In the

Supreme Court of the United States

ORIGINAL

GUARDIANS ASSOCIATION, ETC., ET AL., Petitioners	)	
v.	)	No. 81-431
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL.	)	

Washington, D. C.

November 1, 1982

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v. : No. 81-431

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Washington, D.C.

Monday, November 1, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

CHRISTOPHER CROWLEY, ESQ., New York, N.Y.; on behalf of the Petitioners.

LEONARD KOERNER, ESQ., New York, N.Y.; on behalf of the Respondents.

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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 first this morning in Guardians Association against the Civil Service Commission of the City of New York. Mr. Crowley, you may proceed whenever you're ready.

ORAL ARGUMENT OF CHRISTOPHER CROWLEY, ESQ.,

ON BEHALF OF THE PETITIONERS

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

I'd like to reserve five minutes for rebuttal.

Our case presents the question of the proper intepretation of Title VI of the Civil Rights Act, and more particularly the question of whether Congress meant in 1964 to limit regulatory agencies to the use of a clear intent standard or whether the Congress contemplated the use of an impact approach, at least so far as defining a prima facie case is concerned.

Our case was brought by black and Hispanic policemen alleging that entry level examinations for the New York City Police Department discriminated in their effect on blacks and Hispanics and that they were not job-related. The case has had a long history, but the relevant facts here are that the district court ruled that the examinations did have a discriminatory impact on blacks and Hispanics. It also held that they were

not job-related.

The examinations have both a pass-fail character -- one has to pass them to become a policemen; everyone in our case did pass and did become a policeman -- but they are also used as the sole determinant of the order in which people were appointed to the department, which made a great deal of difference in our case because the exams were given in '68 to 1970 and appointments were still being made as late as October 1974.

The relevant findings were that there was a disproportionate -- that whites were three times as likely to appear in the top two deciles as were the black applicants. On the job-relatedness question, the district court stressed the fact that there had been no job analysis to see what it was that the exams were testing for and that therefore the exams couldn't be validated.

It was important to make a finding as to Title VI because some members of the class would not be entitled to relief except under Title VI. The district court found that we had not shown a showing of intent necessary to make out a 1981 violation.

As to Title VI, the district court placed considerable reliance on the regulations which, as the

court says, were full of language that evidences an intent to disallow practices with a discriminatory impact, and of course the district court placed great reliance on this Court's unanimous 1974 decision in Lau v. Nichols.

The Court of Appeals affirmed as to Title VII and reversed as to Title VI, relying entire on language of opinions in the Bakke case.

Title VI was passed in 1964 as part of the comprehensive Civil Rights Act. It provides in Section 601: "No person shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program with federal sponsorship." Section 602 mandates that the federal agencies promulgate affirmative regulations to enforce the statute.

Shortly after the Act was passed, a presidential task force set about drafting model regulations. Five months later in December, seven federal agencies adopted these comprehensive regulations. They're the same ones at issue now. They were the ones at issue in Lau. Thereafter, a total of some 52 federal agencies have adopted these same impact regulations.

The regulations provide in relevant part here that they prohibit the use of "criteria or methods of administration which have the effect of subjecting persons to discrimination or which have the effect of defeating or substantially impairing accomplishment of the objectives of the program."

In our brief we talk about the language of the statute and the legislative history. In my brief time this morning I would like to stress the regulations and their role here.

The one thing that we suggest that comes across clearly, the only thing that comes across very clearly in the long debate about Title VI, is that there was a very broad authorization by the Congress to the federal regulatory agencies to draft regulations to carry out the mandate of Title VI. They're unusual in that they required affirmative approval by the President, but that was really in a sense an index of how important they were, how importantly they were viewed by the Congress at the time.

There was intense debate about the fact that Title VI did not spell out in more detail just what was meant by discrimination and other violations of the statute. Senator Ervin says that Title VI leaves it to the agencies to define discrimination "without any

guideline whatever to point out what is the Congressional intent."

The House minority report says: "The Administration tends to rely on its own construction of discrimination as including a lack of racial balance."

Senator Ervin, when questioning Attorney General Robert Kennedy, says to you: "So the rules, which would have the force and effect of law, are to be developed first in the minds of the administrators of various programs, and then written in regulations and orders issued by them?" Attorney General Kennedy: "That is correct, Senator."

The point is that there was a great focus on the breadth of the authorization by the Congress to the regulatory agencies. We submit in the first instance that the normal rule that contemporaneous regulations adopted pursuant to a broad authorization like this are entitled to great deference has particularly strong application here, where there was such a strong focus on just what those rules and regulations were going to say, where it was a hot issue when it occurred, when there was a debate as to what the scope of those regulations could say.

It's also important, we think, to express the fact that these impact regulations have been ratified by

the Congress on a number of occasions. In 1966 Senator Ervin and others who had been serious critics of the 1964 Act focused on the impact regulations and were concerned about them. There was an amendment --

QUESTION: Mr. Crowley, may I just ask you, where are the regulations in the materials before us? Do you quote them anywhere?

MR. CROWLEY: They are not quoted, Justice Stevens, I'm sorry to say. There is a reference to them in --

QUESTION: I know they're referred to a couple of times, but I --

MR. CROWLEY: They're not set out, sir. I'm sorry.

QUESTION: They're not in the lower court opinion, either?

MR. CROWLEY: Not in full, I'm afraid, no. Justice -- Judge Carter in his opinion quotes some of them to show the impact language, but they're not set out, no.

QUESTION: I take it you've cited them?

MR. CROWLEY: We have cited them, Your Honor, yes.

QUESTION: So that we can find them.

MR. CROWLEY: Yes, Your Honor. I'd be

saddened if the Court were unable to find them.

QUESTION: But they're not contained in your brief?

MR. CROWLEY: They're not set out in detail in our brief, Justice Rehnquist.

QUESTION: If you rely so heavily on them, I'm somewhat surpised that you didn't set them out in your brief.

MR. CROWLEY: The relevant impact language is set out in our brief. We think that was the relevant point. That was the part that Judge Carter relied upon. The fact that impact was an appropriate approach was what he focused on when the case went back to see if Title VI could make out -- one could make out a case under Title VI.

As I say, we place considerable reliance, and suggest that the Court might --

QUESTION: You say the relevant language is in the brief? I didn't even find that, the specific language you rely on.

(Pause.)

MR. CROWLEY: Your Honor, it would take me a moment to find it, I'm afraid.

QUESTION: But you're sure it's there?

MR. CROWLEY: I believe it is there. I hate

to say I'm sure of anything, but I believe it is there, sir.

QUESTION: You refer to pages 13 and 32 in your index, and I didn't find it on either of those two pages. I'll just put it that way.

MR. CROWLEY: All right, sir.

As I say, the regulations were attacked in 1966 by Senator Ervin and others who had been concerned about the scope of the authorization in 1964, and an amendment was offered which would spell out a detailed intent standard. Congressman Rodino and Congressman Kastenmeier, who had been strong proponents of Title VI and had been involved in its passage, rose to its defense and suggested, in the words of Congressman Rodino, the amendment "presents new criteria and restricts the workings of Title VI. It would in effect be a complete repealer of Title VI."

Congressman Rodino said that it was his "understanding" that the regulations were consistent with the objectives of the title. Representative Kastenmeier said that it was his view that the amendment would "gut Title VI of the '64 law."

QUESTION: Would you paraphrase the regulations that you're relying on?

MR. CROWLEY: I can, sir.

(Pause.)

MR. CROWLEY: Just a second.

QUESTION: Well, if it takes -- I don't mean to interrupt.

MR. CROWLEY: I can quote. The regulation prohibits -- it prohibits the use of "criteria or methods of administration which have the defect of subjecting persons to discrimination" -- and if you look at Appendix page 132, I hope that language is quoted there -- "and also which have the effect of defeating or substantially impairing the accomplishment of the objectives of the program as with respect to individuals of a particular race, color or national origin."

QUESTION: How would one interpret the phrase "which have the effect of subjecting one to discrimination"?

MR. CROWLEY: Well, it is our view, of course, that the appropriate thing -- that that is a clear indication that to look at effects is an appropriate approach and that to do what was done here, to look at the discriminatory impact, the fact that the whites and Hispanics got in the top deciles at a much lower rate --

QUESTION: I don't see how the word "effect" really helps you there. If you say that if it has the

effect to subject one to discrimination, I don't see that as defining how the word "discrimination" should be interpreted it.

MR. CROWLEY: I don't know that it spells it out definitively, Justice Rehnquist. It just -- in our view it shows a disposition to look at the results as opposed to intentions, and suggests that a focus on an impact approach is appropriate at least to make out a prima facie case here as under Title VII.

After the 1966 effort to amend the statute, Congress on ten separate occasions passed funding statutes which contained clauses directly modeled on Section 601. Those statutes were in force pursuant to impact regulations like the one which I just quoted, which is also relied upon in Lau v. Nichols and in our decision below.

In six instances after this Court's decision in Washington versus Davis, Congress reenacted or amended clauses modeled on Section 601 where impact regulations were in place.

We would suggest that these were not incidental ratifications of those regulations. They were conspicuous regulations. They imposed a significant affirmative obligation on the regulatory agencies to monitor programs, to respond to complaints.

They obliged recipients of federal funds to agree contractually to be bound by the regulations.

There were references to, in the Congress in the passage of later Acts, to the regulations. In the passage of -- in the Public Works Employment Act of 1966, the statute itself says the discriminatory provisions will be enforced through agency provisions and rules similar to those already established under Title VI.

When Senator Bayh was talking about Title IX, sex discrimination, he said: "The same procedure that was set up and has operated with great success under the 1964 Civil Rights Act and the regulations thereunder would be equally applicable to discrimination under Title IX."

QUESTION: Is there any other evidence of the agencies' interpretation other than the regulation?

MR. CROWLEY: I do not know of other evidence in the record, Justice White. I know of other evidence --

QUESTION: So -- and Congress then -- as far as ratification is concerned, you just rely on the fact that Congress didn't disagree or perhaps approved of the existing regulations?

MR. CROWLEY: I would submit that Congress had

to be aware of the way in which the agencies were conducting their compliance audits, which they would report on to the Congress in the normal course.

QUESTION: Well, that's what I just asked, whether there --

MR. CROWLEY: Yes, sir.

QUESTION: -- was any evidence other than the regulations. Is there some evidence of enforcement policies independent of the regulations?

MR. CROWLEY: I think I was answering your question. What I say is that the way the agencies have used the impact regulations, the way they've gathered data to conduct compliance audits, would have to be known to the Congress. But there's no detail about that in the record.

QUESTION: Is there anything in the legislative history? You say there was ratification. Is there any express language in that legislative history where Committees recognized or purported to recognize that an impact standard was what was being applied?

MR. CROWLEY: I am not aware of any express language, Justice White.

I was saying that, with respect to Title IX -- excuse me. Senator Bayh's comment suggests, in

sponsoring Title IX, the regulations have worked, there has not been a flood of lawsuits, there has not been a lot of cutoffs, because the statute and these regulations have generally been obeyed.

As Justice Stevens said in Fullilove, "Title VI unequivocally and comprehensively prohibits discrimination on the basis of race in any federally sponsored program. In view of the scarcity of litigated claims, it's appropriate to assume that the law has generally been obeyed."

Given an 18-year history of use of these regulations, the return back of the 1966 intent amendment, the passage of new funding statutes, passage of Title IX, Section 504, other funding statutes using the very language of Section 601, all of which statutes were regularly enforced with impact regulations, we would suggest that there has been as a practical matter developed a comprehensive federal legislative and regulatory scheme using these impact regulations over the years which has worked well, and it should only be disturbed if there's a clear indication that was a contrary Congressional intent back in 1964.

We also think that it's appropriate to uphold these regulations on the grounds that they're reasonably related to the purposes of Title VI. The standard was

set out by Justice Stewart concurring in Lau. He says: "The critical question is whether the regulations and guidelines by HEW go beyond the authority of Section 601."

Citing Mourning, he states, "We held that the validity of a regulation promulgated under a general authorization provision," such as Section 602 of Title VI, "will be sustained so long as it's reasonably related to the purposes of the enabling statute." Moreover, he went on, "In assessing the purposes of remedial legislation, we have found that departmental regulations and consistent administrative construction are entitled to great weight."

We suggest that here these regulations are more than reasonably related; they are essential to a meaningful enforcement of Title VI. The federal agencies have to review thousands of programs, thousands of complaints. They have an obligation to conduct compliance audits.

If they were obliged to use an intent standard like that spelled out in Washington v. Davis, it would be very difficult indeed, if not impossible. Intent is hard enough to unwind in the context of a regular court case with simple issues. It's harder still to probe where you're trying to probe the intent of a school

board or a police department or the Civil Service Commission of New York.

Justice Stevens again, in Rogers v. Lodge quotes an author saying, "Racial attitudes often operate at the margin of consciousness." It's hard enough for courts to probe what's going on at that level. We suggest that it would be virtually impossible for administrative agencies conducting thousands of reviews of federal programs, conducting compliance audits, responding to complaints, it would be impossible for them to do any kind of a meaningful job if they had to use an intent standard.

It's more than reasonably related to take an impact approach, at least as a first step to look to see whether a prima facie case has been made out and then get into the question of whether there's justification -- the kind of analysis that was done in this case.

We also suggest that it's clear that if Congress had wanted in 1964 to adopt a constitutional standard, they knew how to do so. The did so expressly in Title IV. If they had wanted to use a clear intent standard, there was language in Title VII dealing with seniority systems talking expressly in terms of intent. We think that if there had been a determination to make that clear a distinction, they could have done so and

did not.

We also suggest that there should be a heavy burden on those who say that Title VI and Title VII should be interpreted fundamentally differently. Certainly after 1972, when Title VII was made applicable to municipalities, it would be anomalous, we suggest, to have a fundamentally different standard for discrimination in employment under the two titles. You get the very result that we think is so odd here, that you'd have a finding under Title VII that the City of New York has discriminated in violation of Title VII, but they could still receive funding under Title VI.

We think that, as I say, there's a considerable burden on the people who suggest that Congress intended in 1964 to have that kind of a result.

QUESTION: Mr. Crowley, are you going to address in your argument the cases in which this Court has expressed one view or another about the intent required under Title VI?

MR. CROWLEY: Yes, Your Honor, if you like I'll talk to that.

QUESTION: No, I just asked you a question, did you plan to address it.

MR. CROWLEY: Yes, sir.

QUESTION: Because this Court has had several cases.

MR. CROWLEY: Indeed, sir.

The basic focus, of course, of our opponent's position and the view of the Court of Appeals was that this situation is controlled by the Court's decision in Bakke. We suggest basically that Bakke was, first of all, a terribly difficult case; and second, an utterly -- a difficult case, and second, a very different case from ours. And we hope that the Court will be slow to rely on broad language in our situation.

As Justice Brennan said at the outset of his opinion, "We agree with Mr. Justice Powell that, as applied to the case before us, Title VI goes no further," et cetera.

Bakke was not concerned with the question of impact versus intent, as the United States in an amicus brief was careful to spell out. Bakke was not concerned with what makes out a prima facie case of discrimination. You start out in Bakke with an admitted intentional racial classification and the whole focus was on justification of that.

Bakke was not concerned, as we are here, with the validity of contemporaneous regulations adopted pursuant to a broad grant of Congressional authority.

Indeed, Justice Brennan in Bakke places considerable reliance, emphasis, on the regulations. At one juncture he states, "These regulations, which under the terms of the statute require presidential approval, are entitled to considerable deference in construing Title VI."

QUESTION: Do you agree with Justice Brennan's analysis of the legislative history of Title VI in Bakke?

MR. CROWLEY: Not entirely, Your Honor. We think that --

QUESTION: Do you agree with any of it?

MR. CROWLEY: We agree that there is clear indication that many Congressmen were concerned with having a constitutional content for Title VI. Whether it was the exclusive content, we tend to think that that was not the case.

We would suggest that even if it is true that Title VI was intended to have constitutional content, it was by no means clear in 1964 just what that meant. There were a lot of cases at that juncture -- a recent jury selection case where this Court placed great reliance on impact. There were certainly Courts of Appeals decisions where one could conclude that impact was an appropriate way to make out an appropriate constitutional case.

QUESTION: Well, let me phrase the question this way. Justice Brennan and I had quite a different interpretation of the Congressional intent in our respective opinions in Bakke. Which of those two analyses of legislative intent and legislative history does your position come closer to adopting?

MR. CROWLEY: It's closer to yours, Justice --

QUESTION: It's the same as my position?

MR. CROWLEY: I think that's correct.

QUESTION: And quite different than Justice Brennan's.

MR. CROWLEY: That is correct, sir.

I'd like to save some of my time for rebuttal if I may.

CHIEF JUSTICE BURGER: Mr. Koerner.

ORAL ARGUMENT OF LEONARD KOERNER, ESQ.,

ON BEHALF OF RESPONDENTS

MR. KOERNER: Chief Judge and other honorable members of this Court:

At the outset we note that, while we did not raise the issue of whether there's an implied right to sue under Title VI because we weren't aggrieved by the lower court decision since we had won on that issue, it is before this Court.

And we recognize that in Cannon this Court indicated there probably is an implied right, but it took pains to distinguish Title IX from Title VI on the ground that at the time Title IX was enacted the legislators assumed that there was a private right, and not whether or not in fact under Title VI there was. We will not discuss it in depth except to call to your attention that particular issue.

What is conspicuous about the Petitioner's argument, both in the briefs and on oral presentation, is the absence of any of the legislative history at the time of the enactment in 1964. We do not disagree that some of the regulations after '64 have in effect stated it, but our position is that a regulation which makes impermissible that which the legislative history intends to be legal is a regulation that is illegal and has gone too far and is not reasonably related.

In 1964 when President Kennedy was addressing the legislature, he asked them to pass laws that would make illegal what was formerly not being enforced under the Constitution. Each of the floor leaders both in the House and the Senate made clear and unambiguous statements in support of Title VI, which was a general funding provision, that the whole purpose of that particular title was to establish a mechanism to enforce

the Constitution.

Prior to 1963, with the exception of Brown against the Board of Education, each of the courts, including this Court, was troubled by the breadth of the constitutional clause. Indeed, despite the Court's decisions and appellate courts' decisions, there was some question whether the equal protection clause was being enforced.

As a consequence, Hubert Humphrey and Emanuel Celler, the floor leader, both felt the need to pass Title VI, so that if a particular entity is violating the Constitution, that entity will not be eligible for federal funds. A peculiar anomaly existed where you had entities that were not state entities, and therefore not subject to the state action exception under the equal protection clause. So if an entity was not a state entity and received funds, there was some doubt on the executive level whether they could cut off the federal funding.

Hubert Humphrey mentioned the different areas which the Title VI legislation was supposed to involve. One was the distribution of food, the distribution of welfare benefits, the allocation of funding to segregated facilities in the South despite this Court's decision in Brown against the Board of Education.

And in particular what was most galling was the allocation of funding to hospitals which were operated on a segregated basis, but apparently under the law, even though in violation of the Constitution, could receive federal funding. The particular case which was among the cases which motivated the Title VI legislation was Simkins versus Moses Cone, which is cited in our brief.

In Simkins, it was a challenge to the Hill-Burton Act, which was ultimately found unconstitutional. But what troubled the Court in Simkins, where cert was denied by this Court, was whether there was sufficient state action for which the Court could apply the equal protection clause. It did conclude there was sufficient state action, but in another case where you didn't have the sufficient state action the Federal Government would be powerless to cut off the federal funding.

The legislation was clear and unambiguous. More importantly, the cases, which the legislators are presumed to know, at the time of the enactment all support our construction. There was Akins, there were jury selection cases, there were the desegregation cases, Wright against Rockefeller.

Each case dealt with purposeful discrimination

where it was incumbent upon a plaintiff to show that the actions of the government intended to treat one group differently from another. And that is why Title VI was enacted. It was precisely for that reason, to set up a mechanism by which you can stop the federal funding.

Reference has been made to the fact that, with respect to the regulations, why delegation was given because the President was required to review each of the regs. The reason that the President was given this authority was so that the regulations would have a harmonious view of what constituted constitutional violation, and it was hoped that one agency wouldn't cut off funds on a different interpretation of the Constitution than another agency.

And indeed, it was contemplated by the legislators that the constitutional definition of the equal protection clause would be an evolving definition, and that what was a violation at one point may not be a violation later. But the only purpose of Title VI was to conform its standards with respect to the Constitution.

We believe that the majority opinion in Bakke supports this conclusion, and while it is true that Bakke --

QUESTION: Which was the majority opinion in

Bakke?

(Laughter.)

MR. KOERNER: Well, insofar as the legislative history with respect to Title VI. There were at least five judges that commented on the legislative history, and as to the five judges there was a structured approach.

The first issue was, what was the scope of Title VI. The second issue was, assuming that Title VI was a constitutional scope, whether or not reverse discrimination would be inconsistent with the equal protection clause through Title VI.

So I am talking only about the majority opinion insofar as it analyzed the scope of Title VI. I recognize that there were different opinions with respect to whether reverse discrimination is within the ambit of Title VI.

Petitioners have cited Title IV in support of their position because they claim that there Congress made reference to the Constitution and therefore the failure to make reference to the Constitution in Title VI is significant.

Title IV, to the contrary, supports our position. In Title IV the Attorney General is given the authority to investigate and prosecute claims of

desegregation upon claims of individuals who are alleging constitutional violations. But that title assumes a constitutional standard. The reference to the constitutional limitation is in the context of what remedy the Attorney General can seek under Title IV, and in that respect he is limited to the extent that he cannot seek a remedy of busing and he cannot seek any other remedy that'll go beyond the Constitution.

If it wasn't for the purpose of limiting the Attorney General's jurisdiction, there would have been no reference to the Constitution and the constitutional standard would have been assumed.

In addition, Petitioner claims that you have an anomaly in that municipal corporations were excluded from Title VII and that there is therefore a different test, in that if they discriminate they are subject to a less stringent standard under Title VI than Title VII.

That's specifically what Congress intended. If indeed it was intended to have the same standard both under Title VII and under Title VII, there would have been no reason to exclude governmental entities from Title VII, and those entities were not included until 1972 after a great deal of debate.

In addition, with respect to municipal corporations, they were immune from suit under 1983

under Monroe versus Pape, which was familiar to the legislators in Congress at the time of enactment. Can it be said that it is likely that Congress, without anything in the legislative history, would have made municipalities subject to an impact standard with the resultant potential loss of federal funding, after they had been immune under 1983, without any comment to that effect in the entire legislative history? And the answer we believe is that it would be very unlikely.

The 1965 amendment which the Petitioners refer to was an amendment that contained many different pieces, one of which was to establish an intent standard. But the proponent of that amendment, Emanuel Celler, indicated that he was putting it in only to clarify what he believed was already there, a constitutional standard.

More importantly, there were other factors within that amendment. That amendment contained different procedures for Title VI. It allowed an entity receiving federal funds to waive the receipt to be beyond the jurisdiction of the agencies enforcing Title VI. And finally, it restricted the ability of the agencies, even where there was a violation.

So when that amendment failed passage both in the House and the Senate, the reason for its failure was

unclear. And as this Court has remarked many times, any reason to attribute to its failure would be sheer speculation.

Again, the only thing that supports the Petitioners' position are the regulations that were passed subsequent to 1964. Indeed, there is doubt as to whether those regulations were enforced. The only case commenting on the regulations was Brown against Weinberger and the comment generally was that the agencies hadn't enforced it.

And if you review the cases we set forth in our brief after '64 and before this Court's decision in Lau against Nichols, you will see consistently that the courts applied an intent standard and therefore they did not believe the regulations could change the law. As we indicated in the outset of our argument --

QUESTION: Mr. Koerner, you used the word "intent." Was that used in the Congressional debates?

MR. KOERNER: No. They used the reference --

QUESTION: Where did "intent" come from?

MR. KOERNER: Washington versus Davis.

QUESTION: But it didn't come out of --

MR. KOERNER: No, no. The only reference they used was constitutional standard, and they were prepared to incorporate the standard whether it included intent

or effect. They didn't define it in such manner.

In sum, what we are saying is that the language and the history was clear and articulate, that the state of mind of the legislators at that time was only to redress the obvious wrongs created by intentional segregation. There was no --

QUESTION: Even though they didn't use "intent"?

MR. KOERNER: That's right. There was no refinement with respect to intent versus impact. The impact refinement was a judicial gloss put on by this Court in Griggs against Duke Power solely with respect to one portion of Title VII with regard to testing, where the language indicated that it would be illegal to use a competency exam unless you can show that the exam wasn't being "used to discriminate." The term "used" was defined to create an impact standard.

It's also interesting to note that the rest of Title VII has been construed to have an intent standard with respect to disparate impact. So we're talking about the comparison of one isolated section of Title VII, which doesn't result in the calamitous loss of federal funding, with the entire Title VI jurisdiction with the administrative procedure which contemplates both voluntary compliance and a cutback, if that doesn't

work, of federal funding.

We believe this Court's decision in Bakke is clear and its intimation in Board of Education versus Harris that indicated that Bakke had so held the constitutional standard is correct. And we ask that that portion of the circuit court's opinion which has upheld the intent standard for Title VI be affirmed.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Crowley?

REBUTTAL ARGUMENT OF CHRISTOPHER CROWLEY, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. CROWLEY: I'd just like to add briefly, Mr. Chief Justice, that where there has been no reference in the debates to intent, which is our issue, where the debates are necessarily unclear, that whether you assume a constitutional standard or not, that there should be deference to a comprehensive 18-year history of the use and ratification of regulations like these, which were in our view impliedly endorsed by the Congress in '66 and when they used similar language to Section 601 in later years; and that that's the best evidence of what the Congress' attitude toward intent was, toward intent versus impact was in 1964.

QUESTION: Mr. Crowley, may I ask --

MR. CROWLEY: Yes, sir.

QUESTION: -- below was there any discussion of the question whether there was a private cause of action derived from the regulations, as contrasted with from the statute?

MR. CROWLEY: No.

QUESTION: There was never a discussion of that?

MR. CROWLEY: There was never a discussion of that in that light, no, sir.

QUESTION: Is the issue here a private cause of action issue?

MR. CROWLEY: I would have thought, Justice White, that it was covered by the fact that we did plead Section 1983 in this case, which as as I read your view --

QUESTION: But that's the issue -- but the issue is here, then? I mean, you say that if the issue is here there is a private cause of action. But is that question properly before us, whether there is a private cause of action?

MR. CROWLEY: There was no appeal on that subject. No cert was granted on that subject, Your Honor. We think -- it's my understanding that because of the pleading of Section 1983 there would be a private cause of action. We also, of course, think so under the

analysis in --

QUESTION: Is the Respondent privileged to rely on -- to try to have the judgment sustained by arguing a private cause of action?

MR. CROWLEY: I think that could be raised here, sir.

QUESTION: So if we thought 1983 doesn't really dispose of it, when we had to get to the statute, of course Congress could in Title VI have relied exclusively on administrative enforcement wholly aside from 1983.

MR. CROWLEY: I understand that, Your Honor. We would, of course, urge the analysis in Cannon, that it's appropriate to find that there was implied a private right of action in Title VI in addition to 1983.

QUESTION: But we have held that Congressional provisions for an administrative enforcement supplant even 1983.

MR. CROWLEY: That's right, Your Honor.

QUESTION: Well, relying on 1983 doesn't conclusively establish your cause of action, does it?

MR. CROWLEY: I thought it did.

QUESTION: Well, Congress could have intended to provide an exclusive remedy.

MR. CROWLEY: Yes, sir, I suppose they could have. But we think that in this case they did not.

QUESTION: But I gather, Mr. Crowley, if we may address the question of a private cause of action, if we were to conclude that there was no disparate impact liability under 601 itself, but that -- I gather you would not think we could reach the question whether impact liability under the regulations here could be reached.

MR. CROWLEY: If the Congress -- if I understand your question, Justice Brennan, if the Congress in 1964 intended to limit what the federal agencies could do to a clear Washington v. Davis intent standard, I would not argue that the regulations --

QUESTION: You would not argue that?

MR. CROWLEY: No, sir. But we think that, even adopting the notion that there was intended to be constitutional content, it was by no means clear in 1964 that they didn't contemplate that there wouldn't be impact regulations; that those impact regulations were adopted shortly thereafter, with great publicity at the time, and that they're entitled to great deference.

QUESTION: May I ask another question on the private case of action problem. Your suggestion that 1983 may be the source of your remedy, does that treat

the regulations or the Title VI as the federal law that is referred to in 1983? That's my first question.

My second question is, was this at all presented to the Court of Appeals as a basis for sustaining the cause of action? Judge Meskill found no private claim, and did he have a chance to consider the 1983 theory?

MR. CROWLEY: I do not -- I'm sorry, Justice Stevens, I do not recall the answer to your second question.

As to the first, I would have thought that Section 1983, which grants a cause of action as to the Constitution and laws, would make it clear that the cause of action as to Section 601 -- I would think that that would carry over as to regulations as well, sir.

QUESTION: You'd say the word "laws" encompasses regulations as well as federal statutes?

MR. CROWLEY: Yes, sir.

QUESTION: That's your view.

QUESTION: As long as the regulation is valid and has the force of law.

MR. CROWLEY: As long as they are valid and have the force of law, which we strongly urge that they are.

Thank you very much.

QUESTION: Mr. Crowley, do you think we have to decide the private cause of action issue in this case?

MR. CROWLEY: Cert was not granted on it.

QUESTION: I know it was not granted. But is there a lawsuit unless there is a private cause of action?

MR. CROWLEY: I do not believe so, Justice Powell.

QUESTION: What was your answer?

MR. CROWLEY: I hope I'm not right about this. I hope I'm not right about that. I'm afraid I don't think that there would be if there were no private cause of action.

QUESTION: Which would suggest that we do have to decide that issue. I don't know. I'm interested in your view.

QUESTION: Well, certainly we wouldn't be precluded from deciding it, because the Respondent is entitled to argue it to sustain the judgment.

MR. CROWLEY: I'm afraid I agree that you're certainly not precluded from looking at that.

QUESTION: Thank you.

MR. CROWLEY: Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:40 a.m., the case in the above-entitled case was submitted.)

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:
GUARDIANS ASSOCIATION, ETC., ET AL vs. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL. # 81-431

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