

February 14, 2002

Ms. Merrily Friedlander
Chief, Coordination and Review Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Ms. Friedlander:

We are writing to submit comments on the Justice Department's republication of its policy guidance on Title VI's prohibition against national origin discrimination as it affects limited English proficient persons.

The guidance is principally a discussion of the four-part balancing test that is set out for determining the required scope of accommodations for limited English proficient persons in federally funded programs (especially the Justice Department's). Our comments, however, take issue with the premise that such accommodations can or ought to be required under Title VI in the first place.

The validity of our comments is buttressed by a Supreme Court decision, *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001), that was handed down since the guidance first became effective on the last full day of the Clinton administration, January 19, 2001. The events of last September 11 also make this a good time to reassess the wisdom of executive-branch pronouncements that inevitably encourage the balkanization of the nation into ethnic enclaves.

Title VI of the Civil Rights Act of 1964 prohibits "discrimination under any program or activity receiving Federal financial assistance" against any person in the United States "on the ground of race, color, or national origin." The guidance acknowledges that "On its face, Title VI prohibits only intentional discrimination." *Sandoval* reaffirms the Supreme Court's earlier pronouncements that Title VI bans only disparate treatment, not actions that have only disproportionate effects on this or that racial or ethnic group.

There is obviously a problem, then, if a federal agency promulgates regulations purporting to implement Title VI but that ban not only disparate treatment (which Title

VI is aimed at) but also actions with only disproportionate effects (which the Supreme Court has said that Title VI allows). The Court has long recognized that the difference between disparate treatment and disparate impact is one of kind, not just degree. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976). Since a federal agency cannot even ban intentional discrimination without statutory authority, *see NAACP v. FPC*, 425 U.S. 662 (1976), then it would certainly seem to lack authority to ban actions that are not intentionally discriminatory when they have no statutory authority to do so.

While the *Sandoval* decision did not invalidate Title VI disparate-impact regulations—the Court concluded that the issue had not been presented to it—five justices on the Court strongly hinted that they might vote to do so in a future case. The *Sandoval* majority noted, “We cannot help observing ... how strange it is to say that disparate-impact regulations” properly implement Title VI when the statute “permits the very behavior that the regulations forbid.” The Court also noted that Title VI “limits agencies to ‘effectuat[ing] rights already created by’ it. *See* 121 S. Ct. at 1516-17, 1519 n.6, 1521. *See also* Thomas A. Lambert, *The Case against Private Disparate Impact Suits*, 34 Ga. L. Rev. 1155, 1211-21 (2000) (discussing, inter alia, the Court’s “general rule that agency regulations may not be more prescriptive than the enabling statutes under which they are promulgated,” *id.* at 1214).

Since Congress cannot transform a disparate-treatment ban into a disparate-impact ban, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), it seems fair to conclude that a federal agency also lacks this authority. The Court in *Boerne* said that Congress’s font of authority, Section 5 of the Fourteenth Amendment, does not give it authority to make this fundamental transformation; *a fortiori*, an agency’s font of authority, Title VI, does not give *it* authority to make this fundamental transformation. *See* Lambert, 34 Ga. L. Rev. at 1218-21.

Such a transformation is additionally problematic because a ban on disproportionate effects will in fact *encourage* race-consciousness and disparate treatment—the very behavior that Congress sought to ban. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-94 & n.2 (1988) (plurality opinion); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (Blackmun, J., concurring in judgment).

Finally, to the extent that Title VI regulations are applied to states (as they frequently are), problems are raised under *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), because Congress has not approved such incursions on state authority, let alone approved them “unequivocally.” And were Congress to have given agencies authority to rewrite the statute actually passed, problems are raised under the nondelegation doctrine as well.

The justification for the disparate-impact approach in the republished guidance is in one sentence in Appendix B and its accompanying footnote. The sentence reads, “The Supreme Court has consistently upheld agency regulations prohibiting unjustified

discriminatory effects.” The footnote cites three Supreme Court decisions, but the authority provided by each is quite problematic.

Only two majority opinions are cited in footnote 5. The first, *Alexander v. Choate*, 469 U.S. 287, 293-94 (1985), was not a case about Title VI or its regulations; instead, it involved the Rehabilitation Act, which the Court was at pains to assert might well give agencies broader authority to promulgate disparate-impact regulations. The other majority opinion cited in footnote 5 is *Lau v. Nichols*, 414 U.S. 563, 568 (1974), but there is no discussion in this case at all of any regulation’s validity and, in any event, when *Lau* was decided the Court had not yet determined that Title VI banned only disparate treatment, so the divergence between the statute’s ban and the regulations’ could not have been authoritatively addressed.

The other case cited in footnote 5 (and discussed by the majority in *Alexander v. Choate*) is *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983). But to find in *Guardians* a bare majority for the proposition that agencies may promulgate disparate-impact regulations under Title VI, one must add the opinion by Justice White to Justice Marshall’s dissent and to Justice Stevens’ dissent (joined by Justices Brennan and Blackmun). Four members of the Court—Burger, Rehnquist, Powell, and O’Connor—explicitly rejected this view. Furthermore, Justice White actually voted to affirm the holding below denying the plaintiff compensatory damages, and also thought that the statute itself reaches disparate impact, so “[t]he question whether agency regulations under Title VI may forbid only disparate impact ... thus remains open.” Lambert, 34 Ga. L. Rev. at 1207; *see also id.* at 1203-25 (discussing why disparate-impact regulations are invalid under the Court’s precedents).

In all events, whatever tenuous authority these three decisions might have had was snapped by last year’s decision in *Sandoval* (and, earlier, by the Court’s *City of Boerne* decision). Clearly there are at least five justices who view the validity of disparate-impact regulations promulgated under Title VI as very much an open question and, indeed, indicated rather clearly that the regulations rest on dubious authority.

And even if in some future case the Supreme Court rules that federal agencies have authority to write disparate-impact regulations, that would not mean that they *should* do so, especially given the many bad consequences that the disparate-impact approach has had for civil-rights law. Thus, the administration ought to be reassessing the use of the disparate-impact approach in all areas not required by statute, and that includes Executive Order 13166.

Indeed, the disparate-impact approach is especially untenable in the language area. It equates the use of English with national-origin discrimination, which is absurd. Ability to speak English and ethnicity are obviously distinct qualities. Some people of a particular national origin will not be able to speak English well, but others will. Conversely, some people *not* of that particular national origin will *also* not be able to speak English well. Thus, the courts have overwhelmingly rejected claims that employers with a preference or even a requirement for speaking English—practices that

go much further than the mere failure to make the positive accommodations that the guidance would require—are discriminating on the basis of national origin. (These cases are collected and discussed in Barnaby Zall, *English in the Workplace* (2000) (published by the Center for Equal Opportunity).)

The Supreme Court’s decision in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), is also instructive. It held there that it was not national origin discrimination when an employer refused to hire a noncitizen. The Court—per Justice Marshall, with Justice Douglas the only dissenter—endorsed an early EEOC opinion that “‘national origin’ refers to the country from which the individual or his forbears came . . . , not whether or not he is a United States citizen” (*id.* at 94). The Court had noted, “Certainly the plain language of the statute supports [that] result” (*id.* at 88), and that Title VII’s legislative history “suggest[ed] that the terms ‘national origin’ and ‘ancestry’ were considered synonymous” (*id.* at 89). What’s more, the Court expressly rejected the EEOC’s attempt to ban discrimination against foreigners by arguing that it would have a disparate impact on the basis of national origin (*id.* at 92-95). It would seem to follow that discrimination against all foreign languages doesn’t violate the law; only discrimination against a language associated with a particular national origin.

While it is of course possible that a particular Title VI recipient might choose not to make its programs available in a language other than English as a way of discriminating against a particular ethnic group, it seems fair to assume that the overwhelming majority of Title VI recipients use only English not out of any illicit motive but simply because of ease, convenience, and thrift. Thus, it is much fairer for the government to limit itself to going after recipients it suspects of disparate treatment—especially since that is all the underlying statute prohibits. There is no reason to assume recipients who use only English are guilty until they can show their good faith and a business necessity for their policy. Nor is there any reason to assume that, unless the federal government is requiring recipients to make programs available in English, that they will not do so. Many recipients will indeed accommodate non-English-speakers; but the decision of whether and how to do so should be and is theirs to make, not the federal government’s.

The last sentence in the republished guidance asserts that “DOJ’s primary concern is to ensure that the recipient’s policies and procedures overcome barriers resulting from language differences.” No doubt. But Congress has not enacted an affirmative mandate that recipients “overcome[e] barriers resulting from language differences”; it has banned discrimination on the basis of ethnicity, which is very different.

Worse, the guidance endorses the notion that America ought to be a multilingual nation, and removes important incentives for all Americans to learn English. A common tongue becomes more, not less, important as our nation grows more multiracial and multiethnic. We must be able to communicate with one another, and it is very damaging if the federal government is sending the message that learning English is not necessary for being an American. In short, as dubious as Executive Order 13166 is as a matter of law, it is much worse as a matter of policy.

Executive Order 13166 ought to be revoked. Furthermore, all agency regulations and guidance promulgated under Title VI that rely on the disparate-impact approach should be revoked as well.

Sincerely,

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