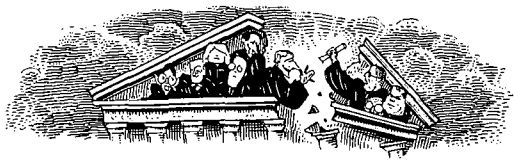

by Terry Eastland

They Went Piscataway

A flip-flop that backfired on the Clinton administration.

On January 21, the Supreme Court asked Solicitor General Walter Dellinger to express the government's views on whether it should review the decision by the U.S. Court of Appeals for the Third Circuit in *Piscataway Board of Education* v. *Taxman*. And just like that, the explosive, racially tinged case that many administration staffers hoped had gone away came back to life.

In 1989, a local New Jersey board of education, adjusting to a decline in enrollment, decided to lay off one of the ten teachers in Piscataway High's business education department. The board narrowed its choice to two equally qualified teachers with the same seniority—Barbara Taxman, who is white, and Debra Williams, who is black. The board wanted to retain Williams, because otherwise no black teachers would be in the business-education unit; thus it invoked its affirmative-action plan. In cases of "equal qualification," the plan authorized the board to pick the person "meeting the criteria of the affirmative action program"—i.e., being black, Hispanic, Asian-American, or Native-American. The board kept Williams and let Taxman go.

But Taxman complained to the Equal Employment Opportunity Commission (EEOC), charging discrimination in violation of Title VII of the Civil Rights Act of 1964. In due course, the civil rights division of the Justice Department (under George Bush) sued the school board. The Clinton Justice Department continued the case, prevailing in the trial court in early 1994. But when the board appealed the ruling to the Third Circuit that summer, the civil rights division, now led by Deval Patrick, suddenly withdrew as a party from the case. Not only did it abandon Taxman, but it asked to re-enter the case as a friend of the court—on behalf of the board. In doing so, Patrick advanced a view of Title VII that would significantly expand the legal basis for preferential affirmative action.

Patrick's switch was controversial even within the administration. As Jeffrey Rosen of the *New Republic* reported, Dellinger—then the head of the Office of Legal Counsel and now the one who must brief the Court on whether it should take the case—disagreed with Patrick. So did a few White House officials. As one former Clinton aide recently told me, "It was one thing to mend affirmative action, but quite another thing to extend it." Outside the administration, Patrick's critics included Democrats like Martin Peretz, editor-in-chief of the *New Republic*, and Albert Shanker, the late head of the American Federation of Teachers. More than a few critics noted that, in switching sides, the administration's lawyers would wind up opposing a client they had earlier represented in the same matter—an ethical no-no in most cases. Shortly before the mid-term elections, George Stephanopoulos acknowledged to a group of reporters that Patrick's handling of *Taxman* was not, all in all, one of the administration's greatest moments.

No doubt Stephanopoulos was relieved that *Taxman* did not make news again until the fall of 1995, when the Third Circuit declined to let Justice re-enter the case. The court gave no reasons for its decision, but it is not implausible to think that the irregularity and unfairness (and, indeed, effrontery) that marked Patrick's maneuver was simply too much for the judges to bear, notwithstanding that they would normally want to know the views of the United States in a Title VII case. Indeed, one judge—a Clinton appointee—later remarked that the department's flip-flop in the case was "somewhat unseemly."

In August 1996, the Third Circuit affirmed the district court's judgment by an 8-4 vote, meaning Barbara Taxman won again. Last fall, when the school board asked the Supreme Court to take its case, the solicitor general did not file a brief urging the Court to do so. Though unremarked in the press, the administration's absence was notable, inasmuch as the Clinton Justice Department had previously filed briefs urging the Court to take other high-profile cases in which the lower courts had ruled against preferential treatment. It appeared that the administration was content to let the Court decide quite on its own whether it should take the Piscataway case. No need to step back into that mud, not before the election.

Now the Court has invited the solicitor general to express the government's views, and he is likely to reply this spring. The Court isn't trying to embarrass the administration by forcing it to confront its sorry record in the case; the Court doesn't act that way. And the request is not unusual: Two or three dozen times a year, the Court asks the solicitor general for his views on whether to grant review in a case in which the government is not a party; the Court uses the solicitor almost as an extra, very senior law clerk.

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In any event, the request is entirely reasonable. The federal government (specifically the EEOC and the Justice Department) enforces Title VII upon public and private employers, and so it obviously has a strong interest in how the courts interpret the statute. The government's Title VII responsibility explains why, when people like Barbara Taxman have a justified complaint, it's often the government that sues to enforce the statute.

What will the Clinton Justice Department advise? As a broad matter, it would be very odd for the solicitor general to fail to state the government's view of the decision being appealed. In this particular case—given the department's past involvement—it would be astonishing. The question is whether the administration will stay the course Patrick (who left in January) began nearly three years ago.

Title VII, as written and originally understood, prohibits an employer from discriminating against anyone on the basis of race. In 1979 and 1987, the Supreme Court wrote this prohibition out of the law by permitting racial preferences. In doing so, however, the Court limited their use to instances in which there was a "manifest imbalance" in "traditionally segregated job categories" and only when they did not "unnecessarily trammel" the rights of nonminorities. *Taxman*, however, is not a case about the use of racial preferences in these limited circumstances. The Piscataway school board did not justify its action in remedial terms—there was no history of the board's discriminating against blacks. Nor could it claim to be trying to overcome racial imbalance, for there was none; the percentage of blacks teaching in the high school exceeded that of blacks in the county. Instead the school board sought to justify Taxman's firing in terms of racial "diversity": It wanted a faculty that would reflect the racial composition of the community and the student population, even in a teaching unit as small as the high school's business education department.

At trial, the pre-Patrick civil rights division argued against this extension of the legal basis for preferential treatment, and Judge Mary Trump Barry agreed. In changing sides, Patrick's brief supported the school board's diversity argument, but took it a step further—"Diversity" doesn't necessarily favor one race over another, but must be viewed "in the circumstances": "Potentially, the same interest in faculty diversity could tip the balance in favor of a white teacher if the composition of a department would otherwise have included no white teacher." In other words, under Title VII, faculty diversity may justify the discriminatory lay-off of any teacher whenever there are too many of that teacher's race, whatever that might be.

Were it only Walter Dellinger's call, he probably would take a different view of Title VII, perhaps even the one the department advanced in the case before Patrick arrived. That would please New Democrats at the Democratic Leadership Council, which sharply criticized Patrick's handling of *Taxman* in a 1995 memo. But the call in this case (as well as all others) belongs to the president, and in this case the point is not merely theoretical. In 1994, the president signed off on what Patrick did and then publicly defended it. "As long as it runs both ways, or all ways," he told reporters, "I support that decision. That is, [if] there are other conditions in which...there were only one white teacher on the faculty in a certain area, and there were two teachers [who] were equally qualified, and the school board...decided to keep the white teacher also to preserve racial diversity." If the president does not change his mind—always possible—the Justice Department will file a brief disagreeing with the Third Circuit's judgment that "Title VII does [not allow] an employer to advance [racial diversity] through non-remedial discriminatory measures" and contending for the opposite—a Title VII that permits diversity-based discrimination.

While the administration's filing in *Taxman* is worth watching for, so is Clinton's choice to succeed Patrick. And so, for that matter, is the response of the Senate to that nominee. Congress passed the Civil Rights Act in the first place; it ought to take some interest in what the courts and the executive branch have done, and are trying to do, to that law. Whether Clinton nominates someone who essentially agrees with Patrick on Title VII should interest Senator Hatch, not to mention Senator Lieberman, the Senate's most prominent New Democrat.

by Grover G. Norquist

Welfare Kings

Bad news for corporate welfare—and Mary Landrieu.

The budget battle has Republicans and Democrats in a Mexican standoff: Clinton will veto serious tax reductions and entitlement reform, and the Republican Congress won't allow tax increases or new entitlements. The elections of 1998 and 2000 will determine whether Republicans gain the power to pass a flat tax, privatize Social Security, and zero out the Departments of Education, Commerce, and Energy. Kansas Republican Sen. Sam Brownback, for one, is confident the budget fights will favor the GOP over the next four years. Drawing an analogy to a python slowly crushing its prey, he predicts: "Every time they weaken, we will tighten our grip."

But Brownback also points to one way Republicans could speed up the process: by cutting corporate welfare spending. Taxpayer groups have identified some $50 billion in annual spending on government loans, loan guarantees, direct subsidies, research, and other favors to corporate special interests. The Overseas Private Investment Corporation (OPIC), for example, insures corporations investing abroad against expropriation. OPIC works like the FDIC program that allowed the Savings and Loan crisis, and while it's not OPIC's annual spending that inflates the budget, it's a fact that the American taxpayer is on the hook for some $9 billion in investment risk. If former Soviet republics begin grabbing OPIC-insured American investments, for example, guess who'll foot the bill. Other egregious programs include the Market Access Program, which spends tens of millions annually advertising American products overseas, and the Export Enhancement Program, whose subsidies permit U.S. exporters to sell agricultural products below cost—in fact, often below the price U.S. consumers are charged.

Corporate welfare is vulnerable now for the same reason Aid to Families With Dependent Children (AFDC) was vulnerable in the last Congress. Bill Clinton ran in 1992 promising to "end welfare as we know it." The American people took him at his word, and much as he initially resisted, he ultimately had no choice but to sign welfare reform into law along Republican lines if he wanted to be re-elected. The same dynamic is at work over corporate welfare. Clinton and his allies all claim to oppose it. (Indeed, in hoping to derail AFDC reform, they popularized the slogan: "Don't cut welfare for the poor, cut corporate welfare.")

But left to their own devices, Clinton and the Democrats won't end corporate welfare as we know it. After all, it proved invaluable in raising campaign funds from corporate America. The push for real corporate welfare reform will come from Republicans who find the practice both offensive to the free market and costly to taxpayers. Democratic mythology notwithstanding, Republicans will have plenty to offer business once corporate welfare is eliminated: tax cuts, less regulation, and tort reform.

Recall how eagerly Republicans, even though they are the party of farmers, voted to phase out agricultural subsidies last year. They knew it was the Democratic Party's left wing that historically benefited most from farm programs, which saw urban liberals voting for farm subsidies in exchange for the otherwise inexplicable support rural congressmen gave welfare entitlements, food stamps, and federal aid to big cities. The GOP will do the same to corporate welfare, as more light is shed on how scandalous Democratic fundraising politicized the Commerce and Energy departments to raise money from business.

There's one danger, congressional Republicans warn: Democrats will try to turn the effort to cut corporate welfare spending into an opportunity to raise taxes. Congressional profligates like Sen. Edward Kennedy have argued for years that, when the government fails to take a dollar from you, it has actually given you that dollar. Under their definition, the investment tax-credit is a "tax expenditure," i.e., a subsidy, when it is more akin to a tax cut. Oddly, the Democratic Leadership Council, which advertises itself as the voice of Democratic moderation, is a leading backer of raising taxes on businesses and individuals by reducing tax credits and preferences. Congressional Republicans will oppose such efforts to raise taxes under the guise of cutting corporate welfare spending. They'll be happy to do away with any tax-credit or preference that does not deserve to exist—the tax break given to ethanol, for example, thanks to the past campaign contributions of Archer Daniels Midland—but only in the context of real tax reform. Bill Archer, the jealous guardian of tax policy who chairs the House Ways and Means Committee, is committed to tax reform, and declares that any change in the tax code that does not lower total taxes will not get through his committee.

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