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John D. Davis

THE SUPREME COURT AND *WASHINGTON V. DAVIS*—A RATIONALE FOR RACISM?

JOHN D. DAVIS

I. INTRODUCTION

In no other areas more than civil rights and civil liberties does the American justice system brush more intimately with the most fundamental social issues of our nation. For that reason, advocates of civil rights and civil liberties greeted the retirement announcements of each Warren Court member with considerable dismay—a consternation matched only by the trepidation with which they awaited the appointments of the Nixon nominees to the Supreme Court. As first one, then two, three, and finally, four members of the most liberal Supreme Court bench in history succumbed to the rigors of age, fatigue and infirmity, the prophets of doom began to sound their forecasts for the deathknell of civil rights. As each Warren Court justice stepped down, the cries of the harbingers of civil rights doom became more strident, and the anxiety within the hearts of civil rights advocates grew. Almost with a hush, civil libertarians settled back to await what they were certain would be wholesale reversals of all their hard-fought gains achieved during the previous two decades.

Those twenty years were the culmination of almost fifty years of struggle during which the alienated and powerless in our society, through prayers, parades and activism had sensitized and educated the Great Society and its courts to respond with legislative programs and judicial decisions that gave them some promise that the justice, equality and brotherhood upon which this country was founded might at last be within reach of the desperate grasps of our disadvantaged and oppressed. But with the inception of the era of Benign Neglect and a once-again conservative court, most civil rights advocates forecast a steady erosion of the principles of fairness, as the political and economic scions of the country demand that order receive primacy even over justice, and the anti-Warren Court status quo be resurrected.

Slowly, at first, and now with a frequency and boldness most apparent in the area of criminal procedure, the current Supreme Court has begun to justify the fears of many that some of the more liberal Warren Court decisions will be overruled. In the area of racial discrimination the Burger Court, while obviously desirous of delimiting the gains made by Blacks in employment and school desegregation, has rendered a number of judgments inconsistent with that judicial philosophy. Especially in employment discrimination, there have been some landmark holdings to the advantage of Black Americans'

* Director of the NBA, EEOC Law Project. J.D. 1971, University of Denver; A.B. 1964, Wabash College. Mr. Davis acknowledges the research assistance of Herschelle Reed, J.D. 1976, Howard University.

efforts to seek redress from two and one-half centuries of involuntary servitude, and one hundred and thirteen (and still counting) years of rejection, oppression, and economic deprivation. Indeed, these cases have increased the potential for social progress. However, *Washington v. Davis*[1], decided June 7, 1976, is not one of those cases. This article attempts to comment on the case, in terms of why it is not, why and how it should have been, and what attorneys (especially Black attorneys) need to do in order to get the most positive decisions from a negative judicial framework.

II. Background Of Case

This case began in April of 1970 when two Black police officers of the Metropolitan Police Department (hereinafter MPD) of the District of Columbia filed suit in federal district court[2] against the Mayor (then Commissioner) of the District of Columbia, the Commissioners of the United States Civil Service Commission,[3] and the Metropolitan Police Department's Chief. The complaint was amended eight months later to a class action alleging racially discriminatory promotion policies by the Metropolitan Police Department and sought injunctive relief and a declaratory judgment for damages and other relief. Two other Blacks were allowed to intervene, their complaint alleging that their applications for hire as police officers had been rejected because the MPD's recruitment and hiring policies were racially discriminatory against Blacks. One of the series of personnel practices complained of was the use of a written pre-employment test (hereinafter Test 21) which, their complaint stated, disqualified a disproportionately high number of Black applicants.

The plaintiffs alleged that the personnel practices in question violated their rights under the due process clause of the fifth amendment to the United States Constitution, under 42 U.S.C. Section 1981, and under the District of Columbia Code, Section 1-320.[4]

Test 21 is a verbal communications examination specifically testing vocabulary, reading and comprehension. It is administered generally to prospective government employees, and was developed by the Civil Service Commission, not by the police department. Plaintiffs challenged the test in

1. 44 U.S.L.W. 4789 (U.S. June 7, 1976).

2. 348 F. Supp. 15 (D.C. 1972) (Gesell, D.J.).

3. District of Columbia employees, including the police department, are federal employees who are hired according to the United States civil service regulations, as set forth in tit. 5 C.F.R. §§ 3300, et seq. (C.S.C.).

4. 42 U.S.C. § 1981 (1970) is the equal protection statute, and D.C. Code Encycl. § 1-320 (West Supp. 1970) mandates non-discrimination on the basis of religion, residence, race, color or national origin in recruitment and hiring for positions in the District of Columbia government.

Until Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, et seq. (1970)) was amended by the Equal Employment Opportunity Act of 1972 to extend coverage to the Federal Government, most cases brought against racial discrimination in Federal employment were brought under the fifth amendment's guarantee of due process of law. This case is one such case. Most cases brought since the effective date of the 1972 amendments are brought under Title VII, whose standards were applied by many Federal judges to pre-1972 cases.

federal district court as not being related to job performance and as having a discriminatory impact on Black applicants. After considerable pre-trial discovery, and a number of cross-motions for summary judgment focusing solely on Test 21, the plaintiffs showed that:

(1) The number of Black police officers on the MPD was not proportionate to the population percentage of the Distric
(2) A substantially higher number of Blacks failed Test 21 than whites.
(3) The test has not been validated to establish its reliability for measuring subsequent job performance.[5]

The federal district court accepted this showing as sufficient to shift the burden of proof to the defendants to demonstrate the validity of the test. However, the court dismissed the case, granting the defendants' motion for summary judgment based on what it considered to be the defendants' affirmative efforts to recruit Blacks, and on the relative percentage of Blacks on the police force in proportion to Blacks in the recruitment area. The court went on to hold that the test was a useful indicator of training school performance, which obviated the need to show actual job performance validation, and consequently did not discriminate against otherwise qualified Blacks.[6]

Plaintiffs appealed[7] on a constitutional issue asserting that the use of Test 21 invidiously discriminated against Blacks, constituting a fifth amendment denial of due process. The court of appeals decided the case under Title VII standards, as set forth in *Griggs v. Duke Power Company*,[8] and held that Test 21 was illegal because it had a disproportionate impact on Blacks and was not shown by defendant-appellees to be satisfactorily related to successful performance of the job of a police officer. The district court said that plaintiffs had not claimed there was "an intentional discrimination or purposeful discriminatory act"[9] and, therefore, the "proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability".[10] The court of appeals, in reversing the district court, declared that the lack of discriminatory intent was irrelevant to the main issue—the effect of the Test—and that a constitutional violation was established where the test in question disproportionately excluded Blacks in comparison to Whites and where there was no proof that the Test had been validated as a predictor of job performance.[11]

5. *Supra* note 2, at 16.
6. *Id.* at 17.
7. 512 F.2d 956 (1975) (Robinson, C.J.).
8. 401 U.S. 424 (1971) (Burger, C.J.).
9. 348 F. Supp. at 16.
10. *Id.*
11. 512 F.2d at 960, quoting the Supreme Court in Griggs (*supra* note 8): "Congress directed the thrust of the [Civil Rights] Act to the *consequences* [sic] of employment practices," the Court admonished, "not simply the motivation." 401 U.S. 424, 432.

III. THE DECISION

The United States Supreme Court granted the defendant-appellees their petition for certiorari,[12] and in June of 1976 the case was decided. The Court reversed the court of appeals, concentrating on the difference between constitutional claims of discrimination and those brought under Title VII:

> As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose, but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule.[13]

In the paragraph immediately proceding the one quoted above, the Court has said that:

> Although the petition for certiorari did not present this ground for reversal, our Rule 40(1)(d)(2) provides that we "may notice a plain error not presented . . . ."[14]

The Supreme Court read Test 21 as a racially neutral criterion that has a disproportionate racial impact, but saw it as serving a valid governmental purpose which, therefore, standing alone, would not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are to be justified only by the weightiest of considerations.[15] In fact, the Court explicitly states its difficulty in understanding how any such racially neutral criterion can ever be discriminatory and a denial of equal protection of the laws "simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups."[16]

IV. THE MEANING OF THE CASE

Washington v. Davis has to be read as redefining the meaning of unconstitutional invidious discrimination. The Court is saying that, henceforth, a law or official governmental act which has a disparate effect on Blacks (or other minorities) is not unconstitutional unless it can be shown that the law or act was perpetrated with a discriminatory intent or purpose. That the Court feels intent to be the overriding consideration is shown by its use of the words "intent" and "purpose" no less than thirty times in the decision. This is the Court's holding, despite the fact that the sole issue before both the court of appeals and the Supreme Court was whether or not Test 21 was valid, given its disproportionate impact against Blacks and hence its denial of their right to due process of law under the fifth amendment.

The Court was obviously persuaded by the comparatively progressive

12. 423 U.S. 820 (1975). The appeal was filed by the District of Columbia government, the Civil Service Commission declining to petition for writ of certiorari, instead filing a brief as respondents.

13. 11 EPD ¶ 10,958 at 8047, 44 U.S.L.W. at 4791.

14. *Id.*

15. *Id.* at 4792.

16. *Id.* at 4794.

record of the MPD in recruiting a sufficient number of Black applicants to cause a significant change in its racial composition.[17] However, the Court's eagerness to accept the MPD's "affirmative" recruitment efforts as proof of the absence of discriminatory intent, coupled with its professed "ignorance" that supposedly neutral criteria can be racially discriminatory[18] forecasts a gloomy future for civil rights advocates in this country.

By giving intent such primacy, even over effect, the Court is ignoring the history of the civil rights movement in this country. More importantly, the Court is making bad law as regards the rights of Black people in this country. Now, in order for Blacks to prove a constitutional violation of civil rights, the discrimination complained of must be shown to be intentional or purposeful. This multiplies the burden of proof for the plaintiff, who now must not only show that some government criterion or act has a disparate effect on Blacks as a class, but also that such disparity is intentionally afflicted. This is an extremely difficult task, especially when one reads the inconsistencies to be found in the *Davis* case.

We have mentioned the Court's obsession with intent by the police department, while ignoring both the effects of the Test, and the lack of validation evidence. The record in the case shows that four times as many Blacks failed the Test as Whites (57% to 13%, respectively).[19] Additionally, there was never any evidence brought forward to indicate the Test was job-related.[20] In fact, the only evidence on the record indicated that the Test was not job-related.[21]

The Supreme Court's rationale for ignoring the weight of this evidence is merely to state that the constitutional standard for adjudicating claims of invidious racial discrimination is not identical to the statutory standard,[22] which they held not to apply here. Nevertheless, the Court went on to sustain the District Court's finding that Test 21 could be validated by showing its relatedness to the police training program,[23] and that to find Test 21 so validated would not foreclose *Griggs*[24] or *Albermarle Paper Company v. Moody.*[25] Thus, the Court first said it was an error for the court of appeals to apply a statutory standard to the case, and then addressed statutory issues in the same opinion.[26]

17. ". . .we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, . . . negated any inference that the Department discriminated on the basis of race . . . ." *Id.*
18. *Supra* note 16.
19. 512 F.2d 960.
20. 512 F.2d 961.
21. 512 F.2d 964, n. 44 (cited in the decision at note 11).
22. *Supra* note 13.
23. 11 EPD ¶ 10, 958, 44 U.S.L.W. at 4793.
24. *Id.* at 4791, note 8.
25. 422 U.S. 405 (1975).
26. *See* Dissent, Brennan, J., 44 U.S.L.W. at 4796.

Let us summarize what has happened thus far. First, the case is brought to enjoin the use of a Civil Service test because it has a disproportionate impact on Black applicants. Next, the test is upheld, not because of proof of its validity, but because the district court ruled that the defendants' affirmative efforts to recruit Black applicants somehow imputed lack of discriminatory intent thru the use of the Test. Third, the court of appeals reversed, stating that Title VII standards can appropriately be applied in a situation involving disproportionate impact and job relatedness, in which case the Test must fail absent evidence of validity. Finally, the Supreme Court overruled the court of appeals, sustaining the use of the Test, and said that it was error to apply statutory standards to constitutional issues. All of these decisions were reached because of, or in spite of, a lack of evidence to rebut the plaintiff's initial prima facie case, which showed the Test to be discriminatory in its effect on Blacks, and lacking a job validation study.[27] Yet, the Court ignored all of the above and based its decision for the defendants on the plaintiffs' failure to show any discriminatory purpose in the use of the Test.[28]

After stating that intent is the critical factor in *Davis*, the Court went on to cite a school desegregation case—*Wright v. Council of the City of Emporia*[29]—as an example of a circumstance in which "the racial impact of a law, rather than its discriminatory purpose, is the critical factor."[30] Although it cites *Wright* as an example to be distinguished from *Davis*, the Court held *Keyes v. School District No. 1*[31] as the prevailing law to determine equal protection where racial discrimination is claimed. The *Keyes* case, which is the Denver public school desegregation case, was decided almost completely upon the school district's "purpose or intent to segregate."[32] Thus, intent is controlling in an equal protection controversy involving invidious racial discrimination—but not always, according to the Court.

The Court is not clear as to the type of proof necessary to show an equal protection violation; "this is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination."[33] In some cases, states the Court, statistics may be used which show ". . . systematic exclusion . . . absence of Negroes . . . the totality of the relevant facts . . . disproportionate exclusion . . . circumstances [in which] the discrimination is very difficult to

27. a) The number of Black police officers in the Police Department is not proportionate to the population mix of the District of Columbia, b) A higher percentage of Blacks fail Test 21 than Whites, c) Test 21 has not been validated to show its reliability for measuring job performance. 348 F. Supp. at 16.

28. 44 U.S.L.W. 4791.

29. 407 U.S. 451 (1972).

30. 44 U.S.L.W. 4793.

31. 413 U.S. 189 (1973).

32. 413 U.S. at 211.

33. 44 U.S.L.W. 4791.

explain on non-racial grounds. . . ."[34] When such evidence is construed as making out a prima facie case, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result."[35]

Does this mean that a showing of disproportionate impact, coupled with proof that there was a history of exclusion of Blacks from a particular line of governmental employment, is enough to invoke a prima facie showing of unconstitutionality? Not if the *Davis* case stands, because that is exactly what the plaintiffs showed. What about statistical disparity, history of exclusion and the absence of any criteria or standards for ruling on employment tests? Again, not under *Davis.*

V. CONCLUSION

What, then, is the meaning of *Davis*? The case says nothing new in the area of intent. It is essentially a restatement of the law (and widely accepted law, too) that unconstitutional intent can seldom be inferred from effect alone. The policy in the *Davis* case, Test 21, was racially neutral even though the results of the Test, its effect, were not. And, although the plaintiffs did make out a prima facie case at the district court level,[36] the Supreme Court sidestepped the issue by reversing on the grounds that no evidence of discriminatory intent or segregative purpose, the crucial elements in distinguishing the constitutional standard from the statutory standard, was shown.

That the Supreme Court is on solid ground, however arguably, can be shown by a long line of cases leading up to this decision.[37] This is not to say that more liberal courts, from similar facts adduced at trial, have not found for the plaintiffs in employment cases involving equal protection from state and municipal employment discrimination.[38] However, the cases cited are all appellate court decisions, none having reached the Supreme Court on the intent issue, and all involving circumstances wherein minorities and women were almost virtually excluded from the police force. With the Metropolitan Police Department, however, there have always been a substantial number (when compared to other large cities) of Blacks on the force. But, the population mix of Blacks in the District of Columbia is 75%, which means

34. *Id.*

35. Alexander v. Louisiana, 405 U.S. 625 (1972), quoted in 44 U.S.L.W. at 4792.

36. *Supra* note 27.

37. Geduldig v. Aiello, 417 U.S. 484 (1974); Keyes v. School District No. 1, *supra* note 31; Jefferson v. Hackney, 406 U.S. 535 (1972); Alexander v. Louisiana, *supra* note 35; Reed v. Reed, 404 U.S. 71 (1971); Palmer v. Thompson, 403 U.S. 217 (1971); Wright v. Rockefeller, 376 U.S. 52 (1964).

38. Pennsylvania v. O'Neill, 473 F.2d 1029 (3rd Cir. 1973); Chicano Police Officers Assoc. v. Stoner, 526 F.2d 431 (10th Cir. 1976); Kirkland v. N.Y. State Department of Correctional Services, 520 F.2d 420 (2nd Cir. 1975); Bridgeport Guardians v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2nd Cir. 1972). *See* 512 F.2d 960, n.2.

that at its current rate of hiring, Blacks will never constitute more than 45-50% of all officers on the MPD.

What we wind up with in *Davis* is a case of first impression, on a number of counts:

a) Black plaintiffs suing a government headed by a Black mayor and city council.
b) A police department, that, although it has a history of failing to recruit and hire Blacks, recently embarked upon an effective recruitment effort directed towards Blacks.
c) An employment discrimination suit brought under the fifth amendment, citing statutory standards.
d) A decision that would have been just the opposite had the case been brought under Title VII.

Given the facts of the case, one cannot but conclude that this was not a good case for litigation. The Supreme Court had the intent theory ready for use; the facts of the case are arguable as to whether or not intent could be proved; there was no precedent for allowing a statutory standard to control a constitutional issue; and the minority profile of the MPD was already better than that of any major city in the United States, and steadily improving. In deciding the case, the Supreme Court majority (7-2) has shown that it is not at all attuned to the subtleties and nuances of racial discrimination, but can perceive racism only when it is so overt as to be blatant. After all, one is forced to ask, how serious can the MPD be in its efforts to recruit Black police officers when it continues to use an unvalidated, non-police developed, twenty-year old test that rejects Blacks at a rate four times greater than Whites? Especially considering the tremendous amount of taxpayers' money that has been spent to develop culturally-fair police and fire examinations in such cities as San Francisco, New York, and Dallas?

But, had this case been won by plaintiffs, it would not have provided a remedy against public employers not already in existence (at least since 1972).[39] And except for being able to make out a pure theory of racial discrimination in employment, under the fifth amendment, little stood to be gained. But in light of the anti-Black responses already coming in from the circuits[40] and other courts,[41] in response to *Davis*, the case may haunt us for a long time to come. Hopefully, we can get some legislation that will require strict standards of review whenever racial discrimination is claimed as a constitutional violation. Also, we must lobby Congress for even stricter requirements for affirmative action plans by government contractors, and more rigid monitoring by government agencies enforcing civil rights regulations.

The decision in *Davis* came like a slap in the face to many. Thanks, we

39. *See* Section 717, Title VII of the Civil Rights Act of 1964 (as amended). 42 U.S.C. 2000e.
40. *Cf.* Arnold v. Ballard, 12 EPD ¶ 11224 (1976).
41. *See* Richardson v. McFadden, 45 U.S.L.W. 2130 (1976).

needed that. Many civil rights advocates are of late increasingly drawn into those intellectual arguments about "reverse discrimination" goals versus quotas, preferential treatment, etc.

These abstract mental exercises do nothing but obscure the real truth, and that is that we are not even close to winning the war against discrimination. In the twelve years since the Civil Rights Act of 1964 was passed, we have made little actual progress towards our proclaimed goals of equality without reference to race, sex, religion, national origin or skin color. In that respect, the *Davis* case is a timely reminder that ours is still a racist social order.

Many civil rights attorneys have deceived themselves into believing the Boilerplate Law in civil rights is settled, and all that remains in dispute are the finer points. This unfortunate and dangerous self-delusion has led many black lawyers into believing that the civil rights struggle is no longer in need of their services, and they now devote their talents to pursuits irrelevant to the black community.

The laws are on the books. But they have not yet worked for most of us, nor will they become a reality, unless all of us, as attorneys, return to our former pasture of viligance and perseverence in pursuit of the still-undelivered freedom and equality promised by our constitution.

The Supreme Court has put the ball in our hands. The burden as always is on us. Now more than ever, we must shoulder it and carry on.