In the

ORIGINAL

Supreme Court of the United States

NORTH HAVEN BOARD OF EDUCATION, ET AL.,	)	
Petitioners	)	
v.	)	NO. 80-986
TERREL H. BELL, SECRETARY, DEPARTMENT OF EDUCATION, ET AL.	)	

Washington, D. C.

December 9, 1981

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Washington, D. C.

Wednesday, December 9, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

SUSAN K. KRELL, ESQ., Washington, D. C.; on behalf of Petitioner New Haven Board of Education.

PAUL E. KNAG, ESQ., Stamford, Connecticut; on behalf of Petitioner Trumbull Board of Education.

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C.; on behalf of the Federal Respondents.

BEVERLY J. HODGSON, ESQ., Bridgeport, Connecticut; on behalf of Respondent Linda Potz.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in North Haven Board of Education against Bell.

Ms. Krell, I think you may proceed when you are ready.

ORAL ARGUMENT OF SUSAN K. KRELL, ESQ.,
ON BEHALF OF PETITIONER NEW HAVEN BOARD OF EDUCATION

MS. KRELL: Thank you.

Mr. Chief Justice, and may it please the Court, this case involves the validity of regulations promulgated by the then Department of Health, Education, and Welfare, now the Department of Education, pursuant to Sections 901 and 902 of the Education Amendments of 1972.

It is the Petitioners' position that Section 901 was drafted with an unmistakable focus on the beneficiaries of federal financial assistance and not as a general prohibition on discriminatory conduct by recipients of such federal financial assistance, and thus the regulations in question are invalid.

I will briefly present the facts in the North Haven case, and counsel for Trumbull will address the facts in that case. The legal issues are the same.

The North Haven case arose when a former teacher who had quit her job applied for an open position and a different female applicant was hired. The rejected

applicant filed charges of sex discrimination in employment with the EEOC and with HEW. She also filed a federal court suit under Title 7 of the 1964 Civil Rights Act, under 43 US Code 1983, and under Title 9.

When HEW attempted to investigate her charge, the Board of Education pointed out that it believed HEW did not have jurisdiction over general employment practices, and that several district courts had so found. HEW, however, persisted, thus necessitating the North Haven Board filing a suit in district court in Connecticut. Judge Ellen B. Burns granted North Haven's motion for summary judgment, and held the regulations in question void, invalid, and of no effect whatsoever, and granted an injunction prohibiting further investigation by HEW.

The Trumbull litigation followed a similar path, and the Department of Justice appealed both cases to the Second Circuit Court of Appeals, where they were consolidated. The cases were held in abeyance pending a decision by this Court on three petitions for writs of certiorari filed by Justice Department from three court of appeals decisions that, similar to Judge Ellen Burns' decision, had held the regulations invalid.

When those petitions were denied, the cases were reactivated and heard by the Second Circuit. At that time there were 15 court decisions in various district courts and

courts of appeals, all holding these regulations invalid. The Second Circuit, however, reversed the decision of the district court and upheld the validity of those regulations.

It is our position that an analysis of the legislative scheme of Title 9 in its entirety, of the statutory language of Sections 901 and 902, and the legislative history all establish that employees in general are not among the class protected by Section 901. The Department of Education has recently indicated its agreement with that position.

The genesis of what became Title 9 were hearings, extensive hearings held before the House of Representatives in 1970, and at that time two problems were brought to its attention. One was sex discrimination in employment against women employed in educational institutions, and at that time Title 7 of the 1964 Civil Rights Act explicitly excluded women -- excluded educational institutions from its parameters. The Equal Pay Act at that time exluded people in positions of executive, professional, and academic. That would also work to the detriment of women faculty members of educational institutions.

So, thus there was one very special problem of women employees of educational institutions who were victims of sex discrimination and who were not protected by Title 7

of the Equal Pay Act.

Another problem that was brought to Congress's attention was the problem of student beneficiaries who were also or might also be victims of sex discrimination and who were not protected by Section 601 of the 1964 Civil Rights Act, a section that protected beneficiaries of federal financial assistance from race, color, or national origin discrimination, but did not prohibit sex discrimination.

Growing out of these hearings was the bill that became Title 9, which very explicitly addressed the problem of women employees by amending Title 7 to remove that exemption for employees of educational institutions, and by amending the Equal Pay Act to remove the exemption for academic, professional, and executive positions.

So, employees of educational institutions now have federal forums, federal agencies that could investigate their claims and could go into federal court pursuant to those statutes. The problems of student beneficiaries were addressed in what became Section 901 of Title 9. The section that was enacted prohibited discrimination on the basis of sex in educational programs or activities.

That Section 901 language was chosen over other proposals that had been suggested to Congress. One proposal by the Department of Justice had suggested that instead of amending Title 7 in the Equal Pay Act to protect employees

of educational institutions, HEW should be given that jurisdiction, and it proposed what would have been comparable to Section 901(a), a general prohibition against discrimination of beneficiaries, and explicitly would have given jurisdiction over employment to HEW. That proposal, however, was not adopted.

Similarly, Senator McGovern had proposed a bill that would have first banned general discrimination against beneficiaries in educational programs, and again would have explicitly covered employment. Those proposals were not adopted.

What was adopted was the scheme to protect employees under Title 7 in the Equal Pay Act, and to protect student beneficiaries under Section 901.

The statute then is clearly addressed to those beneficiaries. The exceptions to Section 901 are also all addressed to the student relationship. They address admissions to educational institutions, certain programs or activities that would affect students, or exempt institutions in their entirety. Nothing related to employment is under Section 901.

When Congress does address employment, it has put certain exceptions into the statute. Title 7, for example, makes an exception for bona fide occupational qualification, or for a national security exemption. Those exceptions were

missing from the Section 901 exceptions, further indication that employment was not covered in that general prohibition to protect students.

The HEW regulations in question, however, go much further than the statutory language.

QUESTION: Ms. Krell, how do you deal with the fact that Title 9 was patterned after Title 6, and Title 6 had an express provision excluding employment practices from its coverage, and a similar section proposed in Title 9 was removed?

MS. KRELL: Title 9 in its entirety did address employment. Sections 906 and 908 of Title 9 were the sections that amended Title 7 and amended the Equal Pay Act. To have a Section 904 in it prohibiting agency action if there was employment discrimination would have been inconsistent. So therefore it was eliminated in Congress.

But I think it is also important to remember that Section 604 is not an exclusion from coverage under Section 601. It was instead a clarification of what Senator Humphrey had said had always been intended by the language of Section 601 on which Section 901 was patterned. Further, as we note in our brief, Representative O'Hara had said that what they had done in preparing Title 9 was take a copy of Title 6 and just cut and paste it, mark out Section 601 and make 901, mark out 604 and make 904, but when you took that

and added to it the amendments to Title 7 in the Equal Pay Act, it made no sense whatsoever, and thus it was dropped out.

QUESTION: Ms. Krell, the suggestion has been made the case is moot in view of the new attitude taken by the department. Do you have any comment on that?

MS. KRELL: Yes, Your Honor. It is not, because the Justice Department apparently has not gone along with the proposal of the Department of Education. President Carter had delegated his authority that was given to him under Section 902 to approve the regulations promulgated pursuant to 901 to the Attorney General, and when the Department of Education had proposed a revision of the regulations along the lines we have been discussing, apparently that was not agreed to by Justice, because right after we saw that letter, we got the Justice Department's brief, which indicates it intends to pursue this matter.

QUESTION: So we have a conflict between the two departments of government.

MS. KRELL: Yes, apparently we do.

QUESTION: Now, you mentioned these 16 court opinions. The Fifth Circuit is out of line with some of the others, is it not, in the Dougherty case?

MS. KRELL: Yes.

QUESTION: I would appreciate your comments on

Dougherty.

MS. KRELL: The Fifth Circuit holds the regulations invalid as written because they are not program specific, and they are not directed to the employees in certain programs receiving federal financial assistance, but rather are broader, and would just cover all employees conducted by a recipient of federal financial assistance.

QUESTION: Would you be happy with that kind of a resolution?

MS. KRELL: No, Your Honor, because we think employment was not intended to be covered by Section 601.

QUESTION: At all?

MS. KRELL: Right.

QUESTION: Even though an employee might have something to do with the students who are protected and the like?

MS. KRELL: In those very narrow circumstances where the discrimination against the employees is so widespread that the students are precluded from having a non-discriminatory environment, where the students cannot operate in a non-discriminatory educational institution, then to remedy the discrimination against students, a remedy or some solution to the problem of employment discrimination might have to be addressed.

QUESTION: Isn't that in essence the Fifth

Circuit's approach?

MS. KRELL: No, I think they went further than that, because they did not limit it to cases where the discrimination against employees was wide-ranging throughout an entire educational institution.

QUESTION: But I take it you would be content with the more narrow one that you have just described, the more narrow than the Fifth Circuit.

MS. KRELL: Where employment in general is not covered, but only in specific instances where it is necessary to protect the students, in those circumstances, yes.

QUESTION: I take it the department's position -- I am sure we will learn what it is -- but it would accept a regulation that was just program-oriented.

MS. KRELL: I believe the department said it would favor regulations where there was a clear nexus established between discrimination against the employees and discrimination against the students.

QUESTION: Ms. Krell, did I understand you to suggest that the Secretary could not withdraw these regulations without the approval of the Justice Department?

MS. KRELL: Right. Yes, Your Honor.

QUESTION: Well, the new regulations that are proposed haven't gone into effect. The old ones are still

in effect.

MS. KRELL: The old regulations are still in effect.

QUESTION: And they cannot be withdrawn by the Secretary, notwithstanding his change of view.

MS. KRELL: Right.

QUESTION: Without the approval --

MS. KRELL: Of the Attorney General.

QUESTION: But there has been a notice of --

MS. KRELL: It has not been published, Your Honor.

QUESTION: I see.

MS. KRELL: We saw it in the Daily Labor Report. We do not know what the regulations themselves say.

What HEW did in the regulations was go much further than the statutory language chosen, and they attempted to rewrite the statutory scheme by means of regulations, which they cannot do. They very explicitly put into the very first regulation in question that general prohibition on employment discrimination, which had been rejected by Congress.

They further, recognizing that if employment was to be covered, there were certain situations in which there had to be exceptions, put in a bona fide occupational qualification into the regulations, which had also been missing from the statutory language. So I think the

regulations in question go much further than that which was intended by Congress, and as such they must be declared invalid by this Court.

CHIEF JUSTICE BURGER: Mr. Knag.

ORAL ARGUMENT OF PAUL E. KNAG, ESQ.,

ON BEHALF OF PETITIONER TRUMBULL BOARD OF EDUCATION

MR. KNAG: Mr. Chief Justice, may it please the Court, I represent the Trumbull Board of Education. After the Trumbull Board of Education declined to renew the contract of a non-tenured guidance counselor, Linda Potz, Ms. Potz commenced seven different actions and proceedings in various forums, including a claim under the Subpart E regulations promulgated by HEW under Title 9, and so, we too commenced an action seeking to declare the Subpart E regulations to be invalid.

Ms. Krell has described how the structure of the statute shows clearly an intent by Congress to regulate employment by its amendments to the Equal Pay Act, and Title 7, and on the other hand to address beneficiaries by Section 901, and that analysis is strongly buttressed by an analysis of the derivation and legislative history of this section.

As this Court pointed out in Cannon, Section 601 was the basis of Section 901. Title 9 was derived from Title 6. And when President Kennedy first proposed Title 6 in 1963, he proposed a Title 6 which would have covered

employment expressly. However, the committee later deleted that language, and noted that employment was now being covered under Title 7 of the Civil Rights Act of 1964.

Once that coverage of employment was deleted from Title 6, both the floor leaders and the Justice Department, which was the principal proponent of the legislation, went out of their way to make clear the intention that Title 7 -- Title 6 was generally not intended to cover employment.

For example, a Justice Department memorandum stated, "The mere fact that an aid recipient violated Title 7 would not itself warrant termination of aid. Moreover, the agency administering the aid would not adopt a non-discrimination in employment provision in connection with its aid program unless assistance to employment was one of the purposes of the program."

As Ms. Krell pointed out, this all occurred before the Section 604 language was ever added to the statute, and when they did add Section 604 to the statute, Senator Humphrey went out of his way to make clear that "We have expressed in specific language what has always been intended." In other words, Section 604 did not change the meaning of Section 601.

QUESTION: Senator Birch Bayh's statements, how do you explain those? He was the chief Senate sponsor.

MR. KNAG: That's right.

QUESTION: And did he not make several statements indicating that he thought employment was covered?

MR. KNAG: Senator Bayh made a number of statements, and those included, first of all, the statement that Title 6 and Title 9 were identical, the statement that Section 901 applied to beneficiaries of federal funds, and also --

QUESTION: So you would say he was just confused about the whole thing?

MR. KNAG: That is one interpretation, and that is the interpretation that was adopted, in effect, by most of the courts which considered his remarks. But there is another possible explanation, and that is, as Ms. Krell noted, we recognize that under certain circumstances where, for example, in order to effectuate a desegregation decree you need to have provisions concerning faculty assignment. Title 6 did cover employment, and so we agree that in certain circumstances Title 9 does cover employment.

But nowhere in Senator Bayh's remarks is there any statement that he intended to provide more coverage in the area of sex discrimination than in the area of race discrimination.

QUESTION: Why are plaintiffs anxious to bring themselves under the coverage of Title 9? Is it because of the potential to cut off federal funds to the employing

agency?

MR. KNAG: I don't think so. The respondent in this case has gone out of her way to point out that there has been no threat of a cutoff of federal funds in this case. It would certainly make no sense to cut off school lunch funds, because --

QUESTION: Well, if remedies are available under other programs like Title 7, I just wondered why you thought plaintiffs would be anxious to come under this --

MR. KNAG: Unfortunately, in this area, Justice O'Connor, we have been confronted with a reductio ad absurdium of the doctrine of overlapping remedies, and it becomes a test of wills, a test of endurance to get through to the end of one of these cases.

QUESTION: Well, you are more familiar with it, perhaps, since you have been working on this particular problem. Is there any other federal program in which any of these plaintiffs were involved that would have resulted in the cutoff of federal funds if they were successful?

MR. KNAG: The records don't show that either plaintiff were engaged in any federal program, and our complaint is that HEW went in and investigated these matters without even inquiring on that subject, because that is what the regulations say. It just makes no sense to construe this statute, Title 9, as authorizing the cutoff of funds

for students in circumstances which weren't authorized in Title 6, and it makes a lot of sense to say that it is a travesty of the judicial process when in order to establish that it properly discharged a guidance counselor or failed to renew a guidance counselor's contract, a school board like this has to go through seven different lawsuits and claims and proceedings.

QUESTION: Yes, but you started this lawsuit, didn't you?

(General laughter.)

MR. KNAG: We certainly did, but we had a number of cases that were far more advanced that were, we thought, headed to this Supreme Court, and we pleaded with the Department of Education to hold off pending resolution of this issue, and they declined to do that. They said, we are only going to follow these cases in the districts and circuits where they have been rendered, and that is why we needed to proceed.

I will reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE FEDERAL RESPONDENTS

MR. LEE: Mr. Chief Justice, and may it please the Court, may I state first, just briefly, that the interchange, the exchange that occurred is correct. The

Department of Education has in fact withdrawn its request for change of regulations pending the outcome of this case. There is no question that they disagree with the regulations and with the policy.

QUESTION: Was that at the request of the Attorney General?

MR. LEE: It was not.

QUESTION: But Mr. Solicitor General, I gather that -- had the Secretary wanted to withdraw them, that could not be done without --

MR. LEE: It still has to get over the hurdle. Ms. Krell is correct --

QUESTION: Yes.

MR. LEE: -- that under the applicable executive order, it is the Attorney General that has the final authority to make any change in Title 9 regulation.

QUESTION: Is that by statute?

MR. LEE: Excuse me?

QUESTION: Is that by statute?

MR. LEE: Well, it is by statute and then executive order implementing the statute.

QUESTION: Mr. Solicitor General, is it the position of the department that the Secretary had no discretion with respect to issuing regulations? Is it you view that the statute compelled him to take the position

that the former Secretary took in these regulations?

MR. LEE: Certainly the statute, Justice Powell, did not require all of the details of the former regulations, but insofar as employment coverage is concerned, that is the position of the government.

QUESTION: Despite the fact that, what, a dozen courts have held to the contrary?

MR. LEE: Yes, and there are three -- the reason that those dozen courts are so wrong are set forth in our brief, and in the few minutes that I have this morning I would like to discuss the three most salient of those as to why it is that those courts were wrong.

QUESTION: Before you move to that, Mr. Solicitor General --

MR. LEE: Yes.

QUESTION: -- I have made this observation from this bench before. But can you tell me why executive branches of government don't get their act together before they go into federal court?

MR. LEE: Well --

QUESTION: It is very unseemly, it seems to me.

MR. LEE: That is exactly correct, and while we live in the society that we live in, with the privileges of the First Amenmdment which are permitted, there is certainly nothing that can be done about public statements that are

made, but that is the very reason for the exclusive litigating --

QUESTION: I am not talking about public statements, Mr. Solicitor General. I am talking about the formality that results in two major departments of government having different views and bringing the issue to this Court to resolve.

MR. LEE: Well, the only view that is being presented to this Court is the view that I am about to espouse.

QUESTION: That is only because she objected to the position of the Secretary of Education.

MR. LEE: That is correct, and that is because of the fact that as an officer of this Court with peculiar responsibilities to this Court to advise as to what the intent of Congress was in 1972 when it passed these amendments, we are more than just another lawyer representing another client.

QUESTION: I take it from what you have said in your response to Justice Powell that the act to which reference was made, the decision in your department, and that of the Attorney General, is that you have got your act together. Right or wrong, you now have your act together.

MR. LEE: We have always had our act together.

(General laughter.)

QUESTION: I am speaking of the government when I say, you have the act together.

MR. LEE: That is correct, and this case simply shows that indeed for exclusive litigating authority in the Department of Justice.

(General laughter.)

QUESTION: Which may be right or which may be wrong.

MR. LEE: In this case it happens to be right.

(General laughter.)

QUESTION: Mr. Solicitor General, whether you like it or not, you are the spokesman for the United States government.

MR. LEE: That is correct.

QUESTION: Whether you like it or not.

MR. LEE: That is correct.

QUESTION: You have also got another arrow here, that the law, the executive order, even if you weren't the exclusive litigator for the United States, the executive order puts the authority under this statute in the Attorney General.

MR. LEE: That is exactly right.

Now, with my authority adequately sustained, I would like to get on to why it is --

(General laughter.)

MR. LEE: -- that we are right in this case. I turn first to the language. On its face, it clearly includes employment. It says no person shall be subjected to discrimination, and person clearly includes employment. Title 9's kinship to Title 6 has been noted. Title 6 does contain the same language. Title 6 does not pertain to employment, but Title 6 contains this express disclaimer. Title 9 does not.

I recognize the argument that my opponents have made that 604 in Title 6 was just there for purposes of clarification. I will simply refer to Pages 34 and 35 by brief, and note that that issue is far from clear. But analysis should not tarry there, because in any event, even if it was only in the statute for purposes of clarification, once you put a 604 clarifier onto a 601 basic prohibition, then any future Congress that wants to prohibit discrimination by using the 601 prototype needs to use the clarifier with it, because once the clarifier has been used, the defect becomes a procedure of art, if you will, and it must be used if the purpose is to exclude employment.

The case here is, of course, much stronger, because a Section 604 counterpart was included by the House version of the 1972 Act and taken out in conference. The legislative history concerning the reason for that deletion is short, but equally clear. The conference report devotes

two sentences to the matter. The first sentence describes the difference between the House and Senate version, and the second sentence states simply, "The House recedes."

Now, in response to a question by Justice O'Connor, there was suggested a different reason for the deletion of Section 904 than the one given by the conference report. It is suggested that the reason for that change was simply to correct a drafting mistake because the bill was obviously inapplicable, or rather, the disclaimer was obviously inapplicable, and it was, to other parts of the 1972 amendment, namely, that part that extended the coverage of Title 9 and the Equal Pay Act.

This is an inadequate explanation for two reasons. The first is that receding and correcting are two different things. The conference knew which it was doing and said which it was doing. The conference report does not say that the conferees picked up a mistake, and nowhere in the legislative history is there even the slightest hint that what they were doing was to correct a mistake. The language that they used was the language that says that there was a substantive difference between the Senate and the House, and that on that issue it was the Senate version that prevailed.

QUESTION: I take it, Mr. Solicitor General, you feel the legislative history is crystal clear.

MR. LEE: It really is, Justice Blackmun. It is crystal clear if you read it against two perspectives. One of those perspectives is a time one. If you look at it from the standpoint -- in recognition of the fact that whereas from 1972 -- from 1970 to 1972 there were four -- three or four efforts, depending on how you count, to include some kind of guarantee in the civil rights laws of the United States providing against discrimination against women in education, and much of the legislative history that is quoted from and that might imply therefore some confusion comes from those earlier efforts, the 1970 and the 1971 efforts.

The legislative history that really counts the most occurred all on one single day, and it consists of statements by one Senator. The case probably is not unique in this respect, but it certainly is distinctive. Now, the reason that the statements by Senator Bayh on that particular day are so important is this. The version that eventually prevailed was the Senate version. That is the one that became law. The Senate version was passed on the same day that it was introduced by Senator Bayh as an amendment to an existing Senate bill. It didn't go through committee.

So that introduction, debate, and final Senate passage all occurred on the same day. And as a consequence,

the views of Senator Bayh are the only views that were expressed in the legislative history, and his views really are the legislative history, because of the peculiar way that this particular bill was passed.

Now, the second --

QUESTION: Mr. Solicitor General --

MR. LEE: Yes.

QUESTION: -- may I interpose a question there? I guess it is subsequent to the Act's enactment there are some statements by Congressman O'Hara.

MR. LEE: Yes, that is correct.

QUESTION: Now, does the legislative history tell us what the Congressman's views were on the substantive issue that separated the two Houses?

MR. LEE: Congressman O'Hara's?

QUESTION: Congressman O'Hara's, prior to the conference --

MR. LEE: Absolutely not.

QUESTION: It does not?

MR. LEE: There is nothing on the House side.

QUESTION: We know the position of the House though. The position of the House was contrary to you position.

MR. LEE: That is correct.

QUESTION: The position of the Senate was --

MR. LEE: That is correct. That is correct.

Now, the second perspective with respect to the legislative history and what in my view, Justice Blackmun, makes it so crystal clear, is a distinction that everyone recognizes between the two parts of this particular proposal. Senator Bayh did two things with these amendments. One was to propose Title 9, which prohibited sex discrimination in educational institutions receiving federal funds. The second part of the amendment was an extension of both Title 7 and also the Equal Pay Act.

Now, it is true, as my opponents have pointed out, that some portions of the legislative history can be read as applicable to Title 7 or the Equal Pay Act, but there is simply no answer to these two compelling propositions, and I have never seen any answer to either of these propositions.

The first is that nowhere in Senator Bayh's statements and nowhere in the legislative history is there any suggestion that the many statements concerning employment apply only to Title 7 and the Equal Pay Act. There is nothing to that effect.

QUESTION: General Lee, is there or more properly was there when Senator Bayh spoke a recognized definition of the word "program"?

MR. LEE: I don't think there is very much in -- I don't remember anything, frankly, on discussion of that

issue, and indeed it is an issue that is not involved, in our view, in this case. It is going to be in --

QUESTION: You said that there was -- you referred to institutions, protecting against sex discrimination in educational institutions. That isn't what the statute says, is it?

MR. LEE: That is correct.

QUESTION: It says programs.

MR. LEE: That is correct. It is programs, and it is program specific in two ways. One is the way that you referred to, Justice White, that it is only in the program that receives the aid that the statute reaches, and the second is that insofar as the termination provisions are concerned it can only be with regard to that program.

QUESTION: Mr. Solicitor General, you mentioned Title 7. There are two individuals who initiated the complaints that brought about this action. Would they have had relief available under Title 7?

MR. LEE: Yes, I think so.

QUESTION: And under Title 9 is there any administrative procedure remotely equal to or comparable to the EEO procedure that is spelled out in great detail?

MR. LEE: That is just in its incipient stages of development, given this Court's --

QUESTION: Development where?

MR. LEE: Well, given this Court's decision in Cannon that there is a private remedy. The extent and the nature of those -- of that private remedy and the procedures that would be --

QUESTION: In one of the footnotes to your brief, you say the Department of Education had little or no experience with respect to discrimination.

MR. LEE: That is correct. That is correct.

QUESTION: You want it to take over an area in which EEOC has had more than a little.

MR. LEE: No, and I think that is again outside the scope of what we are talking about here, and it may very well be for those reasons.

QUESTION: Is it outside of the scope of the Congress to enact parallel legislation that gives options to employees in some instances with elaborate procedure and others with none?

MR. LEE: I apologize. I misunderstood the scope of the question. Certainly not. And this Court in the Gardner-Denver and other cases has noted the overlapping of remedies, and so they are not identical.

QUESTION: This case was started -- at least one of these cases was started by the school board.

MR. LEE: Well, they both were. They both were.

QUESTION: There is no question of private causes

of action here.

MR. LEE: That is correct. That is correct. This is simply not part of this case. Let me turn now second --

QUESTION: Mr. Solicitor -- yes, I wanted to hear your second proposition.

MR. LEE: That is what I want to hear, too, Justice Stevens.

(General laughter.)

MR. LEE: The second proposition is that the Congressional Record had three separate parts of Senator Bayh's statements containing at least, oh, eight or ten separate references that are only consistent with applicability to Title 9, and that under no circumstances can fairly be read as applicable either to Title 7 or to the Equal Pay Act, and I would like to review those just briefly.

First, in his introductory remarks, the Senator describes his amendment, and he says that the heart of this amendment is a provision banning sex discrimination in educational programs receiving federal funds, which is clearly Title 9. That is not Title 7 or the Equal Pay Act.

He then goes on to say that the amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, and then in the very next sentence he says other important provisions in the amendment would extend the equal employment opportunity

provisions in Title 7 and the Equal Pay Act.

Now, they just can't get much clearer than that, that the heart of the amendment is Title 9, which covers admissions, student services, and faculty employment, and that other important provisions extend to Title 7 and the Equal Pay Act.

QUESTION: Mr. Lee, I see your yellow light is on, and I am very concerned about one aspect of the case and your views on it. The fact that the Act is framed in terms of programs and the view of at least one court that the regulations to be valid must address themselves to programs, and not in the broad general terms of these regulations. Would you address that, please?

MR. LEE: Yes, we agree, Justice O'Connor, that the programs that the -- that this is a program specific statute. There is some question, frankly, as to whether these regulations are or are not program specific. As we point out in our brief, you can make an argument that they are program specific. It is very likely after this case is over that the Department of Education will want to have another look at that issue, and of course on that issue we agree with the Department of Education.

In any event, it is very clear because of the posture of this case that that issue is not before this Court at this time.

QUESTION: You don't agree with the Fifth Circuit's reading of the regulation necessarily, but you agree with its rationale.

MR. LEE: I think the Fifth Circuit opinion is a very fine opinion. The only thing that they did wrong was just throwing out all the regulations. Other than that, they are dead right.

QUESTION: And when you say it isn't before the Court, are you indicating that the Court would not be in a position to address itself to that?

MR. LEE: Exactly. I think it almost would partake of an advisory opinion. Certainly you don't want to consider it without a record in this case as to what is a program. That will be a difficult enough issue, and I suspect that we may be back again on that issue at some future time.

QUESTION: That is an interesting concession on your part, that the Fifth Circuit is about right.

MR. LEE: Well, that is our view.

QUESTION: Well, that is what your brief almost says, at least.

MR. LEE: Yes, and to the extent it doesn't say that it should have.

The second part of the legislative history that is so persuasive is Senator Bayh's part by part analysis. Let

me simply say this in the interest of time, that the first section of that summary clearly applies to Title 9. You read it, there is no way that it applies to anything other than Title 9. And the second part clearly applies to Title 7 and the Equal Pay Act. And he says with regard to --

QUESTION: That was after the thing had been passed.

MR. LEE: It was not, and that is the crucial difference. Senator Bayh also submitted a statement after it had passed. And I don't give that one any more credence than Congressman O'Hara. Those don't count. This was on the Senate floor February 28, 1972, the day that everything happened in connection with the statute, and he said, this portion of the amendment covers discrimination in all areas where abuse has been mentioned, employment practices for faculty and administrators, scholarship aid, and admissions. I do not have time to cover the exchange between Senator Bayh and Senator Pell, but it is equally persuasive.

At all points it becomes overwhelmingly persuasive that the Congress that passed the education amendments of 1972, a decade ago, regardless of what is good policy, regardless of what anyone might think today, intended that Title 9's prohibition against sex discrimination in programs that receive federal financial aid apply not only to student matters but also to employment. It is true that there are

references to the legislative history that apply to students. Of course there are. That is covered also. Of course there are references to Title 7 and the Equal Pay Act. That is covered also. But there are a number of references, too many to be ignored, that can only apply to employment discrimination.

QUESTION: Mr. Solicitor General, may I ask you one more question?

MR. LEE: Yes.

QUESTION: Again, now, confining ourselves to pre-enactment legislative history --

MR. LEE: Which is the only thing that is relevant.

QUESTION: -- was there any discussion of the drafting error rationale prior to the enactment of the statute?

MR. LEE: No. You have two sentences, and two sentences only.

QUESTION: Those I know are later, and there is nothing else about that drafting problem before?

MR. LEE: No.

QUESTION: Is it your view that the plain language of the statute is consistent with your perception of the legislative history?

MR. LEE: Oh, yes.

QUESTION: The plain language, no ambiguity, none

whatever?

MR. LEE: Well, if you read it on its face without comparing it to Title 6, it is very plain. It says no person shall be subject to discrimination. The ambiguity comes in in the comparison to Section 6, and then you have to make the comparison to Section 6, and then that gets you into the 604, 904 counterpart with its attendant legislative history.

QUESTION: It might depend on which person.

MR. LEE: Excuse me?

QUESTION: That is all right, Mr. Solicitor General.

MR. LEE: Thank you.

(General laughter.)

CHIEF JUSTICE BURGER: Ms. Hodgson.

ORAL ARGUMENT OF BEVERLY J. HODGSON, ESQ.,

ON BEHALF OF RESPONDENT LINDA POTZ

MS. HODGSON: Mr. Chief Justice, may it please the Court, I represent the private respondent in this case, Linda Potz. Three years ago, after an investigation, the Department of Health, Education, and Welfare found that the Trumbull Board of Education had violated Title 9 when it demeaned Ms. Potz before her colleagues and students, when it asked her to falsify a report which would have shown unequal services to female students, and when it terminated

her employment, leaving female junior high school students without a female guidance counselor.

The Trumbull Board of Education complains that Ms. Potz has pursued multiple remedies. I suggest that the record shows that some of her proceedings merely addressed gross irregularities in the termination proceedings, and certainly no inference should be drawn from those.

Ms. Potz's complaint of discrimination went in the very first instance to the agency which has special expertise concerning education. It went to HEW. Only after the district court had enjoined the Title 9 employment regulations did Ms. Potz resort to Title 7.

Justice O'Connor has expressed interest in why private litigants would be interested in complaining to HEW rather than to the EEOC. The reason for that is that the EEOC has no special expertise concerning the education setting. It has no particular knowledge of the ways in which that setting, in which decisions in that setting may differ.

QUESTION: Are you suggesting that EEOC's jurisdiction is limited to the particular employers as to which EEOC has great expertise?

MS. HODGSON: I am not suggesting that. I am suggesting, however, that there is superior expertise concerning education with regard to HEW.

QUESTION: The issue here is employment, not education.

MS. HODGSON: My suggestion is that the ways in which discrimination takes place, the kinds of choices made are particularly germane to an education setting, and that an agency which deals with educational settings --

QUESTION: Are you suggesting that EEOC would not be adequate to deal with a similar claim in the laboratories of DuPont because they don't know anything about chemistry and how laboratories operate?

MS. HODGSON: I think the EEOC's expertise is probably best developed with regard to industry. I am suggesting only that there may be a superior familiarity of HEW, because it deals with education all of the time. The other reason for resort to HEW is that the EEOC, as this Court knows, has labored under an enormous burden of a case load which it cannot keep up with. The record indicates in this case HEW was able to come in, do a thorough investigation, and come up with findings within a year. That is a very substantial difference, and since this Court has shown great interest in the idea of resolving these problems at the administrative level, it is a difference of which note should be taken.

QUESTION: May I ask, Ms. Hodgson, I gather that the remedy would -- if you prevail on the discrimination

claim under either 9 or 7, is there any difference in the remedy?

MS. HODGSON: It is unsettled whether the availability of administrative remedies is greater under Title 9. Clearly, there is a provision for fund termination. We do not urge that remedy --

QUESTION: Ultimately, what was she seeking, reinstatement?

MS. HODGSON: She was seeking reinstatement --

QUESTION: And back pay?

MS. HODGSON: -- and back pay, and --

QUESTION: And under either 7 or 9, that is what she might expect if she prevailed? Is that it?

MS. HODGSON: Yes. However, the remedies offered under Title 9 can also be attuned finely to the perception by HEW that employment discrimination is having an impact on students. It has been brought to this Court's attention that there is a vast body of social science literature indicating that there is a real lesson to students when female teachers are discriminated against.

QUESTION: But that doesn't suggest that there be a different remedy under Title 9 if she prevailed there than there would under Title 7 if she prevailed there.

MS. HODGSON: There might be in some cases --

QUESTION: There might be?

MS. HODGSON: -- a more complete remedy, depending on the administrative --

QUESTION: In what sense a more complete remedy?

MS. HODGSON: Well, for instance, the Department of Education might find that in order to get rid of this infection of the school program it might want some extra publicity so that students would see that the injustice that they may have drawn some conclusions from would be undone. That would not be a typical sort of remedy under Title 7.

QUESTION: Yes, but all that the teacher would be, I gather, reinstatement and back pay, isn't it?

MS. HODGSON: With regard to the teacher, yes. I am suggesting that the reason that Title 9 governs employment is because the employment does have an effect on students, and that that effect can be adjusted by the administrative agency which knows about that effect.

The present change of position by the administering agency is not really germane. The standard of review here is not what the agency's philosophy is now, and it is not what other courts' philosophy might have been as to an efficient administrative scheme. The flaw with the Alvo, the Romeo, the Seattle cases are all that these courts decided to look into how they thought this regulation should best be enacted, not according to the standard of review which this Court has said is germane to administrative

regulations.

As recently as last month, the court decided in Federal Election Commission versus Democratic Senatorial Campaign Commission that an administrative action is valid as long as it is not inconsistent with the statutory purpose. As the Solicitor General has indicated, there was a statutory purpose here to avoid the use of federal funds to support discrimination. This Court has so found in Cannon versus University of Chicago, that one of the purposes of Title 9 was to keep those who accept federal largesse from using it in a discriminatory manner, and the view that these regulations should be inspected as to their efficiency is simply one which does not comport either with this recent case I have just cited or with the Mourning case or the other precedents from this Court which show deference to administrative regulations and to the contemporaneous view of the agency which accepts the mandate of interpreting the statute.

There is no confusion by Senator Bayh when he addressed the question. The division in his remarks was not, as the petitioners suggest, a division between remedies for faculty members and remedies for students. Rather, the division was, remedies concerning recipients of federal funds and remedies concerning other kinds of educational institutions which did not receive funds.

I would point out that the record does not permit any inquiry into the program specificity question because despite Ms. Potz's effort to make a record concerning infection of the educational program and the loss of equal services to students, the district court enjoined all of the regulations on their face, and that this is not therefore an instance in which program specificity is really raised as an issue to be decided by this Court.

There is no indication in the legislative history or in the language of the statute that Title 7 and the Equal Pay Act were ever intended to be the exclusive remedies, and this Court has recognized the validity of overlapping remedies. There is no reason for the Court to depart from that recognition in this case whatever its own view of efficiency might be. The question is whether at the time of enactment, with broad language which contained no exemption concerning employment, it was proper for the Department of HEW to include regulation of employment because of its expertise in that area.

The Court in reviewing other discrimination statutes has taken note of departures from prior models. In the context of age discrimination, the Court has said that where Title 7 is abandoned and different procedures are engrafted, that difference will be respected, and the change from the Section 604 model of Title 6 must similarly be

given effect.

I urge then that the Court affirm what the Second Circuit's view has been, and I suggest that the number of court decisions is of nowhere near as much significance as the validity of the reasoning, and in this case the application of the traditional standard for judicial review of administrative actions favors upholding those regulations as enacted.

CHIEF JUSTICE BURGER: Mr. Knag.

ORAL ARGUMENT OF PAUL E. KNAG, ESQ.,

ON BEHALF OF PETITIONER TRUMBULL BOARD OF EDUCATION

MR. KNAG: Mr. Chief Justice, I would like to correct several things that were said. First of all, it was suggested that back pay is awardable under Title 9. I would simply point out, although that is not an issue in this case, several courts have now held that damages are not awardable under Title 9.

I would also like to get to the statements by the Solicitor General concerning his two big points about why the legislative history shows that Congress intended to cover employment under Section 901. Now, the fact is that Senator Bayh doesn't state one way or the other whether he intended employment to be covered exclusively under Title 7 and the Equal Pay Act.

The fact is also that the Solicitor General made

an error when he was quoting from the legislative history. At one point he referred to a statement by Senator Bayh referring to coverage of employment discrimination, which he said must refer to Section 901. We don't think it must refer to Section 901. But then he quoted what he said was the next sentence. Well, the fact is that he didn't quote the next sentence. The very next sentence talked about the parallelism between Title 6 and Title 9, and similarly, the other statement that he specifically referred to here talks about employment discrimination, and then in the very next sentence, again in the very next sentence talks about the parallelism to Title 6.

Now, if you look at the statement that he is referring to, here it is. It has got hundreds and hundreds of words in this first part of the statement. There are only six words that just mention employment discrimination. And so the focus clearly of this part is on student discrimination, and the way to reconcile that passing reference to employment discrimination if you construe it to refer to Section 901 is that he intended that it would be covered in the same way that it was covered under Title 6.

Now, that is exactly what the Secretary of Education is proposing to do, based on his letter to the Attorney General, and we think this Court should declare the regulations as presently written invalid, because it doesn't

contain that nexus requirement that the Secretary is imposing -- is proposing, and then allow the Secretary to amend his regulations to conform them to the statute.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted. We will resume at 1:00 o'clock.

(Whereupon, at 12:05 o'clock p.m., the case in the above-entitled matter was submitted, and the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

NORTH HAVEN BOARD OF EDUCATION, ET AL. vs. TERREL H. BELL, SECRETARY DEPARTMENT OF EDUCATION, ET AL. #80-986

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Deane Hammond