

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Peter Rendlet to Sylvia Mathews re: Options for Petitioning the Supreme Court on Prop 209 (2 pages)	09/11/1997	P5 12/2

COLLECTION:

Clinton Presidential Records
Chief of Staff
Sylvia Mathews
OA/Box Number: 12122

FOLDER TITLE:

(Prop 209)

Racheal Carter
2008-0309-F
rc632

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

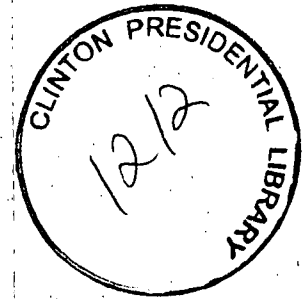
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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September 11, 1997



MEMORANDUM FOR SYLVIA MATHEWS

FROM: Peter Rundlet

RE: Options for Petitioning the Supreme Court on Prop 209

You requested that I briefly lay out our options for petitioning the Supreme Court in the Prop 209 case and outline the potential outcomes and implications associated with each option.

Option 1: Without an invitation from the Court, the Solicitor General files a brief petitioning the Court to hear the case. Here, the Administration would argue broadly that Prop 209 is unconstitutional on its face.

The advantage of this approach is that, win or lose, the Administration will have seized the opportunity to demonstrate the President's principled commitment to diversity, inclusiveness, and equal opportunity. It also gives us the opportunity to put the pressure on the Supreme Court to "do the right thing," as well as set the stage for our future efforts to support these principles (to "win the war"), even if we lose this battle in the Court. Also, if we are lucky, the Court may be influenced by our decision not to petition for a reversal and decide not to take this case. If this should happen, we stand a much better chance of winning in a future challenge to Prop 209 *as it is applied*.

The disadvantage of this approach is that the likelihood that the Court will actually take the case increases. Most observers agree that this will be like walking into a punch: if the Court hears the case, it will probably find Prop 209 constitutional and these types of challenges may proceed throughout the country.

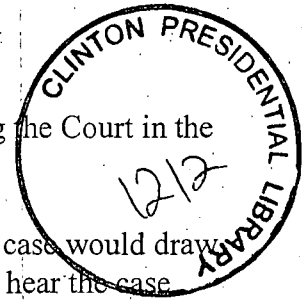
Comment: Despite the drawbacks, this may be the best approach, because, as I outline below, even absent our voluntary petition, the Court can hear the case and rule against us anyway. Sitting on our hands only affects the *likelihood* that the Court will hear the case, not *whether* the Court will hear it. It is not clear to me how influential a petition from the Solicitor General would be in this case, but I suspect that it would not be determinative.

Option 2: The Solicitor General does not voluntarily petition the Court to hear the Case, but the Court nevertheless requests that the Solicitor General file a brief on whether the Court should hear the Case.

Comment: This *may* be the worst case scenario, because we would first be put in the awkward position of publicly explaining our inaction, and thus lose our message and ability to lay the groundwork for our future efforts, and we would still end up filing a brief urging the

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Court to hear the case, therefore undermining the whole point of not petitioning the Court in the first place.



On the other hand, it is possible that those Justices reluctant to hear the case would draw the proper inferences from our initial failure to petition the Court, and thus, not hear the case even after receiving the requested brief. Also, once the Court requests the brief, we can attempt to shape the message at that point, and use the "we were not invited" rationale to explain our initial failure to file the petition.

Option 3: The Solicitor General does not voluntarily petition the Court to hear the Case, and the Court does not request a brief from us.

Comment: If the Court decides to take the case anyway, then this is all bad. We lose message and we lose substance. The potentially saving grace here is that once the Court announces that it will hear the case, we can make the principled argument on the merits and begin to shape the message at that point. Here we are trading the early message against the likelihood that the Court will take the case.

If the Court decides not to take the case, then we could fight a battle with better odds (*i.e.*, an *as applied* challenge to Prop 209) another day. Of course, no matter what we do, the Court can decide not to hear the case, although I'm not optimistic that this will happen.

OVERALL COMMENT:

One thing to keep in mind is that the Court can take the case no matter what we do now. Selecting among the options turns on the whether the Solicitor General's decision not to petition the Court will be determinative as to whether the Court ultimately takes the case. From a purely litigation standpoint, I agree that not filing is better. However, the loss of message and the difficulty for the Administration in explaining its sudden acceptance of bad law for the states in the Ninth Circuit are certain costs of not petitioning the Court. Before accepting these costs, I would want a more scientific approach to evaluating the importance of the Solicitor General's influence on whether the Court will take the case. For example, I would want to know the percentage of cases taken by the Court when the Solicitor General does not weigh in, and the percentage of cases it takes when it urges the Court to hear the case. At a minimum, this information would give us a *better* sense of what we stand to gain by not filing.

Another thing to keep in mind is that if we decide not to petition the Court to hear the case, we can always file a brief on the merits if the Court ultimately decides to take the case, and work to shape our message at that point.

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. report	The Facts on Executive Order 11246 Affirmative Action [partial] (1 page)	07/29/1996	P6/b(6)
002. memo	Jack Quinn to the President re: California Civil Rights Initiative (Prop 209) Litigation (3 pages)	12/10/1996	P5 1213

COLLECTION:

Clinton Presidential Records
Counsel's Office
Dawn Chirwa
OA/Box Number: 17301

FOLDER TITLE:

Affirmative Action Prop 209 [1]

Racheal Carter
2008-0309-F
rc96

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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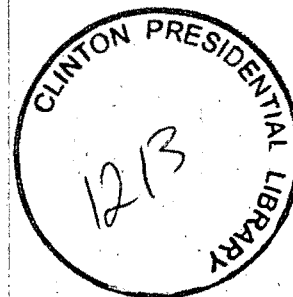
Freedom of Information Act - [5 U.S.C. 552(b)]

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THE WHITE HOUSE
WASHINGTON

December 10, 1996



MEMORANDUM FOR THE PRESIDENT

FROM:

JACK QUINN

SUBJECT:

California Civil Rights Initiative
(Prop 209) Litigation

This memorandum updates you on the status of the litigation challenging the "California Civil Rights Initiative" (CCRI), also known as Proposition 209, and the Justice Department's advice today to defer a decision about joining the litigation.

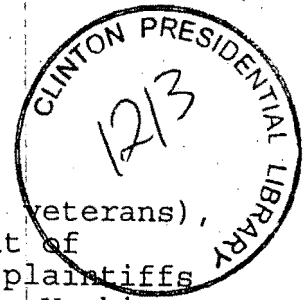
As you know, Prop. 209 was adopted by referendum on November 5, 1996. The referendum amends the California constitution to provide that governmental entities "shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting."

A number of civil rights groups have brought a challenge to CCRI in federal district court. On November 27th, Chief Judge Thelton Henderson issued a Temporary Restraining Order against implementation of CCRI, ruling that the plaintiffs had "demonstrated a strong probability of success on the merits" of their constitutional claim. A Preliminary Injunction hearing on the matter will be held on Monday, December 16th.

Numerous leaders in the civil rights community have urged the White House and the Justice Department to join the plaintiffs' case. The Justice Department had initially led us to believe that it favored intervention. However, based on advice just received from the Solicitor General, the Attorney General today concluded that a more thorough review of the difficult legal issues involved in this litigation is necessary before the Department can make a final recommendation. Consequently, the Department will not intervene in the case before the Preliminary Injunction hearing on Monday.

The gravamen of the plaintiffs' case is that CCRI is unconstitutional because the referendum makes it more difficult

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for minorities and women, but not other groups (e.g., veterans), to petition state and local entities for the enactment of preference programs to protect their interests. The plaintiffs rely primarily on the Supreme Court's 1982 decision in Washington v. Seattle School District No. 1, which invalidated a statewide referendum in Washington that prohibited local school districts from engaging in student busing to promote racial integration, but provided numerous exceptions which allowed student busing for other purposes. The Supreme Court reasoned that the referendum imposed an unconstitutional and unique burden on minorities who were seeking busing for the purpose of racial integration since they were required to surmount a much higher political hurdle -- either petitioning the state legislature to overturn the referendum or seeking adoption of a referendum reversing the anti-busing proposition -- in order to achieve their goal. Persons seeking busing for other reasons, by contrast, bore no such burden.

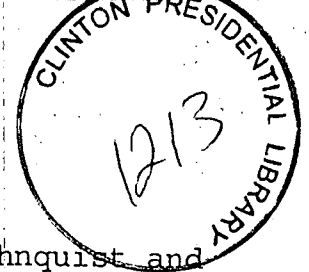
Judge Henderson likened CCRI to the Seattle referendum and concluded that CCRI may very well also be unconstitutional. Like the Seattle referendum, CCRI imposes a higher political burden -- re-amending the state constitution -- on women and racial minorities when they seek affirmative action programs based on race or gender than on groups who seek other types of "preference" programs, such as those based on age, disability, veteran or legacy status, and so forth.

The Justice Department believes that, since the lower courts are bound by Seattle, the plaintiffs' chances up to the Circuit Court level are encouraging. Certainly, given Judge Henderson's ruling on the plaintiffs' TRO motion, it is very likely that, at least, the plaintiffs will prevail on their preliminary injunction motion. Until today, particularly in light of this likelihood of success at the lower court level, there was an inclination at the Department to join the litigation prior to the preliminary injunction hearing on December 16th.

However, the acting Solicitor General today expressed reservations about joining the case. Specifically, Mr. Dellinger has expressed doubts about the claim that CCRI is analogous to the referendum at issue in Seattle and about the continued validity of the Seattle decision itself. Dellinger has therefore urged caution in proceeding with this litigation until his concerns regarding the strength of the constitutional challenge to CCRI have been more fully considered.

In addition, there appears to be a consensus within the Department that it is unlikely that the current Supreme Court would invalidate CCRI even if the Court agreed that CCRI was similar to the referendum in Seattle. Although Justice Stevens voted with the majority in Seattle, Chief Justice Rehnquist and Justice O'Connor both dissented in the case. Justices Kennedy,

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Scalia and Thomas are believed likely to vote with Rehnquist and O'Connor once this case is brought before them. Although this fact, in and of itself, does not compel a conclusion against Justice Department participation, it is a further reason to fully analyze the constitutional issues involved in this case before the Department proceeds.

The Attorney General therefore has determined that a short delay (from two to four weeks) in joining the CCRI litigation will not prejudice the Department's ability to join the case subsequent to the preliminary injunction stage. Thus, she has further concluded that the Department should not join the case prior to the December 16th preliminary injunction hearing, but that a decision as to whether or not the Department should join the case be made once the more thorough legal analysis now underway within the Department is finalized. I anticipate that this Justice Department review should be completed and the Department should be prepared to render a recommendation regarding the strength of our legal arguments within the next two weeks.

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	John Schmidt to Jack Quinn re: CCRI Litigation (5 pages)	12/03/1996	P5 1214
002. memo	John Schmidt to Jack Quinn re: CCRI Litigation (5 pages)	12/03/1996	P5 1215
003. memo	Jack Quinn to the President re: California Civil Rights Initiative (Prop 209) Litigation (3 pages)	12/09/1996	P5 1216

COLLECTION:

Clinton Presidential Records
Counsel's Office
Dawn Chirwa
OA/Box Number: 17301

FOLDER TITLE:

Affirmative Action Prop 209 [2]

Racheal Carter
2008-0309-F
rc633

RESTRICTION CODES

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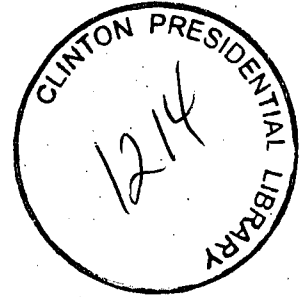
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December 3, 1996



MEMORANDUM

TO: Jack Quinn
Counsel to the President

FROM: John R. Schmidt

SUBJECT: CCRI Litigation

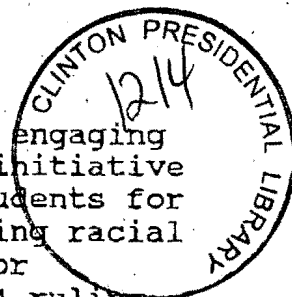
As you know, the Justice Department is considering whether to participate in the constitutional challenge to the California Civil Rights Initiative (CCRI) that has been brought by the ACLU and other groups that support affirmative action.

Passed by the voters of California in a statewide referendum on November 5, CCRI amends the California Constitution to provide that governmental entities in the state "shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color ethnicity, or national origin in the operation of public employment, public education, or public contracting."

STATUS OF LITIGATION: The lawsuit challenging CCRI was brought in federal district court in San Francisco on November 6. On November 27, Chief Judge Thelton Henderson (a Carter appointee) issued a Temporary Restraining Order against implementation of CCRI. The Judge said that the plaintiffs had "demonstrated a strong probability of success on the merits" of their constitutional claim. The Court set a briefing schedule on whether to grant a Preliminary Injunction (which unlike the TRO, will be an appealable order), which gives the State until Friday, December 6 to file a brief in opposition; plaintiffs then have until Wednesday, December 11 to file a reply; and a hearing will be held on Monday, December 16.

CONSTITUTIONAL ISSUE: The crux of the plaintiffs' argument is that CCRI is unconstitutional because it restructures the normal political process in California so as to make it more difficult for minorities and women (but not other groups) to petition state and local entities for the enactment of programs that benefit them. Plaintiffs rely primarily on the Supreme Court's 1982 decision in Washington v. Seattle School District No. 1 (Seattle), which invalidated a statewide referendum in

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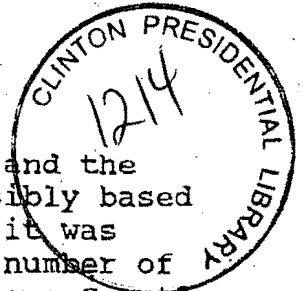


Washington that prohibited local school districts from engaging in student busing to promote racial integration. The initiative at issue in Seattle allowed school districts to bus students for a number of reasons, but not for the purpose of achieving racial integration. The initiative nowhere mentioned "race" or "integration"; nevertheless, the Supreme Court in a 5-4 ruling authored by Justice Blackmun determined that the initiative was unconstitutional because it singled out racial integration and removed that policy option from the bases for student assignment decisions that school districts could make in the normal operation of the political process. The majority in Seattle concluded that the reallocation of political power worked by the Washington initiative imposed an unconstitutional and unique burden on minorities because those championing busing for racial integration -- which the Court said was of special importance to minorities -- had to petition the state legislature to overturn the initiative (or seek a future statewide referendum), and thus were required to surmount a much higher political hurdle than persons seeking other kinds of action.

As Judge Henderson's opinion granting a TRO against CCRI indicates, a strong argument can be made that CCRI is unconstitutional under the reasoning of the Seattle case. Like the Seattle initiative, CCRI targets a matter of particular importance to minorities (and women) -- affirmative action -- and alters the political process only for that matter. The result is that proponents of other types of preferences (*i.e.*, preferences for veterans, the elderly, disabled persons, small businesses, children of alumni, etc. etc.) can press for preferential action at any level of California government, while proponents of affirmative action for minorities or women cannot. Indeed, CCRI arguably is even more burdensome to minorities than the Seattle initiative, which after a period of time could have been overturned by a simple act of the state legislature. CCRI on the other hand is now entrenched in the State Constitution and thus can only be reversed by another constitutional amendment.

Application of Seattle to CCRI would not mean that affirmative action never could be repealed or prohibited. Under Seattle, there is no constitutional infirmity if discrete units of government choose to eliminate their own race-based affirmative action measures. Thus, a city council could abolish affirmative action in municipal contracting, a public university could abolish affirmative action in its own admissions decisions, and a state legislature could abolish affirmative action programs established by state statute. The constitutional principle of Seattle is implicated when a change in law at a higher level of government forecloses the issue, so that governmental entities at a lower level cannot make their own decisions through the normal operation of the political process.

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It is possible to draw distinctions between CCRI and the Seattle initiative. The Seattle initiative was ostensibly based on the neutral principle of neighborhood schools, but it was riddled with exceptions that permitted busing for any number of reasons except for racial integration. Thus, the Supreme Court was able to label the initiative a "racial classification." CCRI is purportedly based on the neutral principle of non-discrimination and non-preference based on race and sex, and sets forth that general principle, with no exceptions. Opponents of CCRI would argue, however, that it fails the test of consistency by leaving in place preferences on a whole host of other grounds, while singling out preferences based on sex or race for special restrictions.

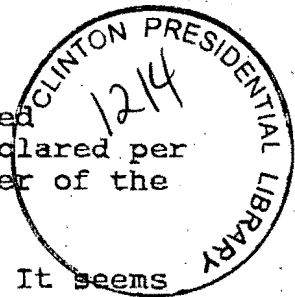
A more fundamental distinction is that some observers might consider it false and even perverse to call CCRI a "racial classification" when it is intended to take all racial decisions out of the equation. Without expressly saying so, the Supreme Court in Seattle may have concluded that the initiative at issue there was motivated by racial animus -- the unwillingness of voters to send their children to integrated schools with minority students. Hence, it was easier to see the initiative as a racial classification. By contrast, it is much harder today to hang the racial animus tag on advocates of CCRI, who claim that they are merely against all forms discrimination on the basis of race or sex.

Another possible distinction is that CCRI is seemingly in keeping with current trends in legal doctrine. In the past decade, the Supreme Court has become increasingly hostile to affirmative action. The Court has admonished that affirmative action is highly suspect as a matter of constitutional law, and should be subject to strict judicial scrutiny, the highest standard of constitutional review. In contrast, the applicable standard of constitutional review for voluntary busing for racial integration was not clear at the time that Seattle was decided. The counter argument here is that while declaring that affirmative action should be subject to strict judicial scrutiny, the Supreme Court also has made plain that affirmative action is constitutional in some circumstances; CCRI would, however, prohibit affirmative action even in those situations.

Notwithstanding the Seattle decision, it is doubtful that the current Supreme Court would invalidate CCRI. It seems more likely that the Court would either distinguish and limit Seattle, or perhaps even overrule it. Chief Justice Rehnquist and Justice O'Connor both dissented in Seattle. In both affirmative action and voting rights cases, Justice Kennedy has expressed his support for a colorblind regime of the sort reflected in CCRI,

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and Justices Scalia and Thomas have said that race-based affirmative action by government agencies should be declared per se unlawful. Justice Stevens is the only current member of the Court who was part of the Seattle majority.



The lower courts, however, are bound by Seattle. It seems highly likely that Judge Henderson will issue a Preliminary Injunction against the initiative and there is a significant likelihood that he will be upheld by the Ninth Circuit. When the case will reach the Supreme Court is uncertain, but it would seem to be in the 1997-1998 term at the earliest.

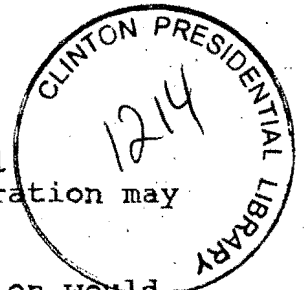
CONSIDERATIONS WITH RESPECT TO PARTICIPATION:

Considerations that weigh in favor of Justice Department intervention in the case include:

1. A strong argument can be made that CCRI is unconstitutional under Seattle. Although the current Supreme Court might well not agree, it can also be argued that application of Seattle to CCRI is the right result -- e.g. preferences based on race or sex (if utilized for constitutionally permissible purposes such as remedying discrimination or achieving educational diversity) ought not to be singled out for specially restrictive treatment in the political process.
2. The President has already expressed his opposition to CCRI.
3. While the support of the Justice Department is unlikely to have much impact on the district judge -- who looks as if he will rule in favor of the plaintiffs -- the Department's participation might enhance the likelihood of success in the court of appeals.
4. Failure to participate will be viewed by large segments of the minority and women's community as an abandonment of their core interests. This view has already been expressed strongly by Jesse Jackson, the National Organization for Women, and others who have criticized the Administration for not already being involved in the case.¹ The view that we are abandoning these

¹We have been told that the Inc. Fund may have some questions about the tactical wisdom of focussing on this particular case as the constitutional test of CCRI. Deval Patrick is meeting with the Fund's lawyers to determine if there is any reason for us to refrain from participation on that ground.

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groups by failing to participate in the CCRI case will undoubtedly color their views of actions the Administration may take or want to take in other areas.

Countervailing considerations against participation would be:

1. We will be portrayed as acting to overturn through the courts the wishes of the California electorate expressed at the ballot box.

2. We may be taken to be signalling a determination to maintain race and sex-based preferences at all costs and even a view that constitutionally such preferences can never be repealed. This would not in fact be our view -- as described above we would be saying only that the political process must be allowed to decide these issues in the same manner as it decides as to other preferences -- but the distinction may be difficult to sustain politically.

3. It can be argued that the case is less likely to be politically divisive if it is cast as local California groups, rather than as the United States Government, versus the State or people of California.

4. We are likely to lose in the end in the Supreme Court and at that point the Administration may be cast as having fought a failed, last-ditch effort to sustain racial preferences.

TIMING: If we are going to intervene, the time for doing so seems imminent. We would act pursuant to the Attorney General's statutory authority to certify for Justice Department intervention any case of national significance involving equal protection claims. (This same authority was relied upon by the Carter Administration in intervening in support of the plaintiffs in the Seattle case -- the Reagan Administration subsequently reversed position and supported the State of Washington in the Supreme Court.) In order to be able to file a brief and then participate in the hearing on December 16, we should probably act this week.

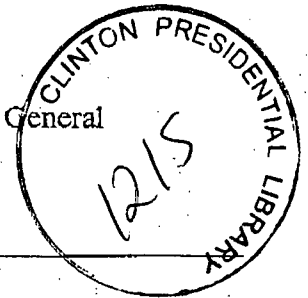
If we are going to do this, it should probably be done as a Justice Department initiative, taken with the concurrence of the President.

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U. S. Department of Justice

Office of the Associate Attorney General



The Associate Attorney General

Washington, D.C. 20530

December 5, 1996

MEMORANDUM

TO: Jack Quinn
Counsel to the President

FROM: John R. Schmidt (TRS)

SUBJECT: CCRI Litigation

As you know, the Justice Department is considering whether to participate in the constitutional challenge to the California Civil Rights Initiative (CCRI) that has been brought by the ACLU and other groups that support affirmative action.

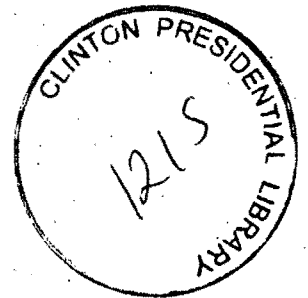
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Memorandum for Jack Quinn
Page 2



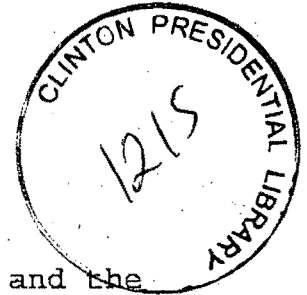
Washington that prohibited local school districts from engaging in student busing to promote racial integration. The initiative at issue in Seattle allowed school districts to bus students for a number of reasons, but not for the purpose of achieving racial integration. The initiative nowhere mentioned "race" or "integration"; nevertheless, the Supreme Court in a 5-4 ruling authored by Justice Blackmun determined that the initiative was unconstitutional because it singled out racial integration and removed that policy option from the bases for student assignment decisions that school districts could make in the normal operation of the political process. The majority in Seattle concluded that the reallocation of political power worked by the Washington initiative imposed an unconstitutional and unique burden on minorities because those championing busing for racial integration -- which the Court said was of special importance to minorities -- had to petition the state legislature to overturn the initiative (or seek a future statewide referendum), and thus were required to surmount a much higher political hurdle than persons seeking other kinds of action.

As Judge Henderson's opinion granting a TRO against CCRI indicates, a strong argument can be made that CCRI is unconstitutional under the reasoning of the Seattle case. Like the Seattle initiative, CCRI targets a matter of particular importance to minorities (and women) -- affirmative action -- and alters the political process only for that matter. The result is that proponents of other types of preferences (i.e., preferences for veterans, the elderly, disabled persons, small businesses, children of alumni, etc. etc.) can press for preferential action at any level of California government, while proponents of affirmative action for minorities or women cannot. Indeed, CCRI arguably is even more burdensome to minorities than the Seattle initiative, which after a period of time could have been overturned by a simple act of the state legislature. CCRI on the other hand is now entrenched in the State Constitution and thus can only be reversed by another constitutional amendment.

Application of Seattle to CCRI would not mean that affirmative action never could be repealed or prohibited. Under Seattle, there is no constitutional infirmity if discrete units of government choose to eliminate their own race-based affirmative action measures. Thus, a city council could abolish affirmative action in municipal contracting, a public university could abolish affirmative action in its own admissions decisions, and a state legislature could abolish affirmative action programs established by state statute. The constitutional principle of Seattle is implicated when a change in law at a higher level of government forecloses the issue, so that governmental entities at a lower level cannot make their own decisions through the normal operation of the political process.

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Memorandum for Jack Quinn
Page 3



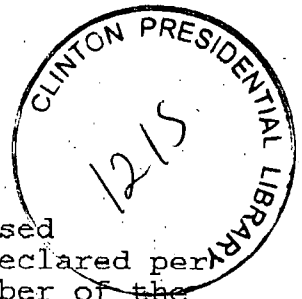
It is possible to draw distinctions between CCRI and the Seattle initiative. The Seattle initiative was ostensibly based on the neutral principle of neighborhood schools, but it was riddled with exceptions that permitted busing for any number of reasons except for racial integration. Thus, the Supreme Court was able to label the initiative a "racial classification." CCRI is purportedly based on the neutral principle of non-discrimination and non-preference based on race and sex, and sets forth that general principle, with no exceptions. Opponents of CCRI would argue, however, that it fails the test of consistency by leaving in place preferences on a whole host of other grounds, while singling out preferences based on sex or race for special restrictions.

A more fundamental distinction is that some observers might consider it false and even perverse to call CCRI a "racial classification" when it is intended to take all racial decisions out of the equation. Without expressly saying so, the Supreme Court in Seattle may have concluded that the initiative at issue there was motivated by racial animus -- the unwillingness of voters to send their children to integrated schools with minority students. Hence, it was easier to see the initiative as a racial classification. By contrast, it is much harder today to hang the racial animus tag on advocates of CCRI, who claim that they are merely against all forms discrimination on the basis of race or sex.

Another possible distinction is that CCRI is seemingly in keeping with current trends in legal doctrine. In the past decade, the Supreme Court has become increasingly hostile to affirmative action. The Court has admonished that affirmative action is highly suspect as a matter of constitutional law, and should be subject to strict judicial scrutiny, the highest standard of constitutional review. In contrast, the applicable standard of constitutional review for voluntary busing for racial integration was not clear at the time that Seattle was decided. The counter argument here is that while declaring that affirmative action should be subject to strict judicial scrutiny, the Supreme Court also has made plain that affirmative action is constitutional in some circumstances; CCRI would, however, prohibit affirmative action even in those situations.

Notwithstanding the Seattle decision, it is doubtful that the current Supreme Court would invalidate CCRI. It seems more likely that the Court would either distinguish and limit Seattle, or perhaps even overrule it. Chief Justice Rehnquist and Justice O'Connor both dissented in Seattle. In both affirmative action and voting rights cases, Justice Kennedy has expressed his support for a colorblind regime of the sort reflected in CCRI,

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and Justices Scalia and Thomas have said that race-based affirmative action by government agencies should be declared per se unlawful. Justice Stevens is the only current member of the Court who was part of the Seattle majority.

The lower courts, however, are bound by Seattle. It seems highly likely that Judge Henderson will issue a Preliminary Injunction against the initiative and there is a significant likelihood that he will be upheld by the Ninth Circuit. When the case will reach the Supreme Court is uncertain, but it would seem to be in the 1997-1998 term at the earliest.

CONSIDERATIONS WITH RESPECT TO PARTICIPATION:

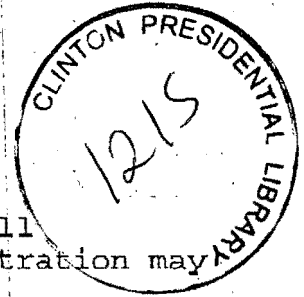
Considerations that weigh in favor of Justice Department intervention in the case include:

1. A strong argument can be made that CCRI is unconstitutional under Seattle. Although the current Supreme Court might well not agree, it can also be argued that application of Seattle to CCRI is the right result -- e.g. preferences based on race or sex (if utilized for constitutionally permissible purposes such as remedying discrimination or achieving educational diversity) ought not to be singled out for specially restrictive treatment in the political process.
2. The President has already expressed his opposition to CCRI.
3. While the support of the Justice Department is unlikely to have much impact on the district judge -- who looks as if he will rule in favor of the plaintiffs -- the Department's participation might enhance the likelihood of success in the court of appeals.
4. Failure to participate will be viewed by large segments of the minority and women's community as an abandonment of their core interests. This view has already been expressed strongly by Jesse Jackson, the National Organization for Women, and others who have criticized the Administration for not already being involved in the case.¹ The view that we are abandoning these

¹We have been told that the Inc. Fund may have some questions about the tactical wisdom of focussing on this particular case as the constitutional test of CCRI. Deval Patrick is meeting with the Fund's lawyers to determine if there is any reason for us to refrain from participation on that ground.

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Memorandum for Jack Quinn
Page 5



groups by failing to participate in the CCRI case will undoubtedly color their views of actions the Administration may take or want to take in other areas.

Countervailing considerations against participation would be:

1. We will be portrayed as acting to overturn through the courts the wishes of the California electorate expressed at the ballot box.

2. We may be taken to be signalling a determination to maintain race and sex-based preferences at all costs and even a view that constitutionally such preferences can never be repealed. This would not in fact be our view -- as described above we would be saying only that the political process must be allowed to decide these issues in the same manner as it decides as to other preferences -- but the distinction may be difficult to sustain politically.

3. It can be argued that the case is less likely to be politically divisive if it is cast as local California groups, rather than as the United States Government, versus the State or people of California.

4. We are likely to lose in the end in the Supreme Court and at that point the Administration may be cast as having fought a failed, last-ditch effort to sustain racial preferences.

TIMING: If we are going to intervene, the time for doing so seems imminent. We would act pursuant to the Attorney General's statutory authority to certify for Justice Department intervention any case of national significance involving equal protection claims. (This same authority was relied upon by the Carter Administration in intervening in support of the plaintiffs in the Seattle case -- the Reagan Administration subsequently reversed position and supported the State of Washington in the Supreme Court.) In order to be able to file a brief and then participate in the hearing on December 16, we should probably act this week.

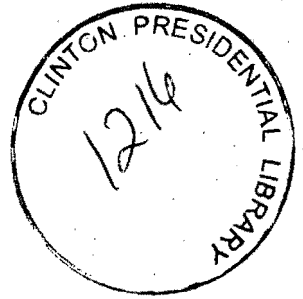
If we are going to do this, it should probably be done as a Justice Department initiative, taken with the concurrence of the President.

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THE WHITE HOUSE

WASHINGTON

December 9, 1996



MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN *Jack Quinn*

SUBJECT: CALIFORNIA CIVIL RIGHTS INITIATIVE
(PROP 209) LITIGATION

As you know, the "California Civil Rights Initiative" (CCRI), also known as Proposition 209, was adopted by referendum on November 5, 1996. The referendum amends the California constitution to provide that governmental entities "shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting."

A number of civil rights groups have brought a constitutional challenge to CCRI in federal district court. On November 27th, Chief Judge Thelton Henderson issued a Temporary Restraining Order against implementation of CCRI, ruling that the plaintiffs had "demonstrated a strong probability of success on the merits" of their constitutional claim. A Preliminary Injunction hearing on the matter will be held on Monday, December 16th.

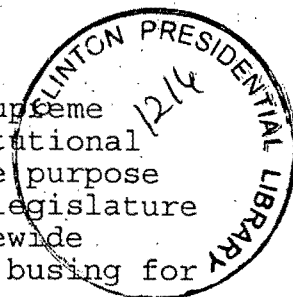
Numerous leaders in the civil rights community have urged the White House and the Justice Department to join the plaintiffs' case. The Justice Department is considering whether to participate in the lawsuit and would like guidance from you as to whether or not to proceed. If they are to join in the suit at this stage, they need to file papers by Wednesday, December 11th.

For the reasons set forth below, I recommend that you approve the Justice Department's participation in this case as an intervening party.

The gravamen of the plaintiffs' legal argument is that CCRI is unconstitutional because the referendum makes it more difficult for minorities and women, but not other groups (e.g., veterans), to petition state and local entities for the enactment of preference programs to protect their interests. The plaintiffs rely primarily on the Supreme Court's 1982 decision in Washington v. Seattle School District No. 1, which invalidated a statewide referendum in Washington prohibiting local school districts from engaging in student busing to promote racial

COPY

integration, but providing numerous exceptions. The Supreme Court reasoned that the referendum imposed an unconstitutional and unique burden on minorities who seek busing for the purpose of racial integration -- either petitioning the state legislature to overturn the referendum or seeking an opposing statewide referendum -- which was not imposed on people who seek busing for other reasons.



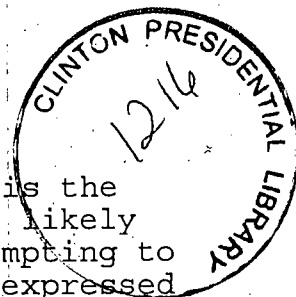
Judge Henderson likened CCRI to the Seattle referendum and concluded that CCRI may very well also be unconstitutional. Like the Seattle referendum, CCRI imposes a higher political burden -- re-amending the state constitution -- on women and racial minorities when they seek affirmative action programs based on race or gender than on groups who seek other types of "preference" programs, such as those based on age, disability, veteran or legacy status, and so forth.

In a recent memo, the Justice Department advised that, since the lower courts are bound by Seattle, the plaintiffs' chances through the Circuit Court level are encouraging. On the other hand, the Department concluded that it is doubtful that the current Supreme Court would invalidate CCRI. Chief Justice Rehnquist and Justice O'Connor both dissented in Seattle, and Justices Kennedy, Scalia and Thomas are believed likely to vote with Rehnquist and O'Connor once this case is brought before them. Despite this prediction, I believe that participating in the litigation is the right thing to do.

Reasons to participate

- A strong case can be made that CCRI is unconstitutional under current, well-settled law. Although it is possible the current Supreme Court would disagree, the argument that minorities and women should not be singled out for more restrictive treatment in the political process is highly persuasive and, I believe, the right result.
- The participation of the United States in the plaintiffs' case may well enhance the plaintiffs' likelihood of success, particularly in the Court of Appeals.
- Large segments of the minority and women's community have pressed strongly for the United States to participate in this litigation. Failure to participate likely will be viewed with great disappointment by many members of this important constituency.
- You have already expressed your opposition to CCRI, although not in constitutional terms, so this action will not be unexpected by proponents of CCRI.

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Reasons not to participate

- The primary reason weighing against intervention is the politically divisive nature of this issue. It is likely that the Administration will be portrayed as attempting to overturn, through the courts, the democratically expressed will of the majority of the California electorate. The Administration may be portrayed also as signaling its view that affirmative action programs can never be repealed.

Neither portrayal would be an accurate characterization. We would not be arguing that the political process can never be used to limit or terminate programs benefiting minorities or women. Rather, we would argue primarily that the political process cannot impose a special or higher burden on minorities or women when they seek remedies or programs uniquely important to them as compared to other groups seeking similar remedies or programs. Admittedly, this distinction may be difficult to explain.

After weighing all these considerations, I recommend that you approve the Justice Department's participation in the CCRI litigation as an intervening party.

Approve: _____

Disapprove: _____

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Jack Quinn to the President re: California Civil Rights Initiative (Prop 209) Litigation (3 pages)	12/10/1996	P5 1217

COLLECTION:

Clinton Presidential Records
Counsel's Office
Dawn Chirwa
OA/Box Number: 17301

FOLDER TITLE:

Affirmative Action Prop 209: Proposition 209

Racheal Carter
2008-0309-F
rc634

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

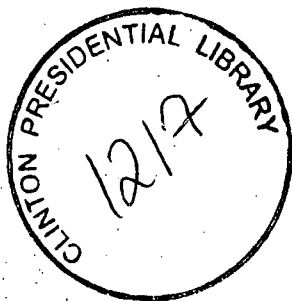
Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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CC-Div. 1
file CCRI

CC-008



THE WHITE HOUSE
WASHINGTON

December 10, 1996

Of course delay but
since preference can be
granted to athletes, etc,
I think analogy to
Seattle is strong. We
don't have to stay out
because the Supreme Court will overrule on
subsequent case from
Seattle - That's a bad
reason to stay out (I think)

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN

SUBJECT: California Civil Rights Initiative
(Prop 209) Litigation

This memorandum updates you on the status of the litigation challenging the "California Civil Rights Initiative" (CCRI), also known as Proposition 209, and the Justice Department's advice today to defer a decision about joining the litigation.

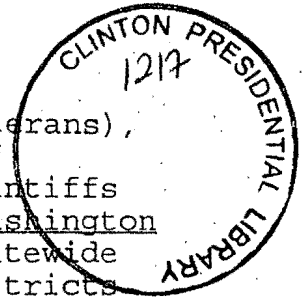
As you know, Prop. 209 was adopted by referendum on November 5, 1996. The referendum amends the California constitution to provide that governmental entities "shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting."

A number of civil rights groups have brought a challenge to CCRI in federal district court. On November 27th, Chief Judge Thelton Henderson issued a Temporary Restraining Order against implementation of CCRI, ruling that the plaintiffs had "demonstrated a strong probability of success on the merits" of their constitutional claim. A Preliminary Injunction hearing on the matter will be held on Monday, December 16th.

Numerous leaders in the civil rights community have urged the White House and the Justice Department to join the plaintiffs' case. The Justice Department had initially led us to believe that it favored intervention. However, based on advice just received from the Solicitor General, the Attorney General today concluded that a more thorough review of the difficult legal issues involved in this litigation is necessary before the Department can make a final recommendation. Consequently, the Department will not intervene in the case before the Preliminary Injunction hearing on Monday.

The gravamen of the plaintiffs' case is that CCRI is unconstitutional because the referendum makes it more difficult

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for minorities and women, but not other groups (e.g., veterans), to petition state and local entities for the enactment of preference programs to protect their interests. The plaintiffs rely primarily on the Supreme Court's 1982 decision in Washington v. Seattle School District No. 1, which invalidated a statewide referendum in Washington that prohibited local school districts from engaging in student busing to promote racial integration, but provided numerous exceptions which allowed student busing for other purposes. The Supreme Court reasoned that the referendum imposed an unconstitutional and unique burden on minorities who were seeking busing for the purpose of racial integration since they were required to surmount a much higher political hurdle -- either petitioning the state legislature to overturn the referendum or seeking adoption of a referendum reversing the anti-busing proposition -- in order to achieve their goal. Persons seeking busing for other reasons, by contrast, bore no such burden.

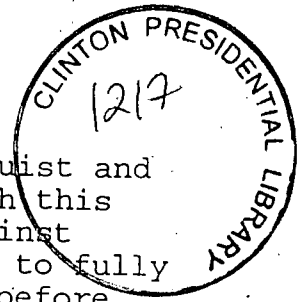
Judge Henderson likened CCRI to the Seattle referendum and concluded that CCRI may very well also be unconstitutional. Like the Seattle referendum, CCRI imposes a higher political burden -- re-amending the state constitution -- on women and racial minorities when they seek affirmative action programs based on race or gender than on groups who seek other types of "preference" programs, such as those based on age, disability, veteran or legacy status, and so forth.

The Justice Department believes that, since the lower courts are bound by Seattle, the plaintiffs' chances up to the Circuit Court level are encouraging. Certainly, given Judge Henderson's ruling on the plaintiffs' TRO motion, it is very likely that, at least, the plaintiffs will prevail on their preliminary injunction motion. Until today, particularly in light of this likelihood of success at the lower court level, there was an inclination at the Department to join the litigation prior to the preliminary injunction hearing on December 16th.

However, the acting Solicitor General today expressed reservations about joining the case. Specifically, Mr. Dellinger has expressed doubts about the claim that CCRI is analogous to the referendum at issue in Seattle and about the continued validity of the Seattle decision itself. Dellinger has therefore urged caution in proceeding with this litigation until his concerns regarding the strength of the constitutional challenge to CCRI have been more fully considered.

In addition, there appears to be a consensus within the Department that it is unlikely that the current Supreme Court would invalidate CCRI even if the Court agreed that CCRI was similar to the referendum in Seattle. Although Justice Stevens voted with the majority in Seattle, Chief Justice Rehnquist and Justice O'Connor both dissented in the case. Justices Kennedy,

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Scalia and Thomas are believed likely to vote with Rehnquist and O'Connor once this case is brought before them. Although this fact, in and of itself, does not compel a conclusion against Justice Department participation, it is a further reason to fully analyze the constitutional issues involved in this case before the Department proceeds.

[The Attorney General therefore has determined that a short delay (from two to four weeks) in joining the CCRI litigation will not prejudice the Department's ability to join the case subsequent to the preliminary injunction stage. Thus, she has further concluded that the Department should not join the case prior to the December 16th preliminary injunction hearing, but that a decision as to whether or not the Department should join the case be made once the more thorough legal analysis now underway within the Department is finalized. I anticipate that this Justice Department review should be completed and the Department should be prepared to render a recommendation regarding the strength of our legal arguments within the next two weeks.

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	The Acting Solicitor General to the Attorney General re: Coalition for Economic Equity v. Wilson, No 97-369 (7 pages)	09/04/1997	P5 1218

COLLECTION:

Clinton Presidential Records
Counsel's Office
Charles Ruff
OA/Box Number: 17989

FOLDER TITLE:

Proposition 209

Racheal Carter
2008-0309-F
rc635

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

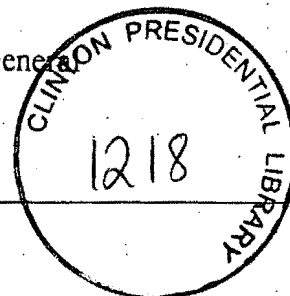
Freedom of Information Act - [5 U.S.C. 552(b)]

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- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Office of the Solicitor General



Washington, D.C. 20530

September 4, 1997

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: THE ACTING SOLICITOR GENERAL

SUBJECT: Coalition for Economic Equity v. Wilson, No. 97-369

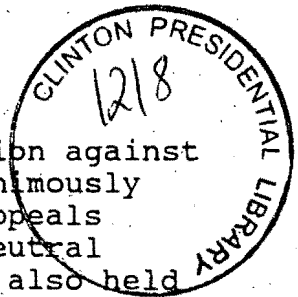
TIMETABLE: The petitioners filed their petition for a writ of certiorari in the Supreme Court on August 29, 1997. The respondents must file their brief in opposition by Monday, September 29, 1997, unless the time is extended. Under the Supreme Court rules, an amicus curiae brief filed to support a certiorari petition must be filed within the same time, i.e., by September 29.

BACKGROUND:

In November 1996 the voters of California adopted by initiative Proposition 209, which amends the California Constitution to provide that neither the State, nor any subdivision or local unit of government, shall "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." That new constitutional provision has not been construed by any state court. Thus, while it is generally agreed that Proposition 209 broadly prohibits many race- and sex-conscious preferential programs subsumed under the label "affirmative action," the full reach of the new provision is not clear.

A coalition of groups favoring affirmative action filed suit in district court on the day after election day. They contended that Proposition 209 violates the Equal Protection Clause because it makes it more difficult for those favoring affirmative action for racial minorities and women to have measures for their benefit enacted than it is for those representing all other interests (such as farmers, veterans, etc.) to have measures for their benefit enacted. They relied on Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), and Hunter v. Erickson, 393 U.S. 385 (1969).

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The district court entered a preliminary injunction against Proposition 209, but a panel of the Ninth Circuit unanimously reversed, and upheld Proposition 209. The court of appeals concluded that Proposition 209 merely "addressed in neutral fashion race-related and gender-related matters." It also held that, unlike the Seattle and Hunter cases, which (it believed) involved measures preventing racial minorities from obtaining remedies for discrimination, Proposition 209 is an "impediment to receiving preferential treatment," and "impediments to preferential treatment do not deny equal protection." The court also noted that, because the programs outlawed by Proposition 209 benefited women as well as racial minorities, those programs benefited the majority of the population of California, and it questioned whether a measure that precludes the majority from obtaining a preference could ever violate equal protection. Finally, the court concluded that Proposition 209 does not conflict with Title VII of the Civil Rights Act of 1964, because (it held) that act does not require race- or sex-based preferences in employment.

The United States filed an amicus curiae brief in the court of appeals supporting the plaintiffs. The United States also filed an amicus curiae brief supporting the plaintiffs' request for rehearing en banc. Rehearing en banc was denied, with four judges dissenting.

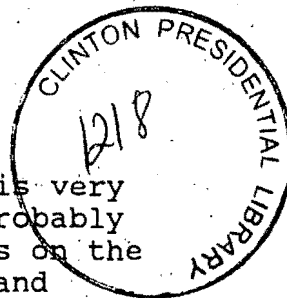
The plaintiffs then filed a petition for certiorari, and also asked the Court to stay the enforcement of Proposition 209 pending the Court's decision on the case. The full Court denied the stay. No dissenting votes were publicly noted.

DISCUSSION:

The issue now is whether the United States should file an amicus curiae brief, without being invited by the Court, asking the Court to grant the certiorari petition.¹ The Administration is firmly on record in opposition to Proposition 209, both on policy and legal grounds, and we have articulated our legal points forcefully in the court of appeals. Nonetheless, for several reasons, I strongly recommend that we not file an uninvited amicus brief on the issue of whether the Supreme Court should take the case.

¹ I am assuming that any amicus brief filed at the petition stage would urge the Court to grant certiorari. It is exceptionally rare -- almost unprecedented -- for the government to file an uninvited amicus brief urging the Court to deny certiorari. I am also assuming that, on the merits, we would take a position supporting the plaintiffs, as we have taken that position below.

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First, success at this time in the Supreme Court is very unlikely, and review in this Court at this time will probably have high costs: precluding any chance of later success on the issue, possibly leading to the overruling of Seattle, and potentially doing damage to our objectives in the Piscataway case. Second, and more important we will hurt our objectives by volunteering an uninvited brief, since that brief may be viewed by the Court as a political statement and will necessarily have to portray the reach of Proposition 209 in the broadest possible terms, foreclosing us from finding ambiguity in Proposition 209 in the future.

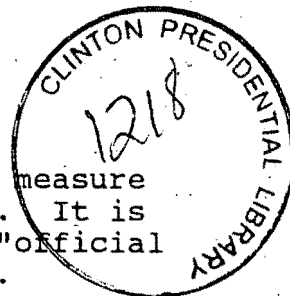
I. Supreme Court review of this case is undesirable.

1. The chances of success in this case, in this Supreme Court at this time, must be counted as very slim, close to nil. (The Court's denial of a stay, even pending its consideration of the certiorari petition, certainly indicates its doubt that plaintiffs will eventually succeed on the merits.) The Seattle decision, on which we would principally rely, has always been precarious. Seattle itself was an extension of a highly controversial strand of equal protection doctrine that has never had the firm support of the Court. Seattle was decided by a 5-4 vote; the dissenting votes were cast by Chief Justice Burger, Justice Powell, then-Justice Rehnquist, and Justice O'Connor. Thus, Justice O'Connor's vote, which would probably be necessary to a victory for the plaintiffs in this case, may not be within reach. If the Court were required to choose between (a) overruling Seattle and (b) extending Seattle to cover this case and to strike down Proposition 209, I believe the Court would overrule Seattle.

2. We would be far better served to preserve the issue in this case for another day. Hostility to affirmative action in the Supreme Court is at the high-water mark. A differently composed Supreme Court may view the matter more favorably to our position. And if the Court denied certiorari now, we would preserve the possibility of winning the issue in another circuit (should another State adopt a similar measure) and returning to a differently composed Supreme Court with a (hopefully) well-reasoned lower-court opinion in our favor.

Denial of certiorari would also preserve our ability to get the courts to look at the application of Proposition 209 in a concrete, factual setting, so that the courts can understand its effect in the real world. A serious problem with this case is that it is an across-the-board challenge to the application of Proposition 209 to bar any affirmative action program. There are few facts in the record. The certiorari petition does not highlight, or even refer to, the effect that Proposition 209 will have in any concrete case. The case is of a kind that is unpopular with the current Supreme Court, brought by advocacy

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groups in tandem with a political campaign, before the measure has been implemented in any particular factual setting. It is similar in that respect to the challenge to Arizona's "official English" law that the Court recently dismissed as moot.

There are significant advantages to waiting until the Proposition (or a similar measure in another State) has been implemented and has had an effect in the real world that could be viewed sympathetically by the Court -- by, for example, forcing the termination of a magnet-school program implemented to remedy past discrimination. In fact, once Proposition 209 has been implemented, its opponents might be able to argue in the lower courts that the Ninth Circuit's decision upholding it on an across-the-board basis does not preclude challenges to it as applied to particular facts. That would enable us to return to the Ninth Circuit and the Supreme Court at a future point when the Proposition may be more vulnerable.

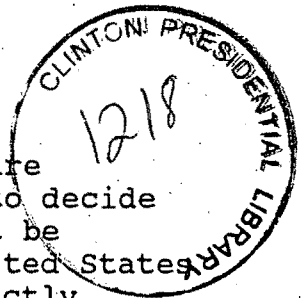
3. It is very undesirable to have this case decided at the same time as the Piscataway case. The juxtaposition of the two cases is highly unfavorable to our position. The facts of Piscataway merely point out the negative effects of some of the very programs that Proposition 209 has outlawed. The two cases taken together invite the Court to make broad negative rulings on affirmative action.

If the Supreme Court upholds the reverse-discrimination claim in Piscataway on a broad basis, and outlaws voluntary nonremedial affirmative-action under Title VII, it is questionable how much good can be done by preserving the challenge against Proposition 209. On the other hand, if the Court preserves affirmative action in Piscataway, there may well be useful language in the Court's opinion, referring to a local government's compelling need to redress past societal discrimination and promote diversity-related objectives, that we can use in future litigation opposing measures similar to Proposition 209.

II. We will only hurt our position by volunteering an amicus brief.

1. There is a serious danger that the Court will view a volunteered amicus filing as a political statement. Generally we do not file at the petition stage unless we are a party, or unless the Court asks for our views (as in Piscataway). When we volunteer a filing at the petition stage, we do so because there is a need to express our view that the decision below (a) is clearly wrong, (b) is very broad, (c) will affect a program implemented by the federal government, and (d) ought to be reviewed without delay.

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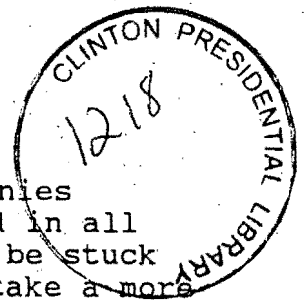
The Court is aware that such volunteered filings are uncommon. It is also aware of the standards we apply to decide whether to volunteer a filing. The Court will no doubt be chagrined to read a volunteered amicus brief by the United States challenging a lower-court ruling that (a) does not directly involve a federal program, (b) involves a measure with an uncertain reach not yet construed by the state courts, (c) did not create a conflict in the circuits, and (d) arguably has the better weight of authority to support it. In short, the case has none of the hallmarks of the kind of case in which we volunteer amicus briefs, and the Court will know that.

2. The Court has been skeptical of the position of the United States on civil rights cases generally, and especially those pertaining to affirmative action. We have tried strenuously to counteract that problem by taking a nuanced view of such issues in our filings -- as, for example, with the merits brief that we recently filed in the Piscataway case -- recognizing the intensity of the national debate over affirmative action. A volunteered filing in this case will hurt our credibility with the Court generally, and particularly with respect to our position in Piscataway. We have labored to craft a moderate yet forceful position on Piscataway, and volunteering a brief in this case would undo that work.

3. The rare briefs we volunteer at the petition stage tend to be strong advocacy pieces that underscore the sweep of the legal ruling of the lower court and predict serious negative consequences from letting that ruling stand, in order to persuade the Court that review is necessary now.² Necessarily, therefore, a brief that we would volunteer in this case would have to give the broadest possible reading of Proposition 209, and to minimize

² See, e.g., U.S. Br. in Rowinsky v. Bryan Independent School Dist., 96-4, at 8 ("The court of appeals' ruling places virtually all claims of an unlawful hostile environment based on student-on-student sexual harassment beyond the reach of Title IX"; "the lower court ruling [] would completely preclude all such claims, regardless of the severity of the conduct"); U.S. Br. in Texas v. Hopwood, 95-1773, at 9 ("If left unreviewed, this decision will effectively eliminate all affirmative actions admissions programs in higher education within the Fifth Circuit"); U.S. Br. in Nipper v. Smith, 95-1463, at 10, 11 ("The decision below severely restricts Section 2's effectiveness"; "the Eleventh Circuit's ruling creates a virtually automatic exemption from Section 2"); U.S. Br. in Kirwan v. Podberesky, 94-1620, at 11 ("The ruling in this case severely impedes the ongoing efforts of the United States Department of Education's Office for Civil Rights to eliminate the vestiges of de jure segregation in state systems in higher education").

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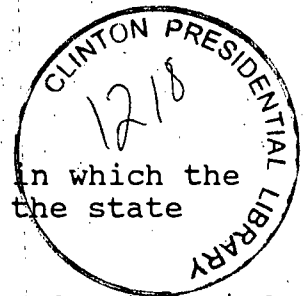
any ambiguities in that measure.³ But if the Court denies certiorari -- which is very likely, and which occurred in all four civil-rights cases in footnote 2 -- then we will be stuck with those representations, and we will be unable to take a more nuanced view if the issues are joined again in the lower courts. That is what occurred after the Court denied review of the Fifth Circuit's decision striking down affirmative action in postsecondary school admissions in the Hopwood case.

In my view, there is some ambiguity in the scope of Proposition 209, and it would be ill-advised to argue to the Court that the Proposition must be read to have the broadest possible reach, before the state courts have had any chance to interpret it. The petitioners have argued, for example, that Proposition 209 prohibits a local government from taking steps even to remedy its own past discrimination, and from using tools such as busing to desegregate public school systems. It is not clear, however, that Proposition 209 -- which prohibits "preferences" -- must inevitably be read in such a broad manner. Indeed, the California Attorney General, in his response to the petitioners' request for a stay in the Supreme Court, suggests that busing and student assignment programs might not be prohibited by Proposition 209. A state court might conclude that a race-conscious remedy narrowly tailored to remedy past discrimination in employment by the same employer, or school assignments by the same school system, is not a preference based on race but is a permissible remedy for a prior constitutional violation.

If we were to argue now, in a volunteered brief, that Proposition 209 should and will be given a very broad reading, and the Court were to deny certiorari, then we would be precluded in the future from arguing that there is ambiguity in the reach of the Proposition. But if, at a minimum, we were to wait until the Court requested our views on the case, then we could take a much more measured view. We could point out the possible ambiguities to the Court, and suggest to the Court that if the Proposition were given the broadest possible reading, then serious constitutional difficulties would result, but that some (though perhaps not all) of the problems might be resolved by a narrower reading. The Court's denial of a stay indicates that it is unlikely to undertake in this case to construe Proposition 209 broadly and as warranting immediate review prior to its interpretation in the state courts. The logic of its stay denial suggests that it has concluded that it should wait for the

³ Moreover, if we did not take that view of Proposition 209, we would be undercutting petitioners' arguments and reducing the prospects for a grant of certiorari.

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application of Proposition 209 in a concrete case, in which the provision has received a binding interpretation by the state courts.

If we did not volunteer an amicus brief and the Court denied certiorari (as is likely), then in the future the government would not be seriously disadvantaged by any representations made at this time in the Supreme Court about the need for a broad reading of Proposition 209. Moreover, we would have preserved our ability in later cases (in California and elsewhere) to explain away the likely denial of certiorari as probably resting on the Court's uncertainty about Proposition 209's meaning and scope in advance of its interpretation by the state courts. Volunteering a brief, however, would eliminate that flexibility for us in the future.

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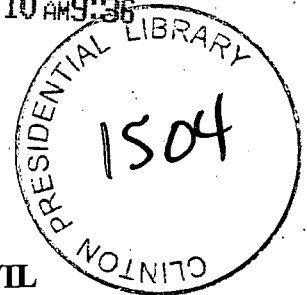
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WASHINGTON

April 10, 1997

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MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F.C. RUFF *CR*

SUBJECT: NINTH CIRCUIT RULING ON THE CALIFORNIA CIVIL RIGHTS INITIATIVE (PROP 209)

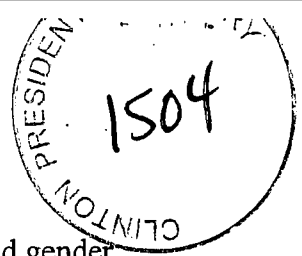
As you are aware, on Tuesday, April 8, a three-judge panel of the Ninth Circuit Court of Appeals held that the "California Civil Rights Initiative" (CCRI) does not violate the U.S. constitution and overturned the district court's preliminary injunction enjoining the implementation of the initiative. On your direction, the United States had joined, as amicus curiae, the plaintiffs' challenge to the constitutionality of CCRI and argued forcefully for the panel to uphold the preliminary injunction pending a trial on the merits. The Department of Justice fully expects to continue to participate in the constitutional challenge to CCRI as amicus and to support the plaintiffs as they move forward in response to the panel ruling.

The Ninth Circuit Panel Decision

As you may recall, the gravamen of the plaintiffs' challenge to CCRI is that the referendum is unconstitutional because the referendum makes it more difficult for minorities and women, but not other groups (e.g., veterans or the disabled), to petition state and local entities for the enactment of preference programs to protect their interests. Plaintiffs relied primarily on the Supreme Court's 1982 decision in Washington v. Seattle School District No. 1 and 1969 decision in Hunter v. Erickson. The United States joined this argument, and the district court relied on Seattle and Hunter in granting the motion for a preliminary injunction. In a strongly worded ruling, the Ninth Circuit panel rejected this argument.

The panel held that in Seattle and Hunter the referendums at issue had placed higher political hurdles in the path of individuals attempting to seek "equal treatment" (e.g. busing to end segregation or fair housing ordinances to combat housing discrimination) -- actions which are constitutionally impermissible. By contrast, CCRI places higher political hurdles in the path of individuals attempting to seek "preferential treatment." According to the panel, this type of "political structure" differing treatment does not violate the Equal Protection Clause since "[I]mpediments to preferential treatment do not deny equal protection." The panel goes on to muse, in dicta, that they are "perplexed" by the concept that, in order to rule for the plaintiffs and find CCRI to be unconstitutional, they must necessarily find that it is impermissible for a majority of voters (which, the panel states, women and racial minorities together constitute) to place a higher political burden upon itself than other groups.

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The panel dealt with the fact that CCRI singles out preferences based on race and gender and specifically preserves preferences based on other criteria by finding that CCRI does not prohibit preferences which minorities and women can enjoy on grounds other than merely their race or gender (for example, on their disability or veteran status). Finally, the panel gave short-shrift to other arguments advanced by the plaintiffs that CCRI preempts Title VII or Title VI provisions that allow for affirmative action programs in certain situations.

Next Steps

The Department of Justice has informed us that while the plaintiffs have not made a final decision on their next steps, they anticipate filing a petition for a rehearing en banc of the panel's ruling. Justice is prepared to support such a petition. We are prepared to have the Press Office issue a public statement that Justice will support the plaintiffs as they move forward in this litigation.