or the commerce clause.

But is the Fourteenth Amendment really threatened? Or are we simply at the peak of a pendulum swing characterized by an inordinate fear by Americans of their own national government? The new majority of the Court, whatever it may be, may render that judgment. Despite the high visibility of social issues, federalism could prove to be historically more important. For example, a jurist could easily proclaim an inclination to uphold precedent, even on social issues, yet later join, in the name of federalism precedent, in holding the Tenth or Eleventh Amendments prohibit most civil rights legislation intended to enforce those very same rights.

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ABA Midyear Meeting Wrapup continued

JUDICIAL CLERKSHIP PROGRAM (JCP)

The ABA Commission and Judicial Division are the proud sponsors for this program. The simulated clerkship program brings together judges with students who wish to pursue judicial clerkships after graduation. We would like to thank LexisNexis for its continuing support of the program.

A special thanks to the judges and staff of the 7th Circuit Court District. Students had the rare opportunity to hear oral arguments before the 7th Circuit followed by a Q & A lunch with the judges.



SAVE THE DATES

National Conference for the Minority Lawyer

June 22-23, 2006
Philadelphia, PA

Join us for our two-day session of substantive CLE programming specifically designed for the minority lawyer. For more registration information see our website at <http://www.abanet.org/minorities/natconf/home.html>.

Annual Meeting

August 3-8, 2006
Honolulu, HI

Join us in Hawaii, as the Commission celebrates its 20th Anniversary promoting the full and equal participation in the legal profession by minorities. To register for the Annual Meeting, see <http://www.abanet.org/annual/2006/>.

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