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Title VI and the Warren County Protests

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ARTICLE

TITLE VI AND THE WARREN COUNTY
PROTESTS

*BRADFORD MANK**

I. INTRODUCTION

One part of the 1982 civil rights struggle against building a Polychlorinated Biphenyls (“PCB”) landfill in Warren County, North Carolina, was an unsuccessful suit by the National Association for the Advancement of Colored People (“NAACP”) under Title VI of the 1964 Civil Rights Act.¹ The NAACP alleged that the state of North Carolina, a recipient of United States Environmental Protection Agency (“EPA” or “the Agency”) funds, had discriminated against minorities by building the landfill in Warren County, which had the highest percentage of minorities among all the counties in the state, while ignoring several alternative suitable or superior sites in other locations in North Carolina that had lower percentages of minorities.² After finding “not one shred of evidence that race has at any time been a motivating factor in any decision taken by any official,” the district court in *NAACP v. Gorsuch*

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¹ Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53, 42 U.S.C.A. § 2000d (West 2007); see Bradford C. Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517, 517 (2002).

² The NAACP sought a preliminary injunction under the Thirteenth and Fourteenth Amendments, the North Carolina State constitution, and Title VI of the Civil Rights Act of 1964. *NAACP v. Gorsuch*, No. 82-768-CIV-5, slip op. at 2-3, 9-10 (E.D.N.C. Aug. 10, 1982); Willie A. Gunn, *From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice*, 22 OHIO N.U.L. REV. 1227, 1279-80 (1996). This Article will discuss only the Title VI aspects of the case.

denied the plaintiffs' request for preliminary injunctive relief and concluded that there was little likelihood that the plaintiffs would prevail on the merits.³ The NAACP had to file a suit in federal court because the EPA had failed to enforce Title VI since the early 1970s.⁴ The district court's unpublished decision itself had little influence on the development of Title VI law. One must look at the Warren County protests' broader civil rights legacy to understand its influence on the enforcement of Title VI.

Although the Warren County Title VI suit was unsuccessful, the Warren County protests led to a 1983 General Accounting Office study and a 1987 United Church of Christ's Commission on Racial Justice (CRJ) study, both of which found that hazardous waste facilities were more likely to be located in minority communities.⁵ The Warren County protests and the two studies helped build a broader environmental justice and civil rights movement that eventually led to President Clinton's requirement that federal agencies ensure that their grant recipients comply with Title VI.⁶

Title VI administrative complainants and litigants have almost always lost their cases, although sometimes these challenges have delayed projects and allowed groups to mount civil rights protests that eventually defeated the project. In a 2003 article, Michael Gerrard concluded that "to date, citizen complaints to the EPA under Title VI have never been successful, though a few have yielded collateral benefits."⁷ The Clinton EPA decided its only Title VI case on the merits against the civil rights complainant.⁸ In 2001, the Supreme Court in *Sandoval v. Alexander* held that Title VI plaintiffs must prove intentional discrimination by a state or local agency against minority groups, a very difficult standard of proof, rather than the less demanding disparate-

³ NAACP, slip op. at 9-10; Gunn, *supra* note 2, at 1279-80. Because the plaintiffs had not raised racial discrimination as an issue during earlier administrative proceedings or in two prior lawsuits, the district court appeared to assume that the discrimination claim was insincere. Gunn, *supra* note 2, at 1279. The court also found that there were no other sites that were both suitable and available for use.

⁴ See *infra* notes 33-37 and accompanying text.

⁵ Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 296-97 (1995). The two studies came at the request of two civil rights leaders arrested at the Warren County protests. Walter Fauntroy, the District of Columbia's Delegate to the U.S. House of Representatives, requested that the General Accounting Office conduct its study. *Id.* at 296-97. Dr. Benjamin Chavis, the head of the United Church of Christ's Commission on Racial Justice, was in charge of the 1987 study. *Id.* at 297.

⁶ See *infra* note 41 and accompanying text.

⁷ Michael B. Gerrard, *EPA Dismissal of Civil Rights Complaints*, N.Y. L.J., November 28, 2003, at 3.

⁸ See *infra* notes 45-47 and accompanying text.

impacts standard of proof that lower courts had used previously.⁹ The *Sandoval* decision made it much more difficult for plaintiffs to bring Title VI cases in federal court. As is discussed in Part IV, the Bush EPA has been much more willing than the Clinton EPA to dismiss Title VI complaints for various procedural reasons and to find against complainants on the merits.

Civil rights lawyers must understand that legal remedies such as Title VI are only one tool in the broader civil rights struggle.¹⁰ Local community groups that seek to block a project that they believe will cause environmental harms to minority groups need to emulate the community organizing that was the hallmark of the Warren County movement. Additionally, civil rights groups must work to elect a President and Congress that are sympathetic to vigorous enforcement of Title VI and to the appointment of Supreme Court justices who will adopt a disparate-impacts interpretation of the term "discrimination" in Title VI.

II. TITLE VI

A. INTRODUCTION TO TITLE VI

In the Civil Rights Act of 1964 ("the Act"), Congress enacted its first comprehensive civil rights legislation in response to the civil rights movement led by Dr. Martin Luther King Jr. and other minority leaders.¹¹ Under Title VI of the Act, federal agencies may not provide federal financial funding to "recipient" nonfederal agencies or programs that discriminate on the basis of race.¹² Typical grant recipients are state

⁹ *Alexander v. Sandoval*, 532 U.S. 275, 287-88 (2001); see *infra* notes 61-63 and accompanying text.

¹⁰ See Luke Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 *FORDHAM URB. L.J.* 523 (1994).

¹¹ See Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 *GEO. L.J.* 1 (1981) (discussing historical background to passage of Title VI).

¹² Section 601 of the statute provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 2007); see BRADFORD C. MANK, *Title VI*, in *THE LAW OF ENVIRONMENTAL JUSTICE* 23, 23-25 (Michael Gerrard ed., 1999; 2d ed. forthcoming in 2007); James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 *STAN. ENVTL. L.J.* 125, 152-55 (1994). The typical intermediary recipient is a state or local agency that receives federal funding and then distributes the proceeds to individual beneficiaries. *Id.* at 154. The ultimate individual beneficiaries are exempt from Title VI. *Id.*

and local agencies, including environmental agencies.¹³ If any program of a state or local government agency receives any federal assistance, Title VI governs the entire agency.¹⁴ Title VI suits usually cannot be filed directly against federal agencies.¹⁵

1. Section 601 of Title VI

Section 601 of Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁶ In 1983, the Supreme Court held that a plaintiff in a Section 601 lawsuit must prove a recipient intended to discriminate and not simply that the recipient’s actions had the effect of causing discrimination.¹⁷ After the Court limited Section 601 suits to proof of intentional discrimination, plaintiffs instead filed suits relying on the disparate-impact regulations issued by various federal agencies under Section 602 of Title VI, until the *Sandoval* decision in 2001 ended that approach.

2. Section 602 Regulations Forbid Disparate Impacts

Section 602 of Title VI requires every federal agency or department to promulgate regulations that prohibit recipients from practicing discrimination, describe how the agency will determine whether recipients are engaging in discriminatory practices, and provide a process for investigating and reviewing complaints of racial discrimination filed with the agency.¹⁸ In 1964, a presidential task force issued model Title

¹³ See *Soberal-Perez v. Heckler*, 717 F.2d 36, 38-39 (2d Cir. 1983); *Colopy*, *supra* note 12, at 154; *MANK*, *supra* note 12, at 25.

¹⁴ Civil Rights Restoration Act of 1987, 42 U.S.C.A. § 2000d-4a (West 2007) (overruling *Grove City College v. Bell*, 465 U.S. 555 (1980); *United States v. Louisiana*, 692 E Supp. 642, 652 (E.D. La. 1988); *MANK*, *supra* note 12, at 25.

¹⁵ See *Cannon v. University of Chicago*, 441 U.S. 677, 715 (1979) (suggesting that Title VI suits may not be filed against the federal government); *Fisher*, *supra* note 5, at 317 n.58 (arguing federal courts are unlikely to accept Title VI suits against the federal government); *MANK*, *supra* note 12, at 29 (same).

¹⁶ Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 2007).

¹⁷ *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2 (1983); *MANK*, *supra* note 12, at 31.

¹⁸ § 2000d-1 of Title VI states in part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section

VI disparate-impact regulations requiring that recipients of federal funds not use “criteria or methods of administration which have the *effect* of subjecting individuals to discrimination.”¹⁹ Since 1964, every federal agency has followed these model disparate-impact regulations.²⁰ Because Section 602 disparate-impact regulations “forbid conduct that § 601 permits” there has been continuing controversy about whether such regulations are valid,²¹ but courts have not yet invalidated the regulations.²²

In theory, a federal agency may revoke funding to a recipient that violates Title VI, but recipients have strong appeal rights that make it very difficult for federal agencies to terminate funding.²³ For example, if the EPA determines that a funding recipient engages in discrimination, the recipient has a right to a hearing before an administrative law judge and may appeal an adverse decision to the Administrator of EPA.²⁴ Further, if the Administrator of EPA attempts to revoke a recipient’s funding, the Agency must submit a written report to appropriate committees in Congress thirty days before the revocation becomes

2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President [subsequently delegated to the Attorney General].

42 U.S.C.A. § 2000d-1 (West 2007); MANK, *supra* note 12, at 25; Bradford C. Mank, *Is There a Private Cause of Action Under EPA’s Title VI Regulations?*, 24 COLUM. J. ENVTL. L. 1, 12 (1999) [hereinafter “Mank, *Private Cause of Action*”]. To facilitate the enforcement of the various § 602 regulations issued by various agencies, the Department of Justice has issued regulations concerning the implementation of Title VI requirements, including a requirement that agencies adopt procedures for monitoring a recipient’s pre- and post-award compliance. *See* 28 C.F.R. § 42.405 (2000) (Department of Justice Regulations); 40 C.F.R. § 7.110-.115 (2000) (EPA regulations); Fisher, *supra* note 5, at 313.

¹⁹ 45 C.F.R. § 80.3(b)(2) (1964) (emphasis added); *see Guardians*, 463 U.S. at 618 (1983) (Marshall, J.) (quoting 45 C.F.R. § 80.3(b)(2) (1964)); Mank, *Private Cause of Action*, *supra* note 18, at 13; Mank, *supra* note 12, at 25.

²⁰ *Guardians*, 463 U.S. at 592 n.13 (White, J.) (observing “every Cabinet department and about 40 agencies adopted Title VI regulations prohibiting disparate-impact discrimination.”); *see* Mank, *Private Cause of Action*, *supra* note 18, at 13; Mank, *supra* note 12, at 25; Paul K. Sonn, Note, *Fighting Minority Underrepresentation in Publicly Funded Construction Projects After Croson: A Title VI Litigation Strategy*, 101 YALE L.J. 1577, 1581 n.25 (1992) (listing Title VI regulations for several federal agencies).

²¹ *Sandoval v. Alexander*, 532 U.S. 276, 285 (2001).

²² Bradford C. Mank, *Are Title VI’s Disparate Impact Regulations Valid?*, *supra* note 2, at 517, 518, 521-28 (2002).

²³ *See* 40 C.F.R. § 7.130(a)-(b) (discussing EPA’s authority to terminate funding to a recipient); Mank, *supra* note 12, at 28.

²⁴ *See* 40 C.F.R. §§ 7.115(e), 7.130(b)(1), 7.130(b)(2)(i), (ii), 7.130(b)(3); Mank, *supra* note 12, at 28.

effective.²⁵ Because of the strong procedural protections guaranteed to recipients, the EPA prefers to reach voluntary compliance settlements with recipients.²⁶

B. EPA'S TITLE VI REGULATIONS AND ENFORCEMENT HISTORY

In 1970, President Nixon created the EPA by patching together health and environmental programs from several different federal agencies into a new single agency.²⁷ From 1970 to 1973, recipients of EPA funding were governed by the Title VI regulations adopted by the agency or department that had been responsible for the program before 1970.²⁸ In 1973, the EPA adopted its own Title VI regulations, which prohibited recipients from engaging in actions having discriminatory effects.²⁹ In 1984, the EPA issued amended regulations that also prohibited each recipient from "us[ing] criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin."³⁰ Further, EPA's regulations forbid a recipient from selecting a site location for a facility where it will have discriminatory effects on protected groups.³¹ Additionally, EPA regulations require state recipients to maintain Title VI compliance programs preventing discrimination by either the state or any beneficiaries of state-administered funds.³²

Despite the antidiscriminatory language in its Title VI regulations, from the early 1970s until 1993, the EPA did not enforce the statute against recipients, because terminating funding to a recipient for Title VI violations would undermine EPA's primary goal of providing financial assistance to state and local agencies to reduce pollution, even though every other federal agency acknowledged its duty to enforce the statute.³³

²⁵ See 40 C.F.R. § 7.130(b)(3)(iii); Mank, *supra* note 12, at 28.

²⁶ See Mank, *supra* note 12, at 28.

²⁷ See Bradford C. Mank, *Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 *ECOLOGY L. Q.* 1, 38-39 (1998).

²⁸ See 37 Fed. Reg. 11,072 (1972); Mank, *supra* note 12, at 25-26.

²⁹ See 38 Fed. Reg. 17,968, 17,969 (1973) (providing a recipient may not "directly or indirectly, utilize criteria or methods of administration which have or may have the effect of subjecting a person to discrimination because of race, color, or national origin"); Mank, *supra* note 12, at 26.

³⁰ See 49 Fed. Reg. 1,661 (1984) (codified at 40 C.F.R. § 7.35(b)); Mank, *supra* note 12, at 26.

³¹ 40 C.F.R. § 7.35(c) (prohibiting location of facility that has discriminatory effect); Mank, *supra* note 12, at 26.

³² 28 C.F.R. § 42.410; Mank, *supra* note 12, at 26.

³³ Mank, *supra* note 12, at 26; Fisher, *supra* note 5, at 313-14 (1995); Colopy, *supra* note 12,

Many minority communities complained that they were not receiving their fair share of federal grants for the construction of sewage treatment facilities under the Clean Water Act.³⁴ In 1975, the Civil Rights Commission explicitly criticized the EPA for failing to “take positive steps to end the systematic discrimination which has resulted in inadequate sewer services for many minority communities.”³⁵ In 1975, the Agency’s Office of Civil Rights (OCR) responded that “[the Commission’s 1975] report should give more recognition to the fact that EPA is essentially a pollution abatement agency and, as such, is to be distinguished from an agency principally concerned with community development.”³⁶ Until 1993, the OCR focused on Title VII employment discrimination complaints filed by agency employees and OCR had the equivalent of only four full-time employees in 1993.³⁷

C. THE CLINTON ADMINISTRATION’S USE OF TITLE VI TO PROMOTE ENVIRONMENTAL JUSTICE

Grassroots environmental justice groups and civil rights groups supported Bill Clinton during his 1992 election campaign and lobbied the newly elected President Clinton to address environmental justice issues.³⁸ The strong environmental justice movement in the early 1990s can be traced back in significant part to the Warren County protests and the subsequent General Accounting Office and United Church of Christ reports. In 1993, the newly installed Clinton administration announced that the EPA would enforce Title VI against recipients that practice discrimination.³⁹ On February 11, 1994, President Clinton recognized the importance of environmental justice issues by promulgating Executive Order 12,898, which requires all federal agencies to develop policies to achieve environmental justice “[t]o the greatest extent practicable and permitted by law.”⁴⁰ The 1994 presidential

at 180–88.

³⁴ Fisher, *supra* note 5, at 313–14.

³⁵ Fisher, *supra* note 5, at 313–14 (quoting U.S. COMM’N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, at 598–99 (1975)).

³⁶ Richard J. Lazarus, *Pursuing “Environmental Justice:” The Distributional Effects of Environmental Protection*, 87 NW. U L. REV. 787, 838 n.232 (1993).

³⁷ Fisher, *supra* note 5, at 314 n.144; Colopy, *supra* note 12, at 183.

³⁸ Bradford C. Mank, *Executive Order 12,898*, in *The Law of Environmental Justice* 104–06 (Michael Gerrard ed., 1999; 2d ed. forthcoming in 2007).

³⁹ See Fisher, *supra* note 5, at 314–15; Mank, *supra* note 12, at 26.

⁴⁰ Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (1994), 3 C.F.R. § 859, reprinted in 42 U.S.C.A. § 4321 (West 2007); Mank, *Executive Order 12,898*, *supra* note 38, at 104.

memorandum accompanying Executive Order 12,898 required federal agencies providing funding to programs affecting human health or the environment to ensure that their grant recipients comply with Title VI, although the directive is not judicially enforceable and does not alter the standard of proof under the statute.⁴¹

The Clinton EPA enforced Title VI more vigorously than previous administrations, but its record was far from perfect. In 1994, the EPA expanded OCR's staff to handle Title VI complaints, although its staff has never been large enough to adequately investigate all of the complaints.⁴² In 1997, the EPA created a new civil rights legal division within the OCR to deal exclusively with Title VI issues.⁴³ The Clinton EPA often delayed deciding Title VI complaints for years because the Agency was reluctant to offend recipients that denied that their permit decisions or programs were discriminatory, and the Agency was sensitive to industry arguments that Title VI complaints could prevent the building of new facilities that would provide needed jobs in a minority community with high unemployment.⁴⁴

1. Select Steel: A Defeat for Environmental Justice Groups

In the 1998 *Select Steel* decision, involving a proposed steel plant in a minority community in Flint, Michigan, the EPA rejected a Title VI complaint alleging serious health impacts on minorities, in part because the State of Michigan denied it had any discriminatory animus, claiming that it had provided adequate public participation and that it had complied with all EPA requirements.⁴⁵ The *Select Steel* case was the

⁴¹ See Presidential Memorandum Accompanying Executive Order 12898, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994); MANK, *supra* note 12, at 26.

⁴² Mank, *supra* note 12, at 26-27; Natalie M. Hammer, *Title VI as a Means of Achieving Environmental Justice*, 16 N. ILL. U.L. REV. 693, 711 (1996).

⁴³ Mank, *supra* note 12, at 27.

⁴⁴ *Id.*

⁴⁵ See *id.* at 48-50 (discussing *Select Steel* Complaint); U.S. EPA, Office of Civil Rights, Summary of Decision on Title VI Complaint Regarding Michigan Department of Environmental Quality's Permit for the Proposed Select Steel Facility (summarizing EPA's decision in *St. Francis Prayer Center v. Michigan Dept. of Environmental Quality*, Title VI Administrative Complaint File No. 5R-98-R5 (1998)), available at <http://www.epa.gov/oct/sssum1.htm> (lasted visited March 28, 2007); Letter from Ann Goode, Director, EPA Office of Civil Rights, to Fr. Phil Schmitter, Co-Director, St. Francis Prayer Center; Sr. Joanne Chiaverini, Co-Director, St. Francis Prayer Center, and Russell Harding, Director, Michigan Department of Environmental Quality (Oct. 30, 1998) (explaining EPA's denial of Title VI complaint in EPA File No. 5R-98-R5), available at http://www.epa.gov/civilrights/docs/ssdec_ir.pdf (lasted visited March 28, 2007); U.S. EPA, OFFICE OF CIVIL RIGHTS, INVESTIGATIVE REPORT FOR TITLE VI ADMINISTRATIVE COMPLAINT FILE NO. 5R-98-R5 (*Select Steel* Complaint), available at http://www.epa.gov/civilrights/docs/ssdec_ir.pdf (lasted visited March 28, 2007); Luke W. Cole, *Wrong on the Facts, Wrong on the Law*, 29 ENVTL.

only Title VI administrative complaint that the Clinton Administration decided on the merits. The EPA emphasized that the Select Steel permit complied with its National Ambient Air Quality Standards (NAAQS) for both ozone and lead.⁴⁶ The EPA found that there was no evidence of discrimination by the State of Michigan.⁴⁷

2. Shintech: *Winning Through Delay*

In 1997, the Shintech Company proposed a \$700 million plastics facility in St. James Parish, Louisiana, a heavily minority community located between Baton Rouge and New Orleans, Louisiana, where there is a high concentration of chemical plants that emit various carcinogens.⁴⁸ The Tulane Environmental Law Clinic filed Title VI petitions on behalf of several citizens' groups, challenging the Louisiana Department of Environmental Quality's (LDEQ) approval of the Shintech project.⁴⁹ The EPA delayed making a decision on the merits of the Title VI claim.⁵⁰ Instead of deciding the merits, the EPA found defects in Shintech's air permit and remanded the permit back to LDEQ to address various technical deficiencies.⁵¹ Because the community protests and legal challenges led to significant delays in building the project, Shintech withdrew its St. James proposal and instead built a smaller plant in Covert, Louisiana, a community that is more balanced racially.⁵² The *Shintech* controversy demonstrates that civil rights groups do not have to actually win a Title VI case in order to defeat a project.

3. *The Clinton Administration's Inability to Draft Title VI Regulations for Environmental Justice*

The Clinton Administration failed to develop Title VI regulations for environmental justice because industry and many state and local government officials opposed stringent regulations that might have led the EPA to find that permit decisions or other practices had discriminatory effects. In 1998, the EPA issued an *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*

L. RPTR. 10,775 (Dec. 1999) (criticizing EPA's *Select Steel* decision).

⁴⁶ See Mank, *supra* note 12, at 49-50.

⁴⁷ See *id.*

⁴⁸ *Id.* at 45-48 & n.198.

⁴⁹ *Id.* at 45-46.

⁵⁰ *Id.* at 47.

⁵¹ *Id.* at 47-48.

⁵² *Id.* at 48.

("Interim Guidance") to help the Agency's OCR evaluate Title VI complaints.⁵³ During a ninety-day public comment period, many industry and local government officials criticized the *Interim Guidance* for failing to clarify critical terms, especially the definition of "disparate impacts."⁵⁴ By contrast, many environmentalists, civil rights activists, and members of the Congressional Black Caucus cautiously defended the *Interim Guidance*.⁵⁵

On June 27, 2000, the EPA concurrently published the *Draft Recipient Guidance* and the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* on Title VI in the Federal Register as two separate but related documents.⁵⁶ After receiving the public comments, the EPA promised to revise the Draft Guidances and publish them in "final" form, but the Clinton Administration never issued final Title VI guidelines.⁵⁷ By failing to issue final Title VI guidelines or regulations, the Clinton EPA missed an opportunity to influence how future administrations would enforce the statute.

III. LITIGATION: SANDOVAL REQUIRES PROOF OF INTENTIONAL DISCRIMINATION

Title VI's prohibition against "discrimination" is ambiguous about whether recipients are prohibited only from engaging in intentional discrimination, or whether federal agencies may prohibit recipients from practices that cause unintentional, disparate impacts.⁵⁸ Before April 2001, most courts of appeals had held that a plaintiff could file a private action based on agency Section 602 regulations prohibiting disparate impact.⁵⁹ On April 19, 2001, in *South Camden Citizens in Action v. New*

⁵³ See EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (Feb. 1998), available at <http://www.epa.gov/civilrights/docs/interim.pdf>; MANK, *supra* note 12, at 40-45.

⁵⁴ MANK, *supra* note 12, at 40-41.

⁵⁵ *Id.* at 40.

⁵⁶ Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650, 39,672-73 (June 27, 2000) [hereinafter Guidance]; Bradford C. Mank, *The Draft Recipient Guidance and Draft Revised Investigation Guidance: Too Much Discretion for the EPA and a More Difficult Standard for Complainants?*, 30 ENVTL. L. REP. (Envtl. L. Institute) 11,144, 11,160 (Dec. 2000) [hereinafter Mank, Guidance].

⁵⁷ See Guidance, *supra* note 56, at 39,650; EPA, Guidance Document: Questions and Answers, at 3, available at <http://www.epa.gov/civilrights>; Mank, Guidance, *supra* note 56, at 11,146.

⁵⁸ See Abernathy, *supra* note 11, at 21-23, 25-27.

⁵⁹ See, e.g., Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996); N.Y. Urban League v.

Jersey Department of Environmental Protection, the U.S. District Court for the District of New Jersey became the first court to find that a state environmental agency had violated the EPA's Title VI regulations by failing to protect minority residents from significant adverse disparate impacts from the cumulative effects of various sources of pollution in the community, although the permit met all applicable EPA regulations.⁶⁰

Five days later, on April 24, 2001, the Supreme Court in *Sandoval* held in a five-to-four decision that agency Section 602 regulations prohibiting disparate impact do not create a private right of action to sue in federal court, because agency regulations cannot provide greater rights than the statute's prohibition against intentional discrimination.⁶¹ After *Sandoval*, plaintiffs suing under Title VI must allege intentional discrimination.⁶² In dictum, Justice Scalia's majority opinion questioned the constitutional validity of Section 602 regulations prohibiting disparate impact, but the Court did not reach that question, explicitly assuming that the Section 602 regulations were valid.⁶³ Even after *Sandoval*, citizens can still file administrative complaints with the EPA.

In his dissenting opinion in *Sandoval*, Justice Stevens argued that the majority had ignored or misinterpreted prior Court decisions strongly suggesting that Title VI's regulations are enforceable in a private action, as well as evidence that Congress intended to allow such suits.⁶⁴ He also contended that the majority's refusal to defer to the agency's Section 602 regulations was contrary to the Court's *Chevron U.S.A. v. National Resources Defense Council* decision, which had held that courts should defer to an agency's reasonable interpretation of a statute that it administers, if the statute is ambiguous and congressional intent is unclear.⁶⁵ He stated, "In most other contexts, when the agencies charged with administering a broadly worded statute offer regulations interpreting

New York, 71 F.3d 1031, 1036 (2d Cir. 1995).

⁶⁰ *South Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. April 19, 2001), modified 145 F. Supp. 2d 505 (D.N.J. May 10, 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001); Bradford C. Mank, *South Camden Citizens In Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?*, 32 ENVTL. L. REP. 10454, 10456-57 (Env'tl. L. Institute) (April 2002). The plaintiffs later amended their complaint to allege intentional discrimination. *South Camden Citizens in Action v. N.J. Dept. of Env'tl. Prot.*, 254 F. Supp. 2d 486 (D.N.J. 2003).

⁶¹ *Sandoval v. Alexander*, 532 U.S. 275, 287-88 (2001).

⁶² *Franks v. Ross*, 313 F.3d 184 (4th Cir. 2002), on remand, 293 F. Supp. 2d 599 (E.D.N.C. 2003); *South Camden*, 254 F. Supp. 2d 486.

⁶³ *Sandoval*, 532 U.S. at 281-82.

⁶⁴ *Sandoval*, 532 U.S. at 294-302 (Stevens, J., dissenting).

⁶⁵ *Id.* at 309-10 (citing *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute's breadth as controlling unless it presents an unreasonable construction of the statutory text."⁶⁶ Additionally, Justice Stevens contended that Title VI regulations could be enforced indirectly under 42 U.S.C. § 1983 even if they could not create an implied right of action directly, because regulations are "laws" within that statute's meaning.⁶⁷

After the death of Chief Justice Rehnquist and retirement of Justice O'Connor, the Supreme Court today is probably less friendly to civil rights plaintiffs, with President Bush's appointment of Chief Justice Roberts and Justice Alito.⁶⁸ Many observers believe that Chief Justice Roberts's judicial views are roughly comparable to those of Chief Justice Rehnquist, who generally interpreted the Fourteenth Amendment and civil rights statutes narrowly.⁶⁹ Justice O'Connor had a mixed record on civil rights issues. In racial discrimination cases, she took a narrow view of the Fourteenth Amendment in *Adarand Constructors v. Peña*,⁷⁰ questioning a minority set-aside program in Richmond, Virginia. By contrast, in *Grutter v. Bollinger*⁷¹ she was the decisive fifth vote in approving the consideration of race as one factor in a law school admissions process, because of evidence that racial diversity can enhance the learning environment in a university. Many observers who have

⁶⁶ *Id.* at 309.

⁶⁷ *Sandoval*, 532 U.S. at 299-300 (Stevens, J., dissenting). Lower courts have split over whether Section 1983 suits can be used to enforce Title VI regulations, with a majority rejecting such suits. Compare *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939-43 (9th Cir. 2003) (rejecting Section 1983 suit to enforce Title VI regulations), and *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 274 F.3d 771, 783-85 (3d Cir. 2001) (same), with *Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002) (allowing Section 1983 suit to enforce Title VI regulations), and *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 47-54 (D. Mass. 2002) (same); see also Bradford C. Mank, *Can Administrative Regulations Interpret Rights Enforceable Under Section 1983?: Why Chevron Deference Survives Sandoval and Gonzaga*, 32 FLA. ST. U.L. REV. 843, 844 (2005) (discussing split in circuits over enforcing regulations through section 1983).

⁶⁸ See James Rowley, *Bush's Power to Shape Courts Ended by Election Loss*, Nov. 14, 2006 ("Democratic control of the Senate limits Bush's options in filling any Supreme Court vacancy that might develop before he leaves office."), available at <http://www.bloomberg.com/apps/news?pid=20601070&sid=aL85fD7t7OFQ&refer=politics>.

⁶⁹ Bob Egelko, *Kennedy—the new point man: No Surprises from Bush's appointees*, S.F. CHRONICLE, July 2, 2006, at A1 ("Roberts, in his first term, compiled a voting record comparable to that of his predecessor, the late Chief Justice William Rehnquist."); Patty Reinert, *Alito's future hinges on past / Senate panel is expected to look at history on civil rights, abortion, executive power*, HOUS. CHRONICLE, Jan. 8, 2006, at A1 (reporting "Roberts replaced a fellow conservative on the court, the late Chief Justice William Rehnquist."), available at 2006 WLNR 440948; Jerry Zremski, *Alito hearings open today with stakes high*, BUFF. NEWS, Jan. 9, 2006, at A1 (same), available at 2006 WLNR 600924.

⁷⁰ 515 U.S. 200, 227 (1995).

⁷¹ 539 U.S. 306, 326 (2003).

reviewed Justice Alito's civil rights cases from the fifteen years he sat as a court of appeals judge on the Third Circuit predict that he will be less receptive to affirmative action and civil rights programs than Justice O'Connor.⁷² During the 2005-2006 term, Chief Justice Roberts voted with Justice Scalia in 86.4% of the cases and with Justice Thomas in 81.5% of the cases; Justice Alito, during his abbreviated term on the Court, which began on January 31, 2006, voted with Roberts in 90.9% of the cases, with Justice Thomas in 76.5% of the cases and with Justice Scalia in 73.5% of the cases.⁷³

It is very difficult for civil rights or other protestors to influence the decisions of the Supreme Court, because the Court's justices are appointed for life. Civil rights advocates need to help elect a President who will nominate in the future justices who read the Fourteenth Amendment more broadly than the current majority on the Court. Because the Senate must confirm judicial appointments, advocates must also work to elect senators who support their approach to judicial appointments.

IV. BUSH ADMINISTRATION

Beginning in 2001, the Bush Administration eliminated the large backlog of Title VI cases left by the departing Clinton Administration, by deciding all of the cases against the complainants or dismissing them on various procedural grounds.⁷⁴ In a 2003 article, Michael Gerrard showed that in every Title VI complaint that has been decided, the OCR denied all claims of discrimination.⁷⁵ In some cases, the EPA found no discrimination but still required or recommended that a recipient state make changes to its program.⁷⁶ In 2006, Gerrard and his colleague Kristina Alexander updated his 2003 analysis in an unpublished table that summarized the twenty-nine complaints decided by EPA from October 20, 2003, until December 6, 2005.⁷⁷ Again, the EPA failed to

⁷² Egelko, *supra* note 69, at A1 ("Alito, who took office Jan. 31 [2006], was distinctly more conservative than O'Connor, whom he replaced."); Reinert, *supra* note 69, at A1; Zremski, *supra* note 69, at A1.

⁷³ Rebecca Cady, Georgetown University Law Center Supreme Court Institute, Supreme Court of the United States: Oct. Term 2005 Overview 2 (June 30, 2006), available at http://www.law.georgetown.edu/sci/documents/GULCSupCtInstituteFinalReportOT2005_30June06.pdf.

⁷⁴ See Gerrard, *supra* note 7, at 3.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ The table will be discussed in BRADFORD MANK, *Title VI in ENVIRONMENTAL JUSTICE* (Sheila Foster & Michael Gerrard eds. forthcoming A.B.A. 2007) [hereinafter MANK-2007].

find in favor of a single complainant.⁷⁸

In 2003, the U.S. Commission on Civil Rights wrote a highly critical report regarding the EPA's compliance with Title VI.⁷⁹ The Commission criticized the Clinton Administration for failing to decide Title VI complaints in a timely fashion, but it was even more critical of the Bush Administration for dismissing many cases for technical reasons without examining whether the recipient's policies caused disparate impacts.⁸⁰ After expressing concerns that the EPA lacked sufficient staff to investigate new complaints, the Commission recommended that the EPA issue a final Title VI guidance, that the Agency conduct its own independent analyses of disparate impacts rather than rely on recipient and complainant data, and that it revise its penalty policies to impose serious penalties on recipients for "willful, repeated noncompliance" with Title VI obligations.⁸¹ The EPA has not implemented any of these recommendations.

On March 4, 2005, the EPA issued the *2005 Draft Final Recipient Guidance* for state and local environmental agencies, which replaces the 2000 Draft Recipient Guidance.⁸² The 2005 guidance encourages recipients to involve the public as early as possible in the permitting and planning process as a way to avoid controversies that may lead to Title VI complaints. The guidance emphasized that its proposals are voluntary suggestions to recipients about how to improve their programs, and that recipients may use different approaches. While many of its suggestions are admirable, the problem with this guidance is that it is voluntary and does not require recipients to do anything to make their programs protect minorities.

On October 26, 2005, in response to public comments on an EPA draft strategic plan, Barry Hill, Director of EPA's Office of Environmental Justice, wrote a memorandum stating that "EPA's use of racial classifications as a basis for making decisions would raise significant legal issues."⁸³ He cited the Supreme Court's decisions in

⁷⁸ *Id.*

⁷⁹ U.S. COMM'N ON CIVIL RIGHTS, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, No. 005-901-00078-2, at 55-62 (reviewing EPA's Title VI program), at enforcement publication list, <http://www.usccr.gov/pubs/pubsndx.htm> [hereinafter Commission on Civil Rights]; MANK-2007, *supra* note 77.

⁸⁰ Commission on Civil Rights, *supra* note 79, at 55-62; MANK-2007, *supra* note 77.

⁸¹ Commission on Civil Rights, *supra* note 79, at 75-78, 167-69; MANK-2007, *supra* note 77.

⁸² 70 Fed. Reg. 10,625 (2005); MANK-2007, *supra* note 77.

⁸³ Barry E. Hill, Dear Commenter (response to public comments on the EPA draft strategic plan) (Oct. 26, 2005); *EPA Says High Court Bars Stressing Race in Environmental Justice Plan*, Inside the EPA, Nov. 23, 2005, (Inside Washington Publishers, at <http://www.INSIDEEPA.com>, subscription required, available on Westlaw, 2005 WLNR 18568318); BRADFORD MANK, *Executive*

*Grutter*⁸⁴ and *Adarand*,⁸⁵ which both said the government must demonstrate that its use of racial classifications is “narrowly tailored” to achieve a “compelling governmental interest” and implied that it would be difficult for the EPA to justify giving greater scrutiny to environmental inequities in predominantly minority areas than in predominantly majority areas.⁸⁶ Although he is not in charge of the Title VI program, Hill’s views could have an influence on how the OCR interprets the scope of its authority under Title VI. Environmental justice advocates have argued that Hill’s approach will hurt minorities and that the Supreme Court decisions cited by Hill do not apply to the EPA’s consideration of discriminatory practices by state and local agencies.⁸⁷ The EPA has never formally adopted Hill’s views.

On November 4, 2005, EPA Administrator Stephen Johnson issued a memorandum, “Reaffirming the U.S. EPA’s Commitment to Environmental Justice,” that directed EPA’s senior managers “to more fully and effectively integrate environmental justice into all EPA policies, programs, and activities.”⁸⁸ A September 2006 report by EPA’s Inspector General, however, found that the EPA had failed to conduct environmental justice reviews mandated by Executive Order No. 12,898.⁸⁹ On October 31, 2005, seventy-five Democratic members of the House and Senate sent a letter that demanded that the EPA take immediate and specific measures to reduce inequities in minority and low-income areas.⁹⁰ Such actions would not directly affect the EPA’s enforcement of Title VI, but they could reduce the need for Title VI administrative complaints and lawsuits.

The Bush Administration has been less committed than the Clinton Administration in enforcing Title VI and environmental justice policies in general. The Supreme Court’s narrow view of civil rights law has probably contributed to the Bush EPA’s approach. Nevertheless, the

Order 12898 in ENVIRONMENTAL JUSTICE (Sheila Foster & Michael Gerrard eds. forthcoming A.B.A. 2007) [hereinafter MANK – *Executive Order 12898*, 2007].

⁸⁴ 539 U.S. 306, 326 (2003).

⁸⁵ 515 U.S. 200, 227 (1995).

⁸⁶ Hill, *supra* note 83; MANK – *Executive Order 12898*, 2007, *supra* note 83.

⁸⁷ *EPA Says High Court Bars Stressing Race in Environmental Justice Plan*, *supra* note 83; MANK – *Executive Order 12898*, 2007, *supra* note 83.

⁸⁸ <http://www.epa.gov/Compliance/resources/policies/ej/admin-ej-commit-letter-110305.pdf>; MANK – *Executive Order 12898*, 2007, *supra* note 77.

⁸⁹ EPA OIG, EPA NEEDS TO CONDUCT ENVIRONMENTAL JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES, AND ACTIVITIES, Report No. 2006-P-00034 (Sept. 18, 2006), available at <http://www.epa.gov/oig/reports/2006/20060918-2006-P-00034.pdf>.

⁹⁰ Patricia Ware, *House, Senate Democrats Urge EPA to Address Inequities Due to Race, Income*, 37 ENV’T REP. (BNA) 2248 (Nov. 3, 2006).

Bush EPA has never totally abandoned Title VI and environmental justice issues, perhaps because it fears that the civil rights community would launch significant protests.

V. CONCLUSION

The Warren County protests were a significant part in the history of building the broader environmental justice movement that encouraged President Clinton to issue his 1994 Executive Order and accompanying memorandum requiring federal agencies to enforce Title VI against alleged environmental inequities. The legacy of these protests was more mixed during the rest of the Clinton Administration. As demonstrated by *Select Steel*, the EPA was reluctant to find Title VI violations against states that complied with applicable environmental regulations, even if those regulations were arguably insufficient to protect minorities from high levels of pollution. By contrast, the *Shintech* case demonstrated that community protests can ultimately win the day, even though EPA never decided the Title VI complaint on the merits.

In recent years, Title VI cases have mainly been decided against civil rights groups. In 2001, the Supreme Court in *Sandoval* rejected numerous lower-court decisions that had allowed suits based on Section 602 disparate-impact regulations. *Sandoval* nullified the promising *South Camden* decision, which environmental justice advocates had just won on the merits. The Bush EPA has rejected all Title VI complaints it has decided on the merits. It has not abolished the Title VI or environmental justice programs, however, probably because it fears the protests that might result.

Environmental justice advocates need to work effectively both in electoral politics as well as in community organizing if they are to maintain the legacy of the Warren County protests. The 2006 congressional elections were a first step toward a national government that is more sympathetic to environmental justice issues. With a Democratic majority in the Senate beginning in January 2007, it will be more difficult for President Bush to appoint a new Supreme Court Justice whose approach to civil rights law mirrors Justice Scalia's.⁹¹ The 2008 elections will be an opportunity to elect a president more sympathetic to civil rights concerns. If vacancies occur on the Supreme Court, a

⁹¹ James Rowley, *Bush's Power to Shape Courts Ended by Election Loss*, Nov. 14, 2006 ("Democratic control of the Senate limits Bush's options in filling any Supreme Court vacancy that might develop before he leaves office."), available at <http://www.bloomberg.com/apps/news?pid=20601070&sid=aL85fD7t7OFQ&refer=politics>.

president concerned about racial justice can nominate and the Senate can confirm new Supreme Court justices who reject *Sandoval's* narrow interpretation of Title VI. Community protests similar to those in Warren County are valuable in winning Title VI cases like *Shintech*, but revitalizing Title VI as an effective statute to protect minority groups requires a broader national movement for social justice that can influence national elections.

