Legal Opinion Letter

WLF Washington Legal Foundation

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Vol. 8 No. 16 July 24, 1998

CIVIL RIGHTS LAWS PROVIDE NO BASIS FOR ENVIRONMENTAL JUSTICE CLAIMS

by
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The United States Supreme Court has granted certiorari to hear an important case that provides the Court with an opportunity to limit burgeoning environmental justice claims. The case, *Seif v. Chester Residents Concerned for Quality Living*, No. 97-1620, will be heard by the Court when it returns from recess in the Fall of 1998.

The Concept of Environmental Justice. The idea of environmental justice as a legal doctrine seeks to impose civil rights protections under Title VI of the Civil Rights Act on environmental permitting decisions by state and local governments. Accusations of environmental injustice generally involve complaints that low-income and minority groups unfairly bear the brunt of living near polluting industrial facilities. Such allegations are much more problematic than clear-cut claims of discriminatory intent. Studies have shown that the distribution of neighborhoods and polluting facilities are affected by a wide variety of factors, such as housing patterns, local zoning decisions, political issues, and personal choice of residents. Further, it is far from clear that residents of any race uniformly object to the presence of a particular facility that produces jobs and revenues for the community.

The Seif Case. The case before the Court comes from a decision of the U.S. Court of Appeals for the Third Circuit, which held that private persons may sue to enforce Environmental Protection Agency (EPA) regulations which prohibit "criteria or methods of administration" in federally-funded programs which have the effect of discriminating on the basis of race, color, or national origin. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997). Like many environmental justice claims, the plaintiffs in *Seif* brought this lawsuit claiming that the environmental permitting process used by the State of Pennsylvania had a discriminatory effect on them because it resulted in a disproportionate number of polluting facilities located in areas with high numbers of minority residents.

In the Third Circuit, the Pennsylvania Department of Environmental Protection argued that private persons had no right to sue in court to enforce the regulations. The State contended that the sole means of enforcing the regulations was to file a complaint with the EPA. The Third Circuit disagreed, and held that private plaintiffs may maintain an action under discriminatory effect regulations under Section 602 of Title VI. *Id.* at 937. The Third Circuit assumed that the agency regulations prohibiting discriminatory effects were valid. *Id.* at 931 n.9.

The Core Issue: Agency Regulatory Authority Under Title VI of the Civil Rights Act. The Supreme Court now has the opportunity to correct a fundamental flaw in the Third Circuit's opinion, specifically, the erroneous assumption that federal agencies may expand their regulatory authority beyond that provided by Title VI. The Court has long held that in enacting Title VI, Congress intended to go no farther than the Equal Protection Clause of the Fourteenth Amendment. *See Regents of Univ. of California v. Bakke*, 438 U.S. 281, 284-87 (1978). The Court has also held that the Equal Protection Clause prohibits only

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instances of discriminatory intent, and not allegations of discriminatory effect. *Washington v. Davis*, 426 U.S. 229 (1976). Thus, the question must be asked, what empowers federal agencies such as EPA to promulgate and enforce regulations which prohibit "criteria or methods of administration" which have only the *effect* of discriminating?

According to the Third Circuit, the answer lies in the Supreme Court's decisions in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985). The Third Circuit interpreted these cases as upholding the validity of discriminatory effect regulations promulgated under the authority of Title VI. However, properly read, neither of the Court's decisions constitutes a holding on the validity of agency discriminatory effect regulations. Moreover, a more recent decision of the Court casts considerable doubt on this proposition.

In *Guardians*, a deeply divided Court affirmed the denial of relief under Title VI; but while three justices stated in *dicta* that discriminatory effect regulations were valid, four justices stated that they were not a valid exercise of agency power. *See Guardians*, 463 U.S. at 611 n.5 (Powell, J., concurring in judgment); *id.* at 612 (Rehnquist, J., concurring in judgment and joining in Part II of Justice Powell's opinion); *id.* at 614-15 (O'Connor, J., concurring in judgment). In *Alexander*, Justice Marshall characterized *Guardians* as upholding the validity of discriminatory effect regulations, but his statement was *dicta* twice over, an overbroad reading of *Guardians* which was not necessary to the decision reached in *Alexander*. Yet it is these two opinions which have formed the basis for the erroneous assumption that agencies may prohibit instances of discriminatory effect.

The contention that this remains an open question is buttressed by the Court's more recent opinion in *United States v. Fordice*, 505 U.S. 717 (1992). In that case, which involved a state's compliance with the Equal Protection Clause in the context of school desegregation, the Court commented on a claim that the state had violated a Title VI regulation, stating, "Our cases make clear . . . that the reach of Title VI's protection extends no further than the Fourteenth Amendment. We thus treat the issues . . . as they are implicated under the Constitution." *Id.* at 732 n.7. The Third Circuit in *Seif* observed this statement, but was unmoved, commenting, "We do not believe that the Court would overturn *Guardians* and *Alexander* in such an oblique manner." *Chester Residents*, 132 F.3d at 931 n.9.

This fundamental question concerning the validity of the EPA regulations will likely be raised by the State of Pennsylvania and its supporting *amici*. Of course, if the State prevails on this argument, the ramifications could extend well beyond the EPA; indeed, most federal agencies have adopted similar regulations governing the funding of state and local programs. The case may therefore become the most important item on the Court's current agenda.

Conclusion. The concept of environmental justice has a certain instinctive appeal, but, unfortunately, it is better suited as a slogan for a bumper sticker than as a coherent legal doctrine. Numerous practical problems, including concepts of legal causation and methodology, complicate attempts to apply discriminatory impact legal doctrine to environmental permitting decisions. But more fundamentally, Congress has not authorized federal agencies to go beyond the discriminatory intent prohibitions of Title VI. The *Seif* case presents the Supreme Court with an important opportunity to call a prompt halt to the use of environmental justice as a legal doctrine.

  ISBN 1056 3059