



clocket CIR report

Fall 2009

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Ratcheting Up...

Six months into the Obama Presidency, CIR has occasion for some good cheer.

It's not simply that plans to greatly expand the government are in trouble with a suddenly skeptical public. More heartening is the way the cause of limited government has been advanced through the courts, Obama Administration or no Obama Administration.

Take last month's decision in the New Haven Firefighters case (*Ricci v. DeStefano*). For the first time, the Court recognized that aggressive efforts by employers to favor the promotion of minority employees could themselves amount to illegal discrimination.

Ricci advanced the rule of law in a savvy way. Though the Court did not forbid employers from ever addressing the "disparate impact" of hiring and promotion policies (as we would have preferred), it did make clear that employers are liable if they use the disparate impact law as a ruse to further an invidious racial agenda. The result: disparate impact law no lon-

ger automatically favors one race at the expense of others and employers no longer have a free pass to use it for that purpose.

As *Ricci* shows, cases with strong facts can move the law forward even when the executive and legislative branches are running full throttle in the direction of ever bigger and more ambitious government authority. The strategy behind *Ricci* is simple: since it may be very difficult to end racial preferences across the board, it's better to bring a series of cases that create political momentum in that direction, momentum that will be difficult or impossible to reverse.

CIR is exploiting the current political reality in another way, too. Better than our opponents, we realize that it's never the last big case that puts an end to racial preferences—it's fear of the next case. So while the editorial writers are kept busy grumbling about the effects of *Ricci*, we're hard at work figuring out an entirely new legal target for our next effort. Our goal is to keep our opponents guessing about where we'll hit next.

One pundit called us a "brooding omnipresence" and that suits us just fine. Our opponents come to realize that just about any race-based classification is vulnerable to one of our highly embarrassing lawsuits, and since they don't know which one is next, they have to prepare to face all of them. Good.

As the following pages explain, several of CIR's cases now are in federal appellate courts or have just moved on from that level. Any one of them could go to the Supreme Court and help continue the legal and political momentum against an intrusive and expanded government. All of them have the kind of strong facts that will keep our opponents on defense.

As if those cases weren't enough, we've been hard at work assembling two other cases this summer that will open new fronts in our strategic litigation against pretensions to limitless government authority. About those cases we'll have to defer comment just now. But in the meantime, there's still plenty to read in these pages about some of CIR's other accomplishments this summer. 

Ricci, Don't Lose that Number

Several weeks ago, we wrote our friends and supporters about the Supreme Court's strong decision in *Ricci v. DeStefano*, the by-now famous case involving white and Hispanic New Haven firefighters whose hard work and high scores on two promotion tests were summarily tossed by city officials. One Reverend Boise Kimber had promised ominous "repercussions" if city officials didn't find a way to boost the chances of promotion for

they cling to the view that few, if any, non-minorities are ever directly harmed by preferences, since naturally they get good jobs and good promotions anyway. So just move along, folks—nothing to see here!

The facts in *Ricci* make it crystal clear that when the government benefits one person because of race, it necessarily harms another because of race. *Ricci* brings this uncomfortable fact into the open. New Haven officials had fallen all over themselves to make two promotions tests friendly to minority test-takers. The test was painstakingly developed by national firefighting experts to reflect the needs of the particular job, and its designers even told candidates which chapters of which books they needed to study from. To guard against any bias against minori-

tossed the test largely to satisfy Reverend Kimber, who made it abundantly clear the city had to favor black promotions no matter what. Our opponents may be bitter about the new law that emerged from this set of facts, but in truth, it was a pretty good statement of what most of us thought the law was all along.

True, current statutory law allows employers some latitude in trying to avoid "disproportionate" hiring results. (As Justice Scalia noted in his concurring opinion, the Court did not address whether that law is constitutional or not.) But that law does not allow employers to engage in blatant and deliberate race discrimination of the sort promoted by Reverend Kimber. Even the liberal wing of the Court recognized that employers cannot jettison tests for the reasons New Haven advanced. That's why the majority ruled an employer has to have a "strong basis in evidence" for thinking there's something unfair about using a particular test before it may jettison it on the ground that different races passed at different rates.

It is an annoying feature of what passes for debate about race preferences that even modest moves that develop the law in an evenhanded way are portrayed as "major setbacks" for civil rights. Conversely, the most egregious departures from the written law are received as commendable interpretations of its underlying purpose.

We beg to differ. The purpose of employment discrimination law is to get rid of *all* racial barriers, not to encourage the creation of new ones. In the end, *Ricci* made progress toward that goal. Happily enough, CIR has another case on tap that will move the law much further in the same direction. For details, see the article on page three. 

I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate—impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?

Justice Antonin Scalia, concurring in Ricci

minority firefighters, and so city officials made that happen by junking the test for everyone.

Ricci is the kind of case that catches liberal supporters of race preferences by surprise. It challenges two of their most cherished myths about the nature of racial favoritism. First, they like to say that preferences are a small tip of the scales that throw a few jobs and promotions to minorities whose qualifications are indisputable. And second,

ties in the accompanying oral exam, each three-member grading panel had two minority members on it.

Yet all this turned out not to be enough for city officials. When the results came in, they took the extreme step of jettisoning the test altogether because blacks did not perform as well as other groups. And it's not as if they tossed the test because they wanted to root out some hidden flaw or bias in it. They had no evidence of any. They

Social Justice, Obama Style

A good part of our summer has been consumed with the latest installment in our long-running battle in the New York City school custodians case. The Supreme Court's ruling in *Ricci* can be expected to point to a much bigger victory in *U.S. v. New York City Department of Education*, but getting there will take a lot of work.

That's because four parties, including ones represented by the NAACP Legal Defense

Fund, Inc., and the ACLU Women's Rights Project, have appealed various aspects of the district court ruling in this case, which the judge below aptly called a "legal juggernaut" and "a veritable *tour de force* of virtually every aspect of affirmative-action law in the employment arena." All that adds up to a ton of paper, of course, but at least our three-lawyer staff has had a chance to lose weight and get in shape this summer by hauling the voluminous files and exhibits around the office.

We've long since given up the ordinary use of our conference room, which has been converted into a war room for this effort. It's now filled with stacks of documents that our summer clerks have valiantly sorted and organized into something resembling

John Brennan contacted CIR after learning that the U.S. Department of Justice had entered into a consent decree that required his employer to give retroactive seniority and other preferences to minority and female building engineers.

order. In this summer's round, CIR's reply brief alone was 81 pages long, but then we had a lot of things to respond to.

One of them was a radical argument by the United States. The Obama Justice Department claims that only minorities (and women) who have been the victims of alleged discrimination can qualify for retroactive seniority. That's bad enough since the DOJ's idea of a "victim of discrimination" is anyone who failed a civil service exam and happens to be black or Hispanic—never mind whether the exam was discriminatory.

But it gets worse. The DOJ also argues that "victims" include individuals who took the test, passed it, and were hired!! According to Team Obama, these minority beneficiaries still suffered from the test they succeeded on, since supposedly it reduced their scores and thus postponed their hiring date.

One irony of this approach is that the group of incumbent custodians who got shoved down the seniority pole by the retroactive seniority granted these additional

"victims" includes not just whites, but some blacks and Hispanics (including our client Ruben Miranda). By Obama logic, these minority incumbents also were "victims" of discrimination when they took and passed the test—yet they are harmed by the "relief" granted other minorities. It's enough to make your head spin—there are real victims of discrimination, non-victims who are "victims," and "victims" who also are victims. (One wonders whether freshly minted Justice Sotomayor would figure out whom to empathize with.)

It's precisely for this reason, though, that *U.S. v. New York City Department of Education* could set a major precedent. Even more than in *Ricci*, the facts vividly illustrate the absurdity of treating a racial group *itself* as a "victim" every time the numbers don't come out right.

After the Second Circuit (minus Justice Sotomayor) has its say about what happened to John Brennan and his colleagues, the losing side will no doubt petition the Supreme Court to hear the case. That is an outcome that can't come too soon for our tastes. 🗨️



Summer Breeze Makes Me Feel Fine...

Each summer, CIR enjoys a much-needed near-doubling of its legal staff with the addition of several law clerks and summer interns. It's another way that we maximize the return on our donors' contributions, for each dollar contributed to CIR results in three to five dollars in legal services for our clients.

It's not a bad deal for the summer clerks either. As one of the premier conservative litigation firms, CIR offers law students an unusual opportunity to work with some of the best litigators around. Plus, they get the chance to help put together some

of CIR's groundbreaking cases.

This summer, for example, Harvard Law School rising "2L" Alexandra Arney and University of Virginia Law School rising "2L" Alexander Cox worked closely with CIR General Counsel Michael Rosman to put together CIR's mammoth brief in the New York City custodians case and helped do the legal groundwork for several new cases now in development.

Alexandra is a *magna cum laude* graduate of Northwestern University, where she received Honors in history and was Phi Beta Kappa. At Harvard Law, she is active with the Federalist Society,

is a supervising editor for the *Journal on Legislation*, and serves as secretary of the Harvard Law Republicans.

Alex graduated *cum laude* from The George Washington University with a B.A. in political science. He was on the Dean's List and a member of the Pi Sigma Alpha Honor Society and the National Society of Collegiate Scholars. At UVA Law, he is president of the Federalist Society and on the editorial board for the *Journal of Law and Politics*.

The "Alexes," singly and jointly, were a tremendous help this summer and we wish them the best as they continue their legal studies. 



Steppin' Out...

CIR's General Counsel Michael E. Rosman found himself in the spotlight quite a bit lately as the national media struggled to comprehend the tortured history of *Ricci v. DeStefano*, the New Haven firefighters case. As one of the handful of Americans who fully understood the case, he became very much in demand.

Suddenly Michael seemed to be everywhere. He authored the "Opposing View" Op Ed on *Ricci* in *USA Today* on June 30, and was featured on NPR's *Morning*

Edition with Nina Totenberg the same morning. He was interviewed by CBS News and featured in its *Washington Unplugged* politics show on June 29. His astute quotes have appeared in the *Christian Science Monitor*, *Human Events*, *Small Government Times*, and *Voice of America News*, among many other publications. On June 19, he appeared on a panel, "Race and the Law in the Wake of the 2008 Election," at the American Constitution Society's 2009 National Convention, and participated in an April 14 panel discussion, broadcast live

on C-Span, that organization sponsored at the National Press Club about the *Ricci* case. On May 28, he was featured in a Federalist Society *SCOTUScast* segment about *Ricci*. Michael also was quoted twice in an April 21 *USA Today* cover story highlighting recent Supreme Court cases that could alter civil rights laws.

Michael joined the CIR Staff in March of 1994 and became CIR's General Counsel in 1995. He received his J.D. from Yale Law School in 1984 and graduated *summa cum laude* with a B.A. in economics and political science from the University of Rochester in 1981. 



Peekaboo!—We'll See You in Court...

Lately another one of those Washington words, like "TARP" or "Nickleby" (No Child Left Behind), has surfaced. This one's "Peekaboo," the nickname for the latest advance in unaccountable government, the recently-created Public Company Accounting Oversight Board, or "PCAOB."

We all know about administrative agencies—gargantuan federal bureaucracies that micromanage our lives under the nominal

supervision of a distracted president and Congress. Peekaboo takes this Constitution-warping innovation a big step further.

The PCAOB oversees the financial auditing of all publicly traded companies—a huge, consequential task. The board has the power to set accounting standards, police accounting firms, and make whatever rules it deems "necessary or appropriate in the public interest or for the protection of investors." Amazingly enough, it can

even levy taxes on companies to fund its own budget. Yet with all that power, it's not even accountable to the president. Its members, rather than being appointed by the president, are appointed by the Securities and Exchange Commissioners collectively; for the people, acting through their elected representatives, removing these panjandrum or telling them what to do alike would be difficult, if not impossible. As far as accountability is concerned, Peekaboo is

the Federal Reserve on steroids.

Several years ago, CIR's friend and former Board Member Mike Carvin helped organize a lawsuit challenging the constitutionality of Peekaboo on the grounds that it violates the Appointments Clause and fundamental Separation of Powers principles of the Constitution. Earlier this year, the Supreme Court agreed to review the case.

Except there is one hitch. For Peekaboo auda-
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CENTER FOR INDIVIDUAL RIGHTS
1233 20th St, N.W., Suite 300
Washington, D.C. 20036

phone: 202-833-8400
e-mail: genl@cir-usa.org
web: www.cir-usa.org

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ciously argues that judicial review is not available for those who wish to challenge the board in court. Already an unaccountable body of vast power, it seeks to insulate its actions not just from elected officials, but even from court cases brought by those most impacted by its rulings.

Needless to say, that set us off here at CIR. Carvin asked us, and we agreed, to write an *amicus* brief attacking that particular theory. In our brief, filed in late July, we argue that since the plaintiffs have no other avenues open to them for review, the Court must consider the substance of their claims, and refuse to make this new Board of Economic Dictators safe from judicial scrutiny.

A Perfect Way...

The Center for Individual Rights has defended free speech and opposed racial preferences since 1989 as part of an ongoing effort to defend the Constitution and to restore government to its traditional limits.

This focus on specific legal areas has helped the Center win an impressive 80 percent of its cases to date. Our record of success reflects CIR's efficiency and effectiveness in advanc-

ing the cause of liberty—now and for many more years to come.

Planned gifts, such as an annuity, charitable trust, or outright bequest (of stock, real estate, life insurance, or cash) give CIR the guaranteed resources to continue fighting—and winning—a carefully chosen strategic handful of legal campaigns.

These gifts take many forms, each one created specifically to serve *your* individual goals. Each form ensures maximum

control over the future use of the gift. And each gift ensures that CIR can continue to work for your goals.

For CIR's supporters, a planned gift is the perfect way to ensure every tax-deductible dollar is spent according to your wishes. If you would like to speak with someone regarding a planned gift to the Center for Individual Rights, please call Megan Beth Lott, toll free at 877-426-2665 ext. 106 or contact her at lott@cir-usa.org.