In the

Supreme Court of the United States

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, et al.,

Respondents.

No. 77-926

Washington, D.C.
January 9, 1979

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THE UNIVERSITY OF CHICAGO, ET AL., Respondents.	:	

Washington, D. C.
Tuesday, January 9, 1979

The above-entitled matter came on for argument at 10:37 a.m. o'clock

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN M. CANNON, ESQ., Suite 2245, 20 North Wacker Drive, Chicago, Illinois 60606; on behalf of the Petitioner.

WADE H. McCREE, JR., ESQ., Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the federal respondents supporting petitioner

STUART BERNSTEIN, ESQ., Mayer, Brown & Platt, 231 South LaSalle Street, Chicago, Illinois 60604; on behalf of the Non-federal Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-926, Cannon against University of Chicago and others.

Mr. Cannon.

ORAL ARGUMENT OF JOHN M. CANNON, ESQ,

ON BEHALF OF THE PETITIONER

MR. CANNON: Mr. Chief Justice, and may it please the Court:

This case presents as a matter of first impression the issue of whether Title IX of the education amendments of 1972 may be enforced in a federal civil action.

The particular case involves an application to medical school which was allegedly denied on the basis of sex.

Title IX provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from any education program receiving federal financial assistance."

At bedrock, this case asks the question, in the words of this Court from Allen v. State Board of Elections whether that sweeping promise of Congress is to be merely an empty promise.

The current operating plan of the Department of Health, Education, and Welfare's Office for Civil Rights contemplates a predicted backlog of 3,570 civil rights complaints, including 889 which include allegations of sex

discrimination.

Title IX applies to approximately 97,000 institutions. The number of participants, according to HEW, is approximately 55 million.

As of September 30, 1976, HEW had asked 20,318 school districts and colleges to file compliance statements. By the following March, 1977, only 6,742 had done so.

The enforcement task is enormous; much more enormous than that faced by the Attorney General with respect to election laws and considered by this Court in the Allen case.

In fact, HEW has declared itself it has no hope of making a complete enforcement job for this spread of concern.

Now HEW in its brief to me made the most significant point of any of the briefs, including our own. And that is that Congress clearly contemplated that voluntary compliance would be the primary means for enforcement, not only of Title IX, but of its predecessor legislation, Title VI, and subsequent legislation dealing with handicapped and age discrimination.

QUESTION: If HEW sees a violation here, do you have any hypothesis to suggest why HEW has not proceeded to enforce the statute, as you construe the statute?

MR. CANNON: Yes, I -- two things. Obviously there was some confusion between the District V office in Chicago and the national office. The national office, in the opinion which is attached to the petition for certiorari, has long

maintained the position, and particularly with respect to Title IX since September of 1974, that there is a private right of action to enforce Title IX; whereas the district office went into the Federal District Court and denied the existence of the private right of action, and said they were proceeding.

And indeed there is, in the appendix, a copy of my correspondence with the United States Attorney in Chicago that indicated the regional director planned to conduct this particular investigation during the first half of January, 1976.

QUESTION: Would you agree that Congress has given HEW a lethal weapon to deal with these problems?

MR. CANNON: Quite frankly, Your Honor, the Carnegie Foundation characterized it as the atomic bomb. I think it's perhaps too lethal in the sense that we referred in our reply brief to going through the fund cutoff procedures with HEW as playing Russian roulette with an institution.

Too many of our wonderful institutions of higher learning, and other federally-assisted organizations, are dependent for anything like their current mode of operations on Federal funds.

Putting the federal funds at risk is one thing that can be avoided by judicial action. And HEW has pointed that out --

QUESTION: Well, Congress -- you're making a very good argument that Congress should have affirmatively, clearly,

and unequivocally provided for a private action as an alternative.

But is that an argument that we should weigh?

MR. CANNON: Well, in considering why they may not have done that, I would point out that legislating in that particular area gets very touchy, particular with the background being Title VI.

And consider the fact that this Court probably would not have tolerated -- and Congress was quite well aware that it would not tolerate -- a reverse of that provision. And historically, there has not been an express authorization for federal jurisdiction to remedy what is at bedrock constitutional violations by federal authorities.

And in this case, as well as Title VI, it's the utilization of federal funds to support discriminatory activity which may well be -- and in many cases was clearly recognized as -- constitutional violations.

So that the absence of a provision is not really new. In fact, the greatest powers of this Court, tracing back in the private right of action to some recent cases with Bibbins and Bell v. Hood.

But more deeply, through Marbury, and all the way back to the King's bench, that -- where there's a legal right provided, unless there's a legal remedy, it's not much of a right.

And that, of course, is our basic question: Is this an empty promise, or will it be enforced? And for the present, it simply must be enforced by the courts or it's not going to be enforced at all.

HEW, the one to do the enforcing, has told us so. And the facts are quite clear.

Moreover, even if HEW could conceivably somehow get around to this enormous number of cases, the regulations that they have promulgated, and by the time Title IX came and followed with the other legislation, these regulations were in existence and known to Congress.

QUESTION: How many of them are there, do you suppose? How many cases are you talking about?

MR. CANNON: Cases, the current predicted backload on the civil rights area for Office of Civil Rights is the 3,570 predicted as of this October, with 889 involving allegations of sex discrimination.

QUESTION: So if you're talking about private enforcement, I suppose you're talking about the possibilities of that many cases, plus a lot of others, that would never get into the HEW AT all?

MR. CANNON: Right. 55 million participants figure of the extreme potential.

QUESTION: We could easily handle those.

MR. CANNON: Not at all. It is the immediacy of the

judicial action, as HEW pointed out.

Many institutions, like all of us, would like to go on our way and not consider some -- and be accused of a violation of civil rights. It's not a pleasant thing to contemplate.

But to take it seriously, and provide meaningful internal procedures, immediate outside enforcement by an independent agency, be it a court or HEW, is not necessary, at least for this time, unless the Court can step in and provide immediate supervision, there cannot be enforcement of the sweeping language of Congress.

And when the Court considers the fundamental rights that are covered by that promise, we would suggest to the Court that neither the judiciary nor the executive nor the Congress itself has any more important business than the enforcing the social justice among our own citizens.

QUESTION: Now you've spoken of these numbers, 55 million figure of course is pretty staggering, but the 3,500 isn't all that staggering. It's roughly 100 cases per district, federal district; although they would not be evenly spread, of course.

Did I say 100? I meant to say 300. About 300 cases per district. That's just a little bit over the caseload for one district judge, average caseload figures.

So it isn't quite as staggering as the 55 million

potential, is it?

MR. CANNON: Absolutely. And it's really -- as HEW pointed out in their brief, the availability of the judicial remedy that is going to lead to meaningful internal compliance procedures.

And whether one views the procedure as primarily aimed at providing outside judgment on the internal affairs, and any judicial review being de novo, or under a standard of clearly wrong, or other such standard, the importance is its immediacy.

A district judge, just like an agency, is going to be influenced by the quality of the internal investigation, the internal record that's made on considering the matters at issue.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE FEDERAL RESPONDENTS,

SUPPORTING PETITIONER

MR. McCREE: Mr. Chief Justice, and may it please the Court:

The government's position in this matter is essentially that presented by my brother a few moments ago: That we have a statute that requires the construction of this Court to determine whether it was -- whether it affords a private remedy against a private party that is a recipient of

federal funds in the education area.

We argue that three years before this statute was enacted, namely, in 1969, in Allen v. State Board of Elections, this Court was confronted with the necessity of construing a similar statute.

That statute provided, no person shall be denied the right to vote for failure to comply with a newly covered enactment that the statute consisted of.

That, of course, required the pre-clearance of changes in election laws. And there was an elaborate scheme of enforcement, which ultimately required the Attorney General to bring an action with a restrictive venue to the District of Columbia to see whether the election change required pre-clearance to see that it didn't offend the objectives of the statute.

Now, in a case with as complicated an administrative procedure for enforcement, even requiring the bringing of the action by the Attorney General in a particular venue, this Court nevertheless, looking at the language -- no person shall be denied the right to vote for failure to comply -- found an intent on the part of Congress not only to create a private right in an individual, but also to afford him a remedy in the federal courts.

QUESTION: General McCree, what do you suppose would be the basis of federal jurisdiction such as this against the

University of Chicago where you don't have any state action?

GENERAL McCREE: The funding, the federal funding, of the agency, I believe the federal government has the -- the Congress has the authority to determine how its funding will be expended by a recipient.

QUESTION: No doubt of that. But what's the statutory provision that would confer jurisdiction on the federal court?

I would suppose 1343 would do it in the case of a state university, but what about a private university?

GENERAL McCREE: Well, 1343, Section 4, which isn't restricted to a state -- or action under the color of a state right -- would be the jurisdictional basis for it. And if Title IX was found to create a private cause of action, 1343, Section 4, would afford jurisdiction for a federal court to entertain it.

And that's the crux of our argument that Section 9 does create a private cause of action against a private recipient of federal funds. And if it does jurisdiction lies, and the court should have heard the matter.

QUESTION: How about 1331?

GENERAL McCREE: Well, 1331 is the general federal question statute. And 1331 --

QUESTION: $10,000 or more --

GENERAL McCREE: -- jurisdictional amount. And

1334 has been construed as -- as not requiring it, so we would look at that.

Whether Mrs. Cannon would have -- could show the jurisdictional amount is problematic. She didn't attempt to. Her action is clearly under 1343, Section 4.

QUESTION: But you think Title IX would be construed to be a civil rights statute?

GENERAL McCREE: I would say Title IX clearly should be construed to be a civil rights statute.

As a matter of fact the legislative history indicates that Title IX was originally contemplated as an amendment to the Civil Rights Act of 1964, but later was enacted as part of the education amendments of 1972.

But its clear language that no person shall, on the basis of sex, be denied participation or be -- or be denied the benefits of or be discriminated against in any federally financed education program -- clearly is the kind of language the Congress has used when it has intended to confer a private right of action to remedy a deprivation of civil rights.

Senator Birch Bayh, who was the sponsor of Title IX in the Senate, clearly stated that the purpose of Title IX was to eradicate the years of discrimination against, particularly, women, but it wasn't limited to women, persons, on the basis of sex.

So I think 1343, 3, would certainly -- its requirement of it being a civil rights statute would certainly be satisfied.

QUESTION: You meant 4, not 3.

GENERAL McCREE: 34, I beg your pardon. Thank you for correcting me, Your Honor.

We submit that the Congress, on the basis of the construction given to language which commences, no person shall be denied a specific right, has reason to, and does in fact utilize that language when it intends to create a private right and to create a private remedy.

We suggest that because in a series of civil rights acts, whenever Congress has intended there not to be a private right of action, it has expressly stated that the administrative remedy will be exclusive.

QUESTION: And yet some other sections of the Civil Rights Act, when they wanted a private cause of action, they provided for it.

GENERAL McCREE: That is correct, if the Court please. But it is done so for a specific purpose of showing a limitation on the private cause of action that was created.

For example, in Title II of the Civil Rights Act of 1964, concerned with public accommodations, there was the express grant of a private action, but it was specifically limited and restricted.

Similarly, in Title VII, which was the equal employment opportunities part of the Civil Rights Act of 1964, there was the express grant of a private act, but specifically limited to require the utilization of state facilities for processing claims of this sort, and then subsequently, the federal agency that was set up and requiring certain time limits to be followed.

QUESTION: You think that if Congress had expressly provided for a private cause of action under this section, it wouldn't have limited it or conditioned it upon exhausting administrative remedies, or anything like that?

GENERAL McCREE: I can only suggest that the Congress did not do so, and when it enacted Title VI of the Civil Rights Act of 1964, it also did not do so.

And of course Title VI --

QUESTION: That's somewhat of a bootstrap.

GENERAL McCREE: It may very well be, but the Congress has a clear pattern of using the language --

QUESTION: Yeah, it may be clear one way or the other.

GENERAL McCREE: I think that's so. I think that explains why we're here today this morning.

But the Congress apparently has relied upon this language formula to create a private cause of action when it intends to do this.

On the other hand, the Congress has used other

kinds of language formulae when it has not intended to do it. For example, the Congress should have -- could have said, no educational institution shall -- or any educational institution that discriminates on the basis of sex will not receive federal funds.

And in such an instance, I would be hard put to argue that someone who felt discriminated against could find from that a private right created, and a federal remedy to vindicate that right.

But here the language consistently runs through the series of civil rights actions which are intended to remedy against discrimination on the basis of race, on the basis of sex, on the basis of age, on the basis of physical handicaps. This language, no person shall be discriminated against.

And when it intended to give a restrictive right of action, it so expressed itself, as it did in Title II and Title VII, when it intended to have no private cause of action, despite the use of that language. It has expressly stated that the administrative remedy will be exclusive, as it did in Title III of the older American amendments of 1975.

But when it did neither, it appears that the Congress intended then for the recipient of this right to be afforded a federal remedy.

QUESTION: Mr. Solicitor General, what import, if any, do you attach to Senator Keating's inability to get a

private right of action included in the original Title VI?

GENERAL McCREE: Well, I think that's the most difficult part of my argument. All I can suggest was that the -- he knew too, however, that if this language formula was used, that he need not win his effort for an expression -- for an express grant.

And the Congress did use this linguistic formula, even though he was unable to get that.

If the Congress had intended not to grant a private remedy, then it would have not concluded merely with rebuffing Senator Keating, it would seem to me, but it would have expressed the contrary, or would have used contrary language, as we can see it did in these other statutes.

This Court, of course, addressed the -- this whole matter of determining when a -- when there should be an extension of a civil remedy to a person injured by another's breach of a right granted, in the case of Cort v. Ash, in 1975, and suggested four questions that must be answered. And I would like to consider those for a few minutes.

The first one, of course, is whether the plaintiff is one of the class for whose especial benefit the statute was created.

I think it's irrefutable here that Mrs. Cannon is one of the class for whose especial benefit the statute was created. I think we can conclude without argument that

she was a person who was to have received a federal right, and that she did indeed receive it.

I argue, as we do in our brief, on page 46 and the following pages, that the use of the language has been consistent in this respect.

The second question, of course, is whether there is any indication of legislative intent to create a private remedy or not. Now, of course, if there was convincing evidence of intent, we wouldn't even apply the Cort v. Ash formula, if there was unmistakable evidence that there was no intent, that would conclude our discussion, and if there was unmistakable evidence there was intent, it would as well.

Here, we have to conclude that the evidence is ambivalent. Nevertheless, we suggest that such evidence as exists does favor the finding that the legislature intended to do it.

I suggested before the consistency of the language, and I direct the Court's attention also to the fact that there were lower court cases granting a private remedy in Title Vi, after which Title IX was adopted, at the time the Congress adopted Title IX.

Now, whether the Congress was acutely and actually aware of those decisions, I can't argue, but I can certainly suggest that they were there for the Congress' direction.

But even if we concede that the second point, that

of legislative intent, is ambivalent, we proceed to the third point: is it consistent with the underlying purpose to apply a remedy?

I suggest that the answer here is a compelling yes. My brother has indicated the problem of -- of numbers that would make it difficult for a person whose rights were offended to get a private remedy.

I would also add that the cutoff isn't a remedy for Mrs. Cannon. And if the government should cut off the funds, she and many persons like here, still would be without a remedy.

Also in the case of a single grant, single federal grant, with nothing in the way of sustaining funds contemplated, there would be no need for a cutoff. And yet she would be without any administrative remedy at all, because there isn't anything an agency could do for her.

And finally, whether this is a right traditionally relegated to state law. I suggest that this is uniquely federal because federal funds are involved, and the federal government has a right to be free from discrimination, or to see that its funds are not employed to discriminate.

I would conclude by saying that private litigation is an indispensable compliment to government actionif the goals of Title IX -- freedom from discrimination on the basis of sex -- are to be achieved.

Thank you.

QUESTION: Mr. Solicitor General, may I come back a moment to the distinction you make between Title VII and Title IX with respect to Congress in Title VII having imposed limitations on the use of the private remedy.

GENERAL McCREE: Yes.

QUESTION: What puzzles me is why Congress should have taken a different view, if it did, in Title IX, in view of the capacity of the private remedy to disrupt education and the freedom of faculties to choose student bodies.

In this case, for example, there were some 2,000 applicants whose academic credentials were superior to the plaintiff in this case. So that I suppose if they had chosen to bring individual suits, they could have been -- 2,000 additional suits.

The disruption to the colleges would be vastly greater, one would think, than the disruption to private industry, as a result of claims under Title VII. What policy considerations could have motivated Congress to make the distinction you draw?

GENERAL McCREE: Mr. Justice Powell, I believe there are two answers to the question.

The first one, is Title VII, the employment case, was an area into which the Congress has not ventured before, and the basis for its jurisdiction there was a commerce clause,

and it was extending some previously understood concepts of the commerce clause, and therefore thought it should closely restrict the private remedy as it explored this new area of extending federal power.

Here under Title IX there's absolutely no question about the power of Congress to control the spending of federal funds, so it need not have felt so queasy about proceeding -- about affording a private remedy there.

I think the second answer is --

QUESTION: But may I comment on your first answer? In view of the decisions of this Court under the Fair Labor Standards Act, how could Congress have been queasy about its powers under the commerce clause to enact Title VII? Window washers have been held to be engaged in interstate commerce.

GENERAL McCREE: But the Congress has not done so in any discrimination areas. And this was its first venture in that field.

QUESTION: Does that make a difference?

GENERAL McCREE: Well, I would think it would. I would think the Fair Labor Standards Act rationale was the impact of just economic factors on the commerce; and here, the nation at the time Title VII was enacted was finally addressing some unfinished business of eliminating discrimination based on race, and there were reservations about it.

QUESTION: You had a second reason, and I interrupted

you.

GENERAL McCREE: I would suggest that the second reason is, an awareness that although Title VI had been law since 1964, there had been no disruption of educational programs across the nation, as the question suggested might result if 2,000 students who ranked below the particular applicant brought a case.

My experience -- my observation has been that Title VI has not resulted in an inundation of the courts on the basis of persons who believe they are aggrieved because of race. And I don't think the same thing would happen under Title IX on the basis of sex, and I think the Congress was probably aware of that.

QUESTION: General McCree, before you sit down, I'm curious about one thing: In the government's brief, on page 21, there's a reference to the Lau case. And to my concurring opinion in it.

The brief reads, "The relevant portion of that opinion, not joined by any other member of the Court, states...." I don't know who wrote the brief, but I think that statement is incorrect.

There was another member of the Court who joined me.

GENERAL McCREE: I apologize for the error, and I appreciate the Court's --

QUESTION: I read it twice to be sure what I was

seeing was correct.

GENERAL McCREE: I'll try not to have that happen again, Mr. Justice.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Bernstein.

ORAL ARGUMENT OF STUART BERNSTEIN, ESQ.,

ON BEHALF OF THE NON-FEDERAL RESPONDENTS

MR. BERNSTEIN: Mr. Chief Justice and may it please the Court:

The -- it's been implied in the arguments of petitioner and the Solicitor General that Title VI and Title IX are to be interpreted together.

You may recall that Title VI was the subject of some consideration by the Court in the Bakke case. It is our position that Section 1 of each of these titles states a policy, and that Section 2 creates a very elaborate enforcement procedure.

And that enforcement procedure is exclusive. We think examining the terms of the statutes on their face reveals this; we think that the studying of Title VI and the Civil Rights Act of 1964, where other titles did contain specific provision for private remedies; confirms the intent which appears on the face of it.

But most important, we think the legislative debates which gave flesh to what appears on the face of the statute, confirm the assertions we have made in our brief.

Now, throughout this litigation, we have constantly referred to the legislative debates, what was said, what exchanges were had, on the floor of the Senate and House; and up until last Thursday, we have had no response to this from the petitioner.

Last Thursday a brief was filed, a reply brief, which sets out some excerpts from the legislative debates which purport to make the point that the first section of Title VI, and by implication, Title IX, was independent of the enforcement procedure under Section 2 of these titles, and that therefore the impliaction is that a private right of action could be implied even though there was no express provision.

Since I could not anticipate these references, nor will I have a further opportunity to respond, I would like to start my argument with a reference to these arguments in the petitioner's reply brief, and show that they completely are misstated, and I say that advisedly; and certainly do not support the position asserted.

The first exchange described in the reply brief is one between Senator Talmadge --

QUESTION: You're speaking of the reply brief?

MR. BERNSTEIN: Yes, sir --

QUESTION: Of the federal respondents?

MR. BERNSTEIN: No, of the petitioner.

QUESTION: Okay.

QUESTION: Filed January 4th?

MR. BERNSTEIN: Yes, sir. No, filed last Thursday, whatever date that was. And I'll refer to page 14 of that brief.

QUESTION: All right.

MR. BERNSTEIN: An exchange between Senator Talmadge and Senate Humphrey is described, and it concludes with the following quotation which is set out in the brief.

And it says, Senator Talmadge continued, the people have the authority to go to court --

QUESTION: Mr. Bernstein, I'm sorry.

MR. BERNSTEIN: Yes, sir.

QUESTION: What page of the reply brief?

MR. BERNSTEIN: I'm sorry, page 14, Mr. Justice Rehnquist.

QUESTION: Thank you.

MR. BERNSTEIN: It says, Senator Talmadge continued, and I'm quoting, "the people have the authority to go to court, and the Senator admits they have that right, and Senator Humphrey is quoted as responding, yes.

Now the implication is that they have the right to go to court under Section 1, Title VI and Title IX.

Well, not so. This was the culmination of a long statement by Senator Talmadge opposing the Civil Rights Act in its entirety, and Title VI in particular. And the point he was making was that there was a pre-existent state right under 1983 for a right of action against the state action, where the discrimination was alleged, whether there was or was not federal funding.

And his point was that this act, which gave the power to the executive to cut off federal funding, was totally unnecessary. It was very oppressive, and had the seeds for destruction of local governments. And I'll quote where he said just about that.

And to the extent there was a legitimate governmental interest in this matter, it was already covered under 1983, and it was in this context that he made the point that the people havethe authority to go to court, and the Senate admits they have that right.

He was speaking of the then-existing state of the law, not of the bill which was then being considered. And Senator Humphrey responded, yes, they do. And then Senator Talmadge, which sort of sums up the point he was trying to make, says, why does not the Senator rely on the Court's authority, instead of giving arbitrary, capricious, wholesale punitive power to some federal bureaucrat to starve entire cities, towns, states and regions at one fell swoop?

He simply didn't like Title VI at all. He was simply urging on the Senate that they not adopt it in its entirety.

Senator Humphrey responded, and I'm reading now from the Congressional Record, 110, page 5246, which was not included in the reply brief, Senator Humphrey replied, but we develop here what I call the legislative history. I wish to make it clear that Section 602 -- second section -- is a limitation on the enforcement of the law set out in Section 601 of Title VI to those agencies affected by Title VI.

Now that exchange disturbed Senator Case, because he thought that that statement could be implied as limiting the pre-existing rights under 1983. So Senator Case got into the act, and he said to Senator Humphrey, now, I'm disturbed about that limitation language. I don't want this statute to take away pre-existing rights.

And that's when the exchange culminated in the two quotations you find at the bottom of page 14. Now you'll see that there are dots indicating omissions from those quotations, and the dots are very significant, and go to the heart of this case. But they have been momitted. I'd like to fill the dots in if I may.

Senator Case says, and I'm quoting from what's in the brief, for myself I would not be satisifed if this language of Section 602 is intended to limit existing rights of individuals under the constitution, or to limit the rights

expressed in Section 601, in any substantial sense -- dots.

All right, here's what the dots say. Federal departments or agencies, with authority to disburse loans, grants, tor to make contracts in order to eliminate discrimination in programs win which those contracts, loans or grants are involved, must proceed in the fashion stated.

With that I agree. And then he goes on.

That is the intent. However, it is not intended to limit the rights of individuals if they have any way of enforcing their prights apart from the provisions of the bill; apart from the provisions of the bill -- by way of suit or any other procedure.

The provision of the bill is not intended to cut down any rights that exist. That was the thrust of the discussion which was set out here on page 14.

Then Senator Humphrey responded, as is set out here, I thoroughly agree with the Senator, insofar as the individual is concerned, and here you see dots again. Now here's what the dots say.

As a citizen of the United States, he has his full constitutional rights. He has his full -- he has his right to go to court and institute suit, and whatever may be provided in the law and in the constitution.

They were talking about existing law, not what the bill would do. And the impliaction in the reply brief that

somehow this was intended to enlarge these rights or to change existing law, is completely foreclosed by the discussion I have alluded to.

Now, there's one more --

QUESTION: Doesn't that boil down to, Mr. Bernstein, suggesting that they were not opposed to a private right of action?

MR. BERNSTEIN: Well sir, if you anticipate me. Because Senator Keating then immediately chimed in.

QUESTION: Talked about his own bill?

MR. BERNSTEIN: Pardon?

QUESTION: Talked about his own bill?

MR. BERNSTEIN: Well, no, he comes right along. And he said that he understood the point that Senator Case was making, and he was glad he got it cleared up, but he had another problem.

This problem was that the bill did not provide a private right of action for the individual. And here's what he says.

Under Section 603 -- that's the judicial review section -- a state or political subdivision of a state, or an agency of either, which is denied funds because of discrimination -- because discrimination is taking place is given the right of action in court.

But there is no correletive right in the citizen.

He's not talking about his bill, he's talking about this bill that's before them for consideration.

If funds are granted for discriminatory projects by public officials, the citizen who is denied the benefits of the project, has no correlative right to bring a suit in court, and he should have.

And that's why he found the bill objectionable. But they never did change the bill, Your Honors.

Now, clearly, he would have liked to have had a private right of action. But what he said, it isn't in there, and I don't like it. And he never got it in.

QUESTION: You say that negates any idea that Congress omitted it because they thought it was unnecessary and already in there.

MR. BERNSTEIN: Sir, I submit there's only conclusion to be drawn, but that they wanted to get it in there, it wasn't in there, and he didn't like the fact that it wasn't in there.

QUESTION: Did Senator Case introduce an amendment?

MR. BERNSTEIN: Pardon?

QUESTION: Did Senator Case introduce an amendment along that line?

MR. BERNSTEIN: Well, if he did, sir, I'm not aware of it.

QUESTION: Senator Keating did, did he not?

MR. BERNSTEIN: Senator Keating -- well, what Senator Keating did was ask the Department of Justice in drafting the bill to include such a provision, and they did not.

QUESTION: Wasn't that earlier, Mr. Bernstein?

MR. BERNSTEIN: That was earlier.

But three weeks later -- and what I quoted occurred on March 13, 1964 -- three weeks later -- it was unable. First, Senator Keating again took the floor, and it was during the course of Senator Ribicoff's analysis of Title VI, and it was there, Justice Stevens, that you found a quotation which is set out in your concurring opinion.

And during the course of that, Senator Keating took the floor from Senator Ribicoff, and he said, and I have to read this because I think this is also quite critical, as Senator Ribicoff has pointed out, both he and I felt that the original -- incidentally, this is quoted on page 24 of our brief, may it please the Court -- as Senator Ribicoff has pointed out, both he and I felt the original Title VI proposal was objectionable in that it emphasized the cutting off of federal funds rather than the ending of discrimination.

We favor a provision allowing the administrator to institute a simple action to eliminate the discrimination, and we favor judicial review of the determination to withhold federal funds.

Parenthetically, while we favor the inclusion of the

right to sue on the part of the agency, the state or the facility which is deprive of federal funds, we also favor the inclusion of a provision granting the right to sue to the person suffereing from discrimination. This was not included in the bill.

Now I submit --

QUESTION: When he say this was not included in the bill, he means the Department of Justice didn't include it in its bill?

MR. BERNSTEIN: That's correct. Well, the bill -- it's hard to describe whose bill it was by this time, but this was the bill now before --

QUESTION: Right, I understand.

MR. BERNSTEIN: -- under consideration.

It was asked that the provision be included. The provision was not included. And as Justice White has pointed out in his concurring opinon in Bakke, there were other references by other Senators to the same failure to have a provision for --

QUESTION: But the request by Senator Keating was to the Department of Justice? There was no formal amendment introduced by Senator Keating, or any bill proposed?

MR. BERNSTEIN: That's correct, that's correct.

But clearly the Senate knew, by this exchange, that they tried to get one in, it wasn't in, and he was decrying

the lack of it.

QUESTION: But I don't see how you can consistently say, they tried to get it in when they didn't propose an amendment.

MR. BERNSTEIN: Well, sir --

QUESTION: I assume that they knew they could propose an amendment. Well, wasn't this just talk?

MR. BERNSTEIN: Well, I suppose all the Congressional debates are just talk, sir.

QUESTION: When they put an amendment, it's no longer talk.

MR. BERNSTEIN: Well, what he's saying is, he tried to get it and didn't get it. And --

QUESTION: Why didn't he -- why didn't he -- did he ever make an explanation as to why he didn't offer an amendment?

MR. BERNSTEIN: I don't know, except his concluding statement which I didn't read, where he said, both the Senator from Connecticut --

QUESTION: What page?

MR. BERNSTEIN: Oh, I'm reading on page 24 of our brief, where he completes his statement before the Senate, where he says, however, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department.

I assume he felt that they weren't going to get it, and he abided at that point. But clearly he expressed the point of view that he wanted it in, and it wasn't in there.

QUESTION: I'm going to ask, Mr. Bernstein --

MR. BERNSTEIN: Yes, sir?

QUESTION: -- your comments go to Title VI only, or to Title VI and Title IX?

MR. BERNSTEIN: No, and Title IX, sir.

QUESTION: Because I gather your comments, to the extent they address Title VI, disagree with Mr. Justice Stevens conclusions in Bakke?

MR. BERNSTEIN: Yes, sir.

QUESTION: You think that was wrong?

MR. BERNSTEIN: You make it difficult for me to be graceful in my response.

QUESTION: Well, you must.

MR. BERNSTEIN: Yes, I think it was wrong.

QUESTION: Of course you do.

And you think Justice White's concurr ing opinion had the better of it?

MR. BERNSTEIN: I think so. I think so. I think that --

QUESTION: But even if that were true, if Congress came along and enacted Title IX, there could be a different provision in Title IX, there could be adifferent legislative

history in Title IX, or there could be the existing legal environment could be such that you had to assume that Congress knew what the law was, or what the lower courts thought the law was.

MR. BERNSTEIN: That's correct. That's correct. And we've addressed that, of course, in our briefs, your Honor.

I think all of us have agreed, all the -- the petitioner, the Solicitor General, all the amici in this case -- and there are many of them -- we all agree that the legislative history of Title VI carries over into Title IX. And Senator Bayh so said when he introduced Title IX. He said, we're doing the same thing we did under Title IX, provides the same procedures, the same regulations, that have worked so well under Title IVI.

QUESTION: What if some courts had already said what they thought Title VI did? Even if you might disagree with what the lower courts said. What if the lower courts had held this, and the Senator, when he was talking, had those cases specifically in mind.

MR. BERNSTEIN: Well, as the Court of Appeals pointed out below, there's no indication that any Senator or any legislator of any one of these cases that have been referred to in the briefs.

Further, as we have repeatedly asserted here, these

cases are mostly equivocal on the point, because the jurisdictional basis was not necessarily Title VI itself.

QUESTION: Then I take it that also in the legislative history of Title IX, there were some Senators who expressly addressed the question, and said, it should -- this shouldn't be -- we are not indicating that there is a private cause of action-

MR. BERNSTEIN: There's an implication that there is such a thing, but I haven't found it, Your Honor. We have rather carefully combed -- in all candor, I must say, we haven't found that reference.

QUESTION: What they said was, we don't intend to change the law, whatever it is now.

MR. BERNSTEIN: That's -- this is the thrust. Whatever the law -- whatever they did in 1964 in Title VI, that was the thrust of what Senator Bayh said when he introduced the bill.

QUESTION: I'm thinking of the colloquy with Congressman Railsback that Judge Bauer referred to.

MR. BERNSTEIN: Oh, that referred not to the adoption of Title IX, but to the civil rights attorneys' award.

QUESTION: Oh, that's right.

MR. BERNSTEIN: Which occurred just last year, while this case was in the Court of Appeals on a hearing; it was an entirely different matter.

What we submit is that apart from the clear construction of the statute, and apart from upsetting the Civil Rights Act of 1964, that the legislative history, which I refer to here, clearly supports our side, if you apply the second test of Cort v. Ash, namely, was there an intent of Congress to deny or create.

And Senator Keating says there was an attempt to deny, and he decried that fact.

QUESTION: Well, is that fair, Mr. Bernstein? He said, there was a failure to create, and he was unhappy there was a failure to create.

But is that quite the same as a statute that says, there shall be no other remedy except the one we expressly provided for?

MR. BERNSTEIN: Well, Your Honor --

QUESTION: There's no exclusivity provision in the statute.

MR. BERNSTEIN: -- I suppose we have trouble on how we read the words. But when he says that a citizen who is denied the benefits has no right to bring a suit in court, I think he's saying that there is no right to bring a suit in court.

QUESTION: Under the bill; no right expressly provided for under the bill.

MR. BERNSTEIN: The one that they're passing; that's

the bill they ultimately passed.

Now, if he says that I -- you know, we can play with the wordsas to putting it positively or negatively, but I think he says there is no right. I think he says it almost in so many words.

I think -- to conclude this part of my presentation -- I think that this clearly sets out that with respect to the second test -- we accept the first and the fourth as set out by the Solicitor General -- but the second test, namely, what is the intent of Congress, I think it could hardly be clearer.

And it really has nothing to do with whether I think the University of Chicago would be overburdened if every disappointed applicant would run to court, or if Mrs. Cannon thinks it's unfair that she doesn't have her day in court. It's what did Congress say. And I think they spoke fairly clear.

And I'd like to --

QUESTION: You haven't mentioned -- before you leave that, you haven't mentioned Congressman Celler, Chairman of the Judiciary Committee of the House and certainly on top of hthis problem, what he said over on page 25 of your brief.

MR. BERNSTEIN: Well, sir, I --

QUESTION: Now, was he bearing on 6, Title VI?

MR. BERNSTEIN: Excuse me, sir.

Page 25?

QUESTION: Page 25 of your brief, yes.

MR. BERNSTEIN: Yes, this is Title VI. The difficulty is, there was very little legislative history on Title IX, other than its introduction by Senator Bayh. And that's why all the legislative history referred to in the brief here goes back to Title VI, and everybody agrees that IX was patterned on VI; in fact, it's claimed that one was a photocopy of the other.

And we don't dispute that. We think it's quite right.

But there's a private action under Title VI; there's one under IX.

This was all under Title VI.

I'd like to get to the third test of Cort v. Ash, namely, whether it's consistent with the underlying legislative scheme. And here I'd like to pick up the reply brief of -- the brief of the Solicitor General's.

Now, you may recall -- Justice White made the point in his concurring opinion in Bakke -- that to permit a private right of action under the first section would in effect to be -- to bypass the elaborate administrative procedure under Section 2.

QUESTION: Yeah, the difficulty is that in this case, I was the only one to --

MR. BERNSTEIN: Well, sir, I recognize that I have

that burden. But I'm glad to have your support. I trust -- I'm hoping that my eloquence can convince some other members of the Court.

The Justice Department took issue with Justice White's statement that this represented a bypass -- that this would represent a bypass of the administrative procedure, and they said there's no inconsistency.

Yet they said -- or let me point the fact out -- Mrs. Cannon's complaint was filed with them in April of 1975, and they still haven't acted on it. They completed their on-site investigations, University of Chicago, Northwestern University, in June of 1976; at least they so advised, in June '76, on-site investigations have been completed. The questions she raises concerning age, raises an issue national in scope, they have to have a national policy on it, and they sure her they will act as expeditiously as possible.

That letter from HEW is set out in the Appendix to the petition for certiorari, it's from HEW to Mrs. Cannon. That was in 1976. Nothing's happened yet.

What they said in their original brief to this Court was that if the Court should decide there was no private right of action, then they'd complete their investigation. Well, if there's no inconsistency between the administrative and judicial procedure, why wait till this Court acts?

They should have gone ahead and completed it. They

explained in their reply brief something else. They say that -- and I think I can quote the words exactly -- they say that since the district court, the courts have decided there was no private right of action, and since HEW couldn't itself resolve that question, he was going to defer further action pending the outcome of this case.

Nobody asked HEW to decide that. That's not their function. There function is not to decide whether there's a private right of action. There function is to act on administrative complaint s under Section 2.

It is clear that what HEW is saying, that if you decide that there's a private right of action, we'll just wash our hands of this matter. We won't go any further.

If they don't mean that, why have they waited? Why have they waited?

QUESTION: Is it reasonable to assume, Mr. Bernstein, that had the HEW acted in 1976, that there could have been by this time judicial review of that administrative determination?

MR. BERNSTEIN: Yes, of course, Your Honor, that is of course true. And I must express some concern and sympathy with Mrs. Cannon's plight. I think it's unfair that she's had to wait this long.

But I think it's a doing of HEW , and I say that in all candor, and perhaps with a little anger. I think HEW has

pulled itself down by its bootstraps. It hasn't acted. And it says, you see, we can't act. And therefore --

QUESTION: Are you suggesting that they're undertaking to compel this Court to decide the scope of their responsibilities instead of deciding it themselves?

MR. BERNSTEIN: Well, I think their responsibility is clear. Nobody has said -- they haven't suggested that they have no authority under Section 2 to proceed. I don't think they need this Court to tell them that. That's clear.

I think what they're saying is, that if this Court says she can go to court, then we don't proceed; and that's the bypass that Justice White was talking about. It's inevitable.

You got another dilemma. Let's suppose they do proceed two ways: administratively and judicially. It comes up in court on one standard of review; it comes up to the administrative agency for judicial review under the APA standard review, which is entirely different.

So, conceptually, at least, the same court can decide the same question under different standards and come out different ways.

The dilemma is simply unavoidable. It seems to me, if the Court please, that there's no way you can give credit to the elaborate chscheme under Section 2 of each of these statutes if you all an independent private right of action.

Judicial review is another matter.

So I submit that this clearly sets forth the answer to the third Cort v. Ash test.

No the government makes one other point in its reply brief -- I think it was lecturing me, but I'm not quite sure, about my failure to perceive the difference between primary jurisdiction and exhaustion of remedies.

And they go to great detail to explain that in circumstances like this, where they are in court on a Title VI case, they may, under the appropriate circumstances, ask the court to defer action while they complete the administrative process, and they say that's the doctrine of primary jurisdiction, that's what they're talking about.

And they seem particularly upset by my statement that I was confused about the course of conduct in various cases that we cited in our brief.

The unfortunate part of the government's position is that they, in fact, in the Terry v. Methodist Hospital of Gary case, which we refer to in our brief, they themselves filed a motion to dismiss for failure to -- for lack of subject matter jurisdiction, because of lack of exhaustion; the very point we're trying to make, they themselves made, but now they deny that.

Well, they withdrew that motion subsequently. but they withdrew it not because they felt the exhaustion

doctrine wasn't proper, but because they wanted -- they explained in a later document, they wanted to facilitate settlement.

So they themselves have adopted the exhaustion argument, if the Court please. We're not doing anything novel here.

And it seems to me it's inevitable that you do that if you're to make any sense out of this statute. Otherwise, you have a shambles.

I think this is the essence of my case, because what I'm really talking about is what Congress intended and not what Mr. Cannon wants or what I want. It's ultimately what Congress said.

There are a few minor things. They weren't touched upon, but they are in the briefs. And that is, the recent amendments to the age discrimination act, which now provides for a specific private right of action, with exhaustion.

And we made the point in our brief that this manifests an intent that when Congress menas to have a right of action under these kinds of statutes, it knows how to say so clearly.

QUESTION: But that's a different Congress than the one that enacted Title IX.

MR. BERNSTEIN: I understand, sir. If you'll forgive me, I'm doing this in the defensive posture. They said that

I can't read the amendment that way, because the amendment implies a pre-existing right. I simply wanted to call your attention to the conference report, which we haven't had a chance to do before, because there was a difference between the House and the Senate on that issue.

But the conference report says as follows: the House bill amended the age discrimination act of 1975 by specifically providing for a private right of action for violations of the act.

I'm responding to the point that that really wasn't what was done. And I point to the conference report to say that that was done.

I agree that actions of subsequent legislatures are not very significant in trying to shed light on what precede.

QUESTION: That really only proves that this particular Congress knew how to create a private cause of action, not necessarily that the preceding one did.

MR. BERNSTEIN: Well, I accept that. I -- if it please the Court, I think that is the essence of our position.

In summary, it is again, not -- oh, I'm sorry. One other thing I have to refer to.

The Solicitor General said in his reply brief that going to court is really not a very serious problem. All you have to do is have the judge ask the question -- for example, Mrs. Cannon, was she kept out because of her age, or for some

other reason?

And once you answer that question, that's easy. I have the impression that whoever wrote that brief for the Solicitor had never tried a case.

If it was that easy, we would not be here. We would have done just that.

It's a little more complicated than that.

What our concern is, you see, the depósing of the admissions committee. Mr. Cannon already filed a notice in the district court to take the deposition of Dean Sitchammel, who is the chairman of the admissions committee at the University of Chicago medical school.

Well, what he'll depose him about? Well, why wasn't Mrs. Cannon acceptable? How about these other 2,000 which you say were better than her and were turned down? How about the 104 you accepted?

We have 5,500 people that we can have discovery about. He has full discovery available. He's already served a notice to discover all that we have on her, including any references that we got through her applications; that is, references from third parties.

All that's available. And that is what is involved. It isn't simply a matter of the University coming in and saying, Mr. Judge, we didn't admit this lady because of her grades.

Mr. Cannon wouldn't be satisfied with that, and he'd be a bad lawyer if he was. He wants to know why. And we're subject to that.

And I submit to you: You put an admissions committee through that once, and they're not going to do this again. They're going to make their decisions on strict grades, and nothing else; because then you can't get at them.

And that's what they're worried about, and that's what we're worried about. And that's why we say in our briefs that at bottom this is an academic freedom issue.

Because this Court has said -- you've cited the Harvard admissions program where diversity is a desirable factor in student bodies. We've set out our admission program, which is aimed to the same end.

But if you submit us to this kind of court proceeding, we're not going to have that.

QUESTION: Well, how do you get academic freedom -- are you suggesting that there's some sort of constitutional right that favors you because of, quote, academic freedom, closed quote, is involved?

MR. BERNSTEIN: No, sir, I really don't. I'm picking up the point that was made repeatedly in Bakke --

QUESTION: By Justice Powell's opinion.

MR. BERNSTEIN: By Justice Powell, and I believe by Justice Blackmun.

QUESTION: Mr. Bernstein --

MR. BERNSTEIN: Yes.

QUESTION: -- I'm a little puzzled by the argument. The burden remains on the plaintiff, does it not? And if the members of the admissions committee each testify that they relied on neutral factors such as grades and judgment and the like, how does she sustain her burden? She doesn't sustain it just because she's female, does she?

MR. BERNSTEIN: That's when the case is over, Your Honor.

QUESTION: Pardon me?

MR. BERNSTEIN: That's when the case -- that's how the case ends.

But it's getting from the beginning, from the complaint to that stage --

QUESTION: But if you say she has a --

MR. BERNSTEIN: But the discovery -- yes, sir.

QUESTION: If you say she has a cause of action, she has a right to take a half a dozen depositions.

MR. BERNSTEIN: Oh, sure.

QUESTION: Does that bankrupt the university?

MR. BERNSTEIN: What it does is, it exposes the university to this kind of thing by any number of disappointed applicants.

QUESTION: Well, but, of course --

MR. BERNSTEIN: Bankruptcy, Your Honor, is not the point.

QUESTION: -- does each disappointed applicant necessarily file a lawsuit after a whole string of other disappointed applicants have filed suit and lost?

I mean, even probable -- just looking at it kind of at large, is it probable that all these universities really are discriminating on account of sex?

MR. BERNSTEIN: Well, Your Honor, maybe I should have stayed out of this thicket when I had the opportunity. But having gotten into it, let me see if I can get out of it.

What we are concerned about, sir, is that if you shift the arena, no matter how it comes out -- as I stated in our brief, we're not concerned about the ultimate merits of the case. We have not conceded the "but for" question at all.

But if you start the discovery route -- if you start that route -- you're going to have a chilling effect on the independence of the admissions committee. I think that's inevitable.

And Your Honor has had sufficient trial experience, I know, to know the problem of clients and the deposition procedure. It does have a chilling effect. And this is our concern.

QUESTION: What do you mean by a chilling effect? Granted, you can say, what do we mean by a chilling effect?

MR. BERNSTEIN: I think I was doing pretty well.

By chilling effect, I mean is this: That the concern of academics that they will have to justify their decisions in a court of law.

QUESTION: Well, but if the petitioner is right, Congress intended to chill admissions committee decisions based on sex.

MR. BERNSTEIN: Yes, sir. I'm sorry. I'm not -- I'm proceeding on the assumption now that in terms of the policies involved here, to the extent that enters into this, that there is a strong policy which would militate against the private right of action, and that if this issue is going to be explored, it ought to be explored fully.

QUESTION: Where did that policy come from?

MR. BERNSTEIN: The policy that I have enunciated about --

QUESTION: Yes.

MR. BERNSTEIN: Well, the policy comes from the fact that I think that if you implicate the judiciary in admissions decisions, then you have threatened academic freedom.

QUESTION: But you said a moment ago in response to my questions that you didn't assert any constitution claims based on academic freedom.

MR. BERNSTEIN: I'm speaking of academic freedom, sir, in the same sense that it was used by Justice Powell in Bakke.

I think it was a quasi-constitutional right; I forget.

QUESTION: But what is a quasi-constitutional right?

MR. BERNSTEIN: I'm waiting for the red light.

QUESTION: Perhaps we're asking you to define our terms.

MR. BERNSTEIN: Yeah, well I enjoy this, so I'd like to take a stab at it.

QUESTION: As I understand your argument, Mr. Bernstein, you're saying that these people on the admissions committee who are going to be chilled are more afraid of a suit by someone like the plaintiff in this case than they are afraid of having their funds cut off by the federal government if they engage in dubious discriminatory policy.

Which is the more serious remedy?

MR. BERNSTEIN: I have -- the -- the fact of the matter is, there's been no discrimination. The question is, where do you establish that fact? That's the issue.

QUESTION: Well, they don't have to establish -- the plaintiff has to prove the contrary. I just -- it just doesn't seem to me that you're going to be scared to death of Mrs. Cannon, but not worry at all about HEW about all your funds.

MR. BERNSTEIN: Well, I can only repeat what I said, Your Honor: That this case, we think, will open the floodgates to a multiplicity of suits. You heard the description of

some 3,500 things pending before HEW, all of which could be shifted to the courts. Now, certainly, it's a --

QUESTION: But you really -- it doesn't apply just to schools. It applies to hospitals and all sorts of other things, too, doesn't it?

MR. BERNSTEIN: That's correct. That's correct. Of course.

QUESTION: So this isn't just an academic freedom issue; it's a question of how to construe this statute.

MR. BERNSTEIN: Well, we're picking up academic freedom again, Your Honor, because academic freedom seemed to be a concern of this Court, or at least to two of its members, in the Bakke case.

We are an academic institution. Northwestern University is an academic institution. And we are concerned about the same -- as I've demonstrated.

QUESTION: Like you said, I am concerned about academic freedom, and I'll speak to my brothers in private about that.

QUESTION: Well, Mr. Bernstein, I took your reference -- we've been making you skitter all over the lot here. But going make to that colloquy with Mr. Justice Rehnquist, I took your suggestion about policy to mean that the legislative history you were discussing earlier, and which is reproduced in the briefs here, indicates that as a

matter of policy, Congress did not grant a private cause of action.

That's the policy you were talking about.

MR. BERNSTEIN: That's right. Yes, Your Honor. Also, our -- the second Cort v. Ash test, as to what the Congress intended. Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:40 a.m. the case in the above-entitled matter was submitted.]