A Tale of Two Sections

Is aggressive enforcement of the Civil Rights Act’s Title VI by EPA the panacea for beleaguered communities who are disproportionately exposed to environmental harms and risks? Or is the problem with the statutory framework?

On April 17, 2012, the U.S. Environmental Protection Agency (EPA) issued for public comment a draft document, entitled “Advancing Environmental Justice Through Title VI.” The comment period ended on June 19. A notice of proposed rulemaking is due this fall. The draft is a supplement to the agency’s comprehensive multi-year environmental justice plan, known as Plan EJ 2014. The supplement sets forth the agency’s goals, milestones, strategies, and activities to ensure environmental justice through aggressive enforcement of the Civil Rights Act. This action by EPA raises two questions, posed above. The answers are “not yet—Title VI is no panacea” and “yes, the problem is with the statutory framework.”

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in all federally assisted programs. Section 601 sets forth the basic principle that federal funds cannot be used to subsidize discrimination. It enunciates the underlying national policy that controls the other provisions. Thus, Section 601 is considered the heart of Title VI. The soul of Title VI, however,
is Section 602, which provides the administrative framework upon which the implementation of Title VI is constructed, and hence the problem with using the Civil Rights Act to prevent discrimination in environmental effects.

Section 602 directs every federal agency providing financial assistance to issue rules, regulations, or orders to ensure nondiscrimination in state and local government programs. Congress vested the president with the authority to approve the necessary instruments to coordinate implementation of Title VI compliance and enforcement activities. Shortly after its enactment, a presidential task force, working in conjunction with the Department of Justice (DOJ), produced model enforcement regulations specifying that recipients of federal funds not use criteria or methods of administration which have the effect of subjecting individuals to discrimination. Federal departments and agencies subsequently issued regulations that prohibit disparate impacts or effects that constitute discrimination. This principle would prove central to enforcement of the title.

Section 602 provides that, after an investigation of a complaint, the federal government cannot take action until the department or agency has determined that compliance cannot be secured by voluntary means. Moreover, if the federal government wants to terminate assistance to a state or local government agency, the head of the federal department or agency must submit a written report to the House and Senate committees that have jurisdiction over the executive branch program or activity involved. And, the termination of funding does not become effective until 30 days have elapsed after the filing of the reports. In short, Congress established the framework of an enforcement process that allows the federal government to terminate, or to refuse to provide or to continue, financial assistance to state or local government agencies that fail to comply with the requirements of the act.

**Title VI Regulations**

On July 5, 1973, EPA issued its Title VI regulations, entitled “Non-discrimination in Programs or Activities Receiving Federal Assistance from EPA.” In 1984, the agency amended its regulations into its current form. EPA’s regulations include general and specific prohibitions against intentional and unintentional discrimination, central to the disparate impacts or effects standard. The agency, in consultation with DOJ, completed its reevaluation of its implementing regulations in June 2012. Critically, it may issue a notice of proposed rulemaking for public comment this fall to make any necessary changes.

Early on, Title VI became the favored tactic of environmental justice advocates since, theoretically, EPA’s implementation of the Civil Rights Act targets the discriminatory impacts or effects of decisions made by state or local governments. The agency’s regulations, as written, appeared to be able to provide relief to affected communities, since Title VI directly addresses the inequitable distribution of environmental harms and benefits. Title VI was considered a ray of hope, and, consequently, community-based environmental justice organizations demanded over the years that EPA aggressively enforce its regulations.

For a variety of reasons, however, the agency has not been able to effectively implement its regulations. In the 2009 case *Rosemere Neighborhood Association vs. U.S. EPA*, the Ninth Circuit Court of Appeals determined that the agency’s failure for more than a decade to process Title VI complaints in accordance with its regulations constituted “agency action unlawfully withheld pursuant to the Administrative Procedures Act.” The court noted that EPA “failed to process a single complaint from 2006 or 2007 in accordance with regulatory guidelines.”

EPA’s Office of Civil Rights (OCR) continues to have a considerable backlog of complaints. According to the regulations, OCR has to acknowledge receipt of a complaint within five days. OCR will then initiate its complaint processing procedures immediately and will review the complaint within 20 days and determine whether it will be accepted, rejected, or referred to the appropriate federal agency. If accepted, EPA will notify the state or local government agency of its preliminary findings within 180 days of the start of the complaint process.

After the *Rosemere* decision, EPA sought to follow its Title VI regulations and issued, for the first time, a disparate impacts or effects decision in the case known as *Angelita C., et.al. vs. California Department*...
of Pesticide Regulation. In that matter, on June 9, 1999, a complaint was filed with OCR on behalf of the children and the parents of children attending schools near locations where the agricultural fumigant methyl bromide was being applied. The complaint alleged that the California Department of Pesticide Regulation (CDPR) discriminated against Latino children by renewing the registration of methyl bromide in January 1999, without taking into consideration the health impacts that this pesticide would have on children that were attending schools within a 1.5-mile radius of the areas in which the chemical was applied. The complaint also alleged that greater amounts of methyl bromide were applied in areas surrounding schools with higher percentages of Latino schoolchildren in comparison to areas surrounding schools with lower percentages. OCR accepted the complaint on December 11, 2001. That same day, OCR notified CDPR of the acceptance.

In September 2002, EPA staff met with representatives of CDPR as part of its investigation. In an April 22, 2011, letter, OCR advised CDPR of its preliminary finding of a prima facie violation of Title VI as a result of the adverse disparate impact upon Latino schoolchildren from the application of methyl bromide between the years 1995–2001. OCR recommended further action, and invited CDPR to engage in confidential settlement discussions. On August 25, 2011, EPA announced that it had reached a settlement with CDPR, which agreed to install one new air monitor, maintain a number of existing air monitors for a period of two years, and conduct outreach to the Latino community.

The Latino community and its legal counsel, however, were not at all happy with the settlement, since it was reached without consultation, and, more importantly, provided no substantive remedy for the long-standing discrimination experienced by the beleaguered community. At an August 2011 environmental justice conference in Detroit convened by EPA entitled, One Community, One Environment, community activists and advocates demanded, among other things, that EPA Administrator Lisa Jackson rescind the Angelita C. settlement for those reasons.

It should be noted, however, that a Title VI administrative complaint is not a “case” or “controversy” within the meaning of Article III of the Constitution. The complainant has no standing, which is a constitutional touchstone for a plaintiff. In order to establish constitutional standing, in Lujan vs. Defenders of Wildlife, decided in 1992, the U.S. Supreme Court determined that a plaintiff must demonstrate three elements: injury in fact, a causal connection, and redressability. The dispute in a Title VI complaint is between the funding federal government agency (EPA in the Angelita C. case) and the grant recipient (CDPR). The Latino community complainants, therefore, are not parties to the action, and, in accordance with EPA regulations, the informal resolution of the dispute is between the actual parties only.

The question, however, is whether the statutory and regulatory structure allows EPA to address the long-standing environmental and public health concerns of communities similarly situated to the Latino community in the Angelita C. matter.

Statute Has Limitations
Strategies for using Title VI in environmental justice litigation have relied on filing administrative complaints involving the implementing regulations, rather than on bringing claims in federal court under the statute. For the sake of argument, let’s assume that EPA will become much more aggressive at investigating and resolving complaints in a timely manner in accordance with its Title VI regulations. As the preceding example shows, however, this does not mean that the complaints will be resolved to the satisfaction of the affected communities. The problem may not be only with OCR’s implementation of the regulations: instead, it may be with the statute itself. Since the statute and its implementing regulations do not contemplate the agency shutting down a pollution-generating facility, it would appear that the language and the thrust of Title VI may need to be changed. Title VI does offer a ray of hope, but it is somewhat limited in its reach.

Arguably, the problems with the statute are three-fold. First, the intentional discrimination standard is an impossibly high burden of evidentiary proof for affected communities. Second, the statutory framework does not allow for the long-standing concerns of community-based organizations regarding the systemic environmental and public health issues to
be addressed. And third, the lack of a private right of action for enforcing Section 602 is troublesome, since it forces community-based organizations to rely entirely on EPA's enforcement of its regulations.

With respect to the standard of proof, in *Guardians Ass'n vs. Civil Service Commission*, decided in 1983, a five-member majority of the Supreme Court held that Section 601 requires proof of intentional discrimination. The Court also held that Title VI permitted federal agencies to promulgate regulations that prohibit disparate impacts or effects discrimination, and that the promulgation of such regulations was properly within the scope of the statute. However, in *Alexander vs. Sandoval*, decided in 2001, writing for the majority, Justice Antonin Scalia expressed reservations regarding the assumption that disparate impacts or effects regulations are permissible. Justice Scalia said that there was considerable tension between the rule enunciated in *Guardians* as well as in *Regents of University of California vs. Bakke*, decided in 1978, that Section 601 prohibits only intentional discrimination but that regulations promulgated under Section 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permitted under Section 601.

It, therefore, follows, that since Section 601 forbids only intentional discrimination, Section 602 should not include a lesser standard of proof. Justice Scalia went on to state, however, that the Court assumed for the purposes of the *Sandoval* case that Section 602 allows federal agencies to promulgate regulations that prohibit disparate impacts or effects. Thus, in light of the majority of the Court's reservations about the assumptions regarding the disparate impacts/effects standard in Title VI regulations, it may be necessary for Congress to consider amending the act and incorporating the disparate impacts/effects standard language into a new version of Section 601. Otherwise, Congress risks the real possibility that more than 45 years of Title VI civil rights case law could be overturned if the legal question comes before the Supreme Court.

The present statutory framework does not allow for the long-standing concerns of community-based organizations regarding the systemic environmental and public health issues to be addressed. The environmental justice movement is based, first, on the general principle that the protection of human health from environmental harms and risks is exceedingly important, and, second, that minority and/or low-income communities disproportionately suffer the ill effects of pollution. Environmental justice activists believe that U.S. civil rights law mandates equal protection of all persons from environmental harms and risks, regardless of race, national origin, or economic status.

When Congress passed the act, it was the culmination of the growing and incessant demand of many people in this country that a nationwide offensive be launched by the federal government against racial discrimination. Congress, in its wisdom, set up an elaborate scheme to enforce the regulations in Section 602. As pointed out by the Supreme Court in *Sandoval*, it is the granting department or agency that is responsible for enforcing Title VI for its own programs and activities. Each department's or agency's regulations provide the enforcement mechanisms, such as the submission of assurances of compliance and compliance reports. Periodic compliance reviews are specifically required in agency and departmental regulations.

In addition, any individual may file a complaint, and agency regulations require a prompt response. If there has been a failure to comply with the regulations, whether determined through a compliance review or a complaint investigation, the recipient is informed and an informal resolution is attempted. If this cannot be accomplished, the federal assistance may be suspended or terminated, based upon an express finding of a failure to comply, after a full and fair opportunity to be heard. The agency head must file a report with the appropriate House and Senate committees. And, the termination of funding does not become effective until 30 days have elapsed after the filing of the reports.

The Title VI enforcement process is primarily about federal funding of a state or local government program and terminating that funding. It has nothing to do with the systemic environmental and public health concerns of community-based organizations. The Latino children in the *Angelita C.* matter continued to be exposed disproportionately to methyl bromide for more than a decade while the complaint languished in OCR. They had no recourse.
In *Sandoval*, the Supreme Court held that the federal agency’s Section 602 regulations prohibiting disparate impacts or effects do not create a right of action because Congress did not intend to create a private remedy to enforce regulations promulgated under the section. To fix this problem, Congress may need to consider amending Title VI and granting community-based organizations a private right of action to file suit against a state or local government for failing to comply with the act.

**Legislation Sought to Amend Title VI**

The lack of a private right of action for enforcing Section 602 is troublesome, since it forces community-based organizations to rely entirely on EPA’s enforcement of its regulations. In *Sandoval*, the Court decided that private individuals may sue to enforce Section 601 and obtain injunctive relief but private individuals cannot sue to enforce Section 602 and obtain injunctive relief and damages. Consequently, community-based environmental justice organizations have had to focus their energies and limited resources on filing administrative complaints with EPA instead of bringing Title VI claims in federal court. If Congress does not amend the act, community-based organizations will not be able to have their environmental and public health concerns addressed. Congress may need to create a free-standing private right of action to allow individuals to enforce regulations promulgated under Section 602.

In a June 2010 report, entitled “Now is the Time: Environmental Injustice in the U.S. and Recommendations for Eliminating Disparities,” the highly respected Lawyers’ Committee for Civil Rights Under Law recommended that the Obama administration seek legislation to amend Title VI to explicitly provide for a private right of action that would entitle communities to obtain injunctive relief upon a showing that the actions of a state or local government agency program constitute a substantial or significant factor in bringing about the adverse, disparate impacts/effects.

Congress has previously amended Title VI as a result of a Supreme Court decision with which it disagreed. As pointed out in *Sandoval*, there is the Civil Rights Restoration Act of 1987, where Congress expanded the term “program or activity” to cover larger portions of the state and local government agency receiving federal financial aid that the statute had previously covered. Congress amended the statute because it determined that the Court’s interpretation of that term was too narrow in *Grove City College vs. Bell*, decided in 1984.

Moreover, another reason for amending Title VI is that it is an anomaly under the Civil Rights Act. The report of the Lawyers’ Committee points out that both Title VII (employment) and Title VIII (housing) of the act have long-standing, well-established disparate impacts or effects causes of action available to private plaintiffs. And, that the same is true for newer civil rights statutes, such as the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990. *Sandoval* left environmental justice community-based organizations without a cause of action for disparate impacts or effects discrimination, and, thus, leaves these organizations without a remedy that is provided for in virtually every other antidiscrimination statutory scheme to address the systemic environmental and public health concerns that exist in many communities throughout this country.

A number of civil rights legal scholars believe that Congress should amend the act because its capacity to undermine discriminatory behavior and attitudes today is different from when it was enacted into law in 1964. They believe that Congress should amend Title VI as a result of the *Sandoval* decision. In the meantime, unless and until Congress acts, communities will continue to file administrative complaints, regardless of the limitations of the act. Indeed, Title VI is part of a process of enforcement, education, and implementation; it does not stand apart from the struggle by activists for environmental justice. Filing administrative complaints with EPA, while at the same time, seeking to amend and reform Title VI, are inextricably intertwined. Title VI is not only important for its ability to regulate the behavior of state and local government decision-makers, but also for the way an amended act could help address the long-standing environmental and public health concerns of beleaguered communities.