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ABSTRACT

In this address, the Assistant Attorney General of the Civil Rights Division, Department of Justice, reviews the Division's civil rights enforcement efforts, and discusses the Reagan Administration's position on racial quotas. To dispel the notion that the Administration is not committed to equal rights, the Assistant Attorney General describes current enforcement activities in the form of investigations and litigation concerning sex and race discrimination in employment, voting rights, school desegregation, and the rights of the incarcerated and institutionalized. Replying to criticisms of Administration policy against numerical goals and quotas to remedy past discrimination, Reynolds reaffirms the government's adherence to the principle of equality which, he says, is contradicted by the concept of affirmative action through preferential treatment. Reynolds points out that no matter how well meant, measures to redress the effects of past discrimination with further discrimination will ultimately limit opportunities for individuals of all racial groups, and will invite a view of people as possessors of racial characteristics rather than as unique individuals. Maintaining that the Administration stands by the principle that individual rights take primacy over rights bestowed on groups because of race or sex, Reynolds stresses that civil rights policy will continue to reject racial quotas. (MJL)

Department of Justice

REMARKS

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE NATIONAL CIVIL RIGHTS COMMITTEE
OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

10:00 A.M.
THURSDAY, JUNE 9, 1983
MARRIOTT HOTEL
WASHINGTON, D.C.

It is a pleasure for me to be here today. The Anti-Defamation League has a long and distinguished history of involvement in efforts to combat bigotry, end discrimination, and vindicate the principle of equality under law. Your invitation, Mr. Finger, to come and "set the record straight" is one that I readily accepted, for our record in the Civil Rights Division of the Justice Department is a strong one. It is a record of unswerving commitment to the eradication of unlawful discrimination and of vigorous enforcement of this Nation's civil rights laws -- and it deserves the widest circulation.

Regrettably, positive news from the Reagan Administration draws little press attention. Thus, reports we have issued on our enforcement record have received little or no coverage, while political rhetoric from virtually every other quarter grabs headlines without, it seems, so much as a rudimentary check of its accuracy. I start with this point not to belabor what is rather obvious to many, but to add the less obvious thought: the real loser in the politics of misinformation practiced by so many of our critics is the cause of civil rights itself to which we are all committed. A recent example is the irresponsible "hatchet job" done on the President's decision to nominate three new members to the Civil Rights Commission. There, so rigorous an assault has been launched on the replacement decision that the qualifications of the three

nominees -- all recognized champions of civil rights; all articulate spokesmen for individual liberty and equal justice; and all individuals known for their uncompromising independence and unyielding integrity -- have been obscured by the rather silly debate over whether an already "overpoliticized" Commission has, by the President's action, suddenly become "politicized." Once again, by ignoring the real issue and choosing instead to fan emotions with empty rhetoric, the cause of civil rights suffers.

Let me try, therefore, to return the discussion of these critically important social issues to the forum of responsible debate, first by sharing with you a quick overview of the enforcement activities of the Civil Rights Division during my tenure as Assistant Attorney General, and then by discussing one of the major policy changes we have made and why we made it.

As you know, the civil rights laws of this country cover a wide range of activities. In the area of employment discrimination, our responsibility is directed at the public sector -- that is, state and local governments. The Division is actively involved in over 100 such cases; we have filed 15 new employment lawsuits since January 20, 1981, including one against the Town of Cicero, Illinois, which, for the first time ever, combined claims of employment and housing discrimination in a single suit. Our litigation in this area challenges discrimination in all of its evil forms -- whether based on race, sex, religion or ethnic origin -- and reaches the full range of employment activities.

But for three cases -- those involving promotion quotas based on race in the New Orleans police and fire departments and in the Detroit police department, and layoff quotas based on race in Boston -- all of this enforcement activity fits the traditional mold and refutes unequivocally the charge that we have abandoned the fight for equal employment opportunity.

The work of our Voting Section similarly dispels any suggestion that we are not committed to equal rights in this area. We have reviewed thousands of proposed voting changes under the Voting Rights Act and refused approval of statewide redistricting efforts of virtually every covered jurisdiction because their proposed reapportionment plans had a dilutive effect on minority voting strength. In most instances, those jurisdictions submitted revised plans, redrawn to protect the voting rights of all citizens, and once we were satisfied that those plans adequately provided minorities full and equal access to the electoral process -- but only then -- they were approved.

In yet another area of our enforcement responsibility, the Division has obtained an unprecedented number of indictments and convictions in cases involving racially motivated acts of violence, including police brutality in New Orleans and Klan activity in Greensboro, North Carolina. We are little more than half through the four year term, and our prosecution record under the criminal

civil rights laws already exceeds that of any prior administration in the history of the Justice Department.

Our school desegregation efforts are also impressive. While much is made of the fact that only two new "case filings" have been authorized to date, no mention is made that this measurement essentially matches the prior administration at a comparable period in its tenure. Nor is it noted that a great many offending school districts are already under court order or are currently in litigation and thus demand considerable time and attention of Division attorneys. Moreover, because de jure segregation in our public schools is not nearly so pronounced, nor so obvious, as in the decades of the '60s and '70s, our investigations must seek to uncover the subtle, as well as the not-so-subtle, violations. We are currently pursuing eight separate investigations in this area. In addition, we have more than 50 school cases in which we are litigating directly or monitoring compliance with outstanding decrees. And the relief we seek no longer relies on the discredited remedy of mandatory student transportation, but instead emphasizes magnet schools and enhanced curriculum programs that promise stable and meaningful desegregation in an improved environment of quality education.

We are also relentlessly challenging unconstitutional conditions in prisons, jails, and institutions for mentally ill and mentally retarded persons from Connecticut to Hawaii and from

Puerto Rico to Michigan. Twenty-five investigations under the Civil Rights of Institutionalized Persons Act have been commenced since this Administration took office.

That, in outline form, is the true state of affairs in the Civil Rights Division. There are some 185 Division lawyers dedicated to the cause of civil rights. They are no less intent today in their commitment to uphold the laws in this area than they were four years ago, and they work for an Assistant Attorney General who yields to no one in his resolve to fight discrimination based on race, sex, religion, ethnic origin and handicap condition. Our strong -- and, in many respects, unprecedented -- record of civil rights enforcement likewise reflects the deeply held conviction of President Reagan, Attorney General Smith, and those of us who serve them in the Department of Justice, that the privileges, rights and opportunities which this Nation bestows on its citizens should not be limited or in any way defined on the basis of immutable characteristics such as race, national origin or gender. We have carried that firm conviction into action, and have the results to prove it.

There are, of course, those who question our commitment, who charge that we seek to "turn back the clock" by opposing numerical goals, quotas and set-asides which, our critics argue, are needed to cure the lingering effects of past discrimination. We have a proud record of civil rights enforcement to refute the general charge. Nonetheless, as Nathan Perlmutter correctly noted recently, unquestioned allegiance to forced busing and racial

quotas has become in some quarters a kind of contemporary "loyalty oath to determine one's fealty to civil rights." 1/ Let me, therefore, turn to the quota issue and tackle it head-on. While the focus of my remarks will be on race discrimination, since that seems today to be the predominant context of the discussion, the points I will make apply with equal force to discrimination on account of sex, ethnic origin and religion as well.

That this Administration opposes preferential treatment based solely on race -- for whatever purpose -- is by now well established. We apologize to no one for our adherence to that fundamental principle. The Constitution guarantees equal treatment under the law, and any compromise of that ideal delays the day when we can truly promise our children a society of racial harmony and equal opportunity.

The national debate over the merits and demerits of race-conscious "affirmative action" has been joined, and we all will be the better for the vigorous and robust exchange. The issues involved are not transient ones. They are issues not of the day, but of the age. And they must be understood in that context. Throughout history, mankind has struggled to overcome the preoccupation with skin color and ethnic origin -- to look instead at each person individually to determine the true measure of his or her worth. The clash between the fundamental principle of

1/ New York Times, June 5, 1983.

racial equality and the wholly antithetical notion that one can, and indeed should, be judged according to his or her race, is a historic and continuing one.

This struggle against the inhumanity of racism has been waged countless times in countless places. We have seen it in the shackles of slavery -- families torn apart and taken to distant shores and hopeless lives of servitude. We have seen it in the death camps of Auschwitz, Dachau and others. And, we see it today. Contemporary racism, though often expressed in subtler forms of discrimination, has the same stifling, choking effect on the creative spirit of its victims.

The principle declared by the Founding Fathers to be self-evident -- that all men are created equal -- has been shown by the pages of history to be anything but self-evident. Indeed, this country will forever be haunted by the fact that the very document which declared this self-evident principle was defied for nearly a century while slavery continued as a way of life. Since then, we have been engaged in America in a long struggle to rid our government and our society of the cancer of racism and discrimination. That effort began in earnest in the wake of the Civil War, with ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. Those amendments, of course, prohibited involuntary servitude, guaranteed equal protection under the law to all citizens, and safeguarded the

right to vote against racial discrimination. Official classifications based on race were no longer to be permitted -- or so it was thought by those who framed the Civil Rights Amendments.

But just a few years later, the Supreme Court ruled otherwise, holding in Plessy v. Ferguson, 163 U.S. 537 (1896), that distinctions based solely on color were not impermissible. Alone in dissent, the elder Justice Harlan decried the decision, insisting that the Civil Rights Amendments had "removed the race line from our governmental systems." Id. at 555. "Our Constitution is color-blind and neither knows nor tolerates classes among citizens . . .," he declared, adding: "The law regards man as man, and takes no account of his surroundings or of his color. . . ." Id. at 559.

Yet, under the view which prevailed in Plessy, the law did take color into account. Indeed, for more than a half-century the separate-but-equal doctrine remained the law of the land, and race was the basis upon which virtually every public benefit -- from attendance in public schools to the use of public restrooms -- was regulated by state and local governments. Not even the Federal Government refrained from racial classifications. Men and women serving their country in the armed forces were separated on the basis of their race throughout the period. And in 1944, the exclusion of U.S. citizens of Japanese ancestry from certain areas in California was upheld by the Supreme Court in Korematsu v. United States, 323 U.S. 214 (1944). This time it was Justice

Jackson in dissent who challenged the use of racial classifications, warning that once race is legitimized as a governmental decision-making criterion, it "lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need." Id. at 246.

It took another decade, however, before the Court overturned Plessy in its historic 1954 decision in Brown v. Board of Education, 349 U.S. 294 (1954). The assignment of school children according to race was unequivocally condemned by a unanimous Court, and the separate-but-equal doctrine was finally discredited in its entirety.

The Brown decision spurred a judicial and legislative drive to eliminate racial discrimination in virtually every aspect of American life. During the next decade, the Supreme Court repeatedly denounced racial distinctions as being, in Chief Justice Stone's words, "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Loving v. Virginia, 388 U.S. 1, 11 (1966), quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Nearly two centuries after the Declaration of Independence recognized the concept of equality as a "self-evident" truth, the principle was finally being written into law. In Congress, the elected representatives of the people enacted a series of important new laws designed to make equal opportunity a reality.

Those statutes -- the Civil Rights Acts of 1957, 1960 and 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 -- wrought far-reaching changes in American society. Artificial

barriers began to crumble, new opportunities emerged, and hope was restored for hundreds of thousands of Americans previously denied the chance to succeed merely because of race, sex or ethnic origin. Classification by race was denounced by those within government and without, but by none more passionately than Dr. Martin Luther King, Jr., who dreamed aloud in the summer of 1963 of a Nation in which his children would "not be judged by the color of their skin, but by the content of their character." It was a dream that an increasing number of Americans of all racial and ethnic groups came to share. Out of the turmoil, bitter debate and strife of the 1950's and 1960's had emerged a broad recognition -- a consensus -- that official colorblindness and equal opportunity were moral imperatives that could no longer be denied.

None were more firmly committed to the principle of colorblindness than the leaders of the civil rights movement, who had for so many years marched courageously under that banner in bold defiance of those bent on ordering society according to the color of a person's skin. Preferential treatment based on race was, to them, intolerable, regardless of the purpose. Roy Wilkins, while he was Executive Director of the NAACP, stated the position unabashedly during congressional consideration of the 1964 civil rights laws. "Our association has never been in favor of a quota system," he testified. "We believe the quota system is unfair whether it is used for [blacks] or against [blacks] . . . [W]e feel people ought to be hired because of their ability, irrespective of

their color. . . . We want equality, equality of opportunity and employment on the basis of ability."

In the decade of the 1970's, however, that resolve began to give ground to a new demand. Instead of race neutrality, "racial balance" and "racial preference" were increasingly advanced as necessary means of overcoming racial discrimination. The quest for equal opportunity evolved, in many quarters, into an insistence upon equality of results. And the constitutional ideal of color-blindness -- so recently rescued from the separate-but-equal era and so ardently defended during the civil rights advances of the 1950's and 1960's -- was itself again under attack.

Those in the forefront of this movement embrace numerical parity, or at least numerical proportionality, as the test of nondiscrimination. Regulation and allocation by race, they now maintain, are not wrong per se. Rather, their validity depends upon who is being regulated, on what is being allocated and on the purpose of the arrangement. If a racial preference will achieve the desired statistical result, its discriminatory feature can be tolerated, we are told, as an unfortunate but necessary consequence of remedying the effects of past discrimination.

Apparently, solace is to be taken in the promise that the disadvantage to those who are not members of the preferred racial class will be only temporary. Once the effects of past discrimination are eliminated, we are assured that society can again turn to equal opportunity as its guiding principle.

The unanswered question, of course, is "how temporary is temporary?" We are told that our tolerance of race preferences need last only until the effects of past discrimination are removed. But, how are we to know when that day arrives? And, by what mystical process are we then to convert to a policy of race neutrality? Can it realistically be maintained that either numerical parity or proportional representation is any measure of success?

In an environment totally free from unlawful discrimination, participation in any given endeavor will inevitably be the product of individual interest, industry, talent and merit. As Morris Abram observed in testifying before the Senate Subcommittee on the Constitution, job applicants simply "do not come proportionately qualified by race, gender and ethnic origin in accordance with U.S. population statistics." Nor do the career interests of individuals break down proportionately among racial groups. Indeed, is there any human endeavor, since the beginning of time, that has attracted persons sharing a common physical characteristic in numbers proportional to the representation of such persons in the community?

What sense, then, does it make to seek to redress "the effects of past discrimination" in such a fashion? We live in a pluralistic society in which numerous groups compete for the limited economic and educational resources available. To prefer one over another "temporarily" in order to achieve racial proportionality requires a similar allocation to every other

discrete racial, ethnic or religious group that can sustain a claim of underrepresentation. Are we really prepared to assign Government the role of dispenser of life's benefits, giving here, taking away there -- all without regard to individual merit -- until, presumably, all preferred classes are in equipoise? And, if so, does there realistically ever come a time when the guiding hand that somehow strikes the perfect balance can be removed and we return again to the ideal of equal opportunity? I fear not.

It is, therefore, for me, far more faithful to the objective of eliminating the effects of past discrimination to emphasize individual relief and nondiscrimination rather than group representation and further discrimination. Can it reasonably be maintained that those who were subjected in the past to the indignity of prejudgment based on their race are benefitted today by a remedy which ensures that their children and grandchildren will continue to be prejudged and allocated opportunity based on race? Does the person selected by reason of a racial classification suffer any less indignity than the person excluded? Let me quote from the ADL's brief in Bakke by way of response:

> A racial quota cannot be benign. It must always be malignant, malignant because it defies the constitutional pronouncement of equal protection of the laws; malignant because it reduces individuals to a single attribute, skin color, and is the very antithesis of equal opportunity; malignant because it

> is destructive of the democratic society which requires that in the eyes of the law every person shall count as one, none for more, none for less. [at p. 19].

The point has been made by many others equally committed to the cause of equal justice for all Americans. As Professor Alexander Bickel declared in his classic book, The Morality of Consent: "The history of the racial quota is a history of subjugation, not beneficence . . . . [T]he quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant" [at p. 133]. Justice William O. Douglas put the principle in its proper constitutional perspective with these words: "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized . . . ." 2/

That, of course, is precisely what quotas do: they erect artificial barriers that let some in and keep others out, not on the basis of ability, but on the basis of the most irrelevant of characteristics -- race. Inevitably, quotas imposed for even the best of reasons serve to limit opportunity for members of all racial groups, including minorities. As Professor Bickel pointed out in the ADL's brief in DeFunis v. Odegaard, 416 U.S. 312 (1974), a case very similar to Bakke:

2/ DeFunis v. Odegaard, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting).

> [A] quota is a two-edged instrument. It cannot help but be, regardless of the motive of its user. The aims of the policy in this case. . . were the achievement of a racially balanced student body, and the alleviation of a shortage of minority attorneys, which can certainly be read as meaning the achievement of a racially balanced profession. But dissimilar purposes were cited, in equally good faith, no doubt, by President A. Lawrence Lowell of Harvard and others in the 1920's, when a number of private universities sought to impose quotas -- restrictive ones, to be sure -- on the admission of Jewish students.
>
> Of course, the aims were different then . . . . But balance and representation -- concepts that abandon the criterion of merit -- cannot avoid restriction as well as recruitment, so long as the number of spaces to be filled is limited. [at 23-24].

In the broadest sense, color-conscious measures pose the greatest threat to members of minority groups because it is they who are, by definition, outnumbered. In the individual sense, members of all racial groups suffer, because an individual's energy, ability, enthusiasm, imagination and effort can take him no farther than permitted by his group's allotment or quota. What began as a pursuit of equality of opportunity is thus in danger of becoming a forfeiture of opportunity in absolute terms: individual opportunity is being diminished in order to achieve group equality, measured in terms of proportional representation and proportional results. Yet, as Justice Powell has stated, "[n]othing in the Constitution supports the notion that individuals may be

asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups." 3/

The more insistent Government is on the use of racial preferences -- whether in the form of quotas, goals or any other numerical device -- to correct what is perceived as an "imbalance" in our schools, our neighborhoods, our work places, or our elected bodies, the more racially polarized society becomes. Such a selection process encourages us to stereotype our fellow human beings -- to view their advancements, not as hard-won achievements, but as conferred benefits. It invites us to look upon people as possessors of racial characteristics, not as the unique individuals they are. It submerges the vitality of personality under the deadening prejudgments of race. The very purpose intended to be served is defeated, for race-based preferences cut against the grain of equal opportunity. And, while we are told repeatedly that this is temporarily necessary in the interest of achieving "equal results," let us not forget that it was the same justification (i.e., achieving "equal results") that sustained for over half a century the separate-but-equal doctrine -- which likewise looked to membership in a particular racial group as an accepted basis for according individuals different treatment.

That sobering thought provides a ready answer to those who argue that we must use race "to get beyond racism." 4/ History

3/ University of California Regents v. Bakke, 438 U.S. 265, 298 (1978) (Opinion of Powell, J.).

4/ University of California Regents v. Bakke, 438 U.S. 265, 407 (1978) (Opinion of Blackmun, J.).

teaches all too well that such an approach does not work. It is wrong -- morally wrong -- when operated by government to bestow advantages on whites at the expense of innocent blacks; it assumes no greater claim of morality if "the tables are turned." More discrimination is simply not the way to end discrimination. We are all -- each of us -- a minority in this country: a minority of one. Our rights derive from the uniquely American belief in the primacy of the individual. And in no instance should an individual's rights rise any higher or fall any lower than the rights of others because of race, gender or ethnic origin. Whatever group membership one inherits, it carries with it no entitlement to preferential treatment over those not similarly endowed with the same immutable characteristics. Any compromise of this principle is discrimination, plain and simple, and such behavior is no more tolerable when employed remedially, in the name of "affirmative action," to bestow a gratuitous advantage on members of a particular group, than when it is divorced from such beneficence and for the most invidious of reasons works to one's disadvantage.

The policy of this Administration is firmly grounded on this principle. Where unlawful discrimination exists, the civil rights laws are being enforced to their maximum extent, both to bring such behavior to an abrupt halt and to ensure that every person harmed by such conduct is made whole. Every worker who was not hired or promoted because of race will be restored to his or her rightful place. Every child whose educational opportunity has been

compromised because of race will have that opportunity restored. But we will continue to challenge -- just as quickly and just as forcefully -- the remedies of overreaction. Racial quotas in the workforce or the school room will not be sought, nor will they be accepted.

At the same time, we fully recognize the significant benefits our citizens obtain from attending a culturally diverse school and laboring in a multi-racial workforce. Our country has always stood for diversity. Pluralism has been our proud boast. But that diversity flourishes only in a society that permits no legal prejudice and affords individual citizens the chance to realize their own destinies with neither the restraint nor the assistance of racial discrimination.

Professor William Van Alstyne put it best, I think, in his Chicago Law Review article, "Rites of Passage: Race, the Supreme Court, and the Constitution" (46 Chi. L. Rev. 775):

> . . .one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life -- or in the life or practices of one's government -- the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Thank you.