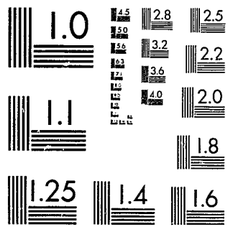

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Department of Justice

REMARKS

OF

THE HONORABLE WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE THE

1983 MID-WINTER MEETING
AMERICAN BAR ASSOCIATION
EQUAL EMPLOYMENT LAW COMMITTEE

COLONY BEACH & TENNIS RESORT
LONGBOAT KEY, FLORIDA

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REPORT FROM THE JUSTICE DEPARTMENT

I am pleased to have the opportunity to speak to you this morning. The report from the Justice Department at essentially the midpoint of the Reagan Administration's first term is a positive one in the area of equal employment opportunity. The legal positions taken have in many instances been surrounded by controversy, but they have yet to wilt under attack. Nor do we expect them to. A quick review of our Title VII enforcement activities at the Department will help explain the basis for this confidence. Let me preface my remarks by noting at the outset that I will speak here principally in the context of equal opportunity for all races, but my comments apply as readily to equal treatment of the sexes in employment matters.

It is by now no great revelation that a fixed and guiding principle of this Administration is that race is an impermissible basis on which to allocate resources or penalties. Our mission at the Justice Department -- indeed our statutory and constitutional duty -- is to pursue relentlessly the eradication of racial discrimination in all of its forms in this country -- the subtle as well as the not so subtle. The ideal of equal justice under law compels the elimination of race-consciousness as a standard of evaluation. Each individual in society deserves to be judged on his or her talents alone, without regard to skin color, and no person who is innocent of wrongdoing should be made to suffer the sting of rejection solely because of another's race -- whether white or black. These are the principles on

which the Constitution and federal laws in this country are founded, and we are dutybound to apply them accordingly.

The Justice Department's commitment to the principle of equal opportunity has not wavered since the early days of this Administration. Attorney General Smith left no doubt about our position in his May, 1981, speech to the American Law Institute, when he stated: "[I]n a just society, government must not require either racial balance or racial separation -- and government must not guarantee any individual a result based upon his or her race."

That has been the central theme of our Title VII enforcement activities. As you know, the Department's principal responsibility in this area concerns public employment, that is, state and local employers. When I first assumed my position as Assistant Attorney General, there were a sizeable number of public employment cases already in process at the Division, either in an investigatory stage or in actual litigation. The approach taken in pursuit of liability in those matters has continued, without interruption -- and on precisely the same terms as urged by my predecessors.

Thus, contrary to media suggestions, no policy shift has occurred in our attitude toward "class action" litigation -- more accurately described as "pattern or practice" suits. We have commenced and have continued such actions in the same manner as before, and we have recovered large amounts of money on behalf of all identifiable victims of the unlawful discriminatory practices.

The back pay award of $2,750,000 obtained by the Civil Rights Division against Fairfax County, Virginia, last year on behalf of 685 victims of discrimination was the largest Title VII recovery -- both in terms of the number of dollars involved and the number of individual beneficiaries -- in the history of the Department. We secured a back pay award of $1,300,000 in a separate employment discrimination case involving the Nassau County police department in Long Island, New York. There are other similar examples I could point to.

Another popular misconception that should be laid to rest is that we have abandoned statistical analyses in determining liability. That is simply not the case. The Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1970), and its progeny set a clear course to be followed in establishing a Title VII violation. We take those decisions as we find them and apply the law in each case in accordance with outstanding Supreme Court precedents. Both disparate treatment and disparate impact analyses are used in our litigation efforts, and statistical evaluations are a regular part of our investigations and trial preparation.

From this it follows -- again contrary to some reports -- that we look for discriminatory effects in the employment field no less than for discriminatory intent. Where a disparate impact on minorities can be shown as a result of an employer's hiring and promotion practices, the burden in our cases -- as in those involving private employment -- shifts to the employer to demonstrate that the adverse effects are job related or based on

validated selection criteria. The Department's litigation strategy in this regard has undergone no change.

Nor does our enforcement record over the past two years signal otherwise. The Division has been actively involved in over 100 employment discrimination lawsuits, including a number of outstanding decrees that we are actively monitoring; 13 new cases have been filed; 20 of our cases have been resolved by consent decrees. There are, moreover, currently 23 ongoing investigations of employment discrimination involving 36 state or local governments. Whether measured against a comparable period in prior administrations, or simply assessed on its own terms, the record is an impressive testament to the Department's overarching commitment to equal employment opportunity.

The relief we seek in these cases also speaks eloquently to that commitment. As in the past, the Department insists in every case that the prior discrimination be enjoined and that the employer engage only in nondiscriminatory race- and sex-neutral hiring and promotion practices in the future. In addition, as in the past, we seek as an element of Title VII relief the affirmative remedies of backpay, retroactive seniority, reinstatement, and hiring and promotion priorities, for all individual victims of discrimination in order to restore them to their "rightful place" -- that is, to the position they would have attained but for the discrimination. Moreover, this "rightful place" relief is, in our view, available not only to those applicants turned away on account of race, but also to those qualified individuals shown to

have been discouraged from ever applying for employment because of their knowledge of the employer's unlawful discrimination.

Finally, employers who have offended the nondiscrimination command of the 1964 Civil Rights Act are, under our decrees, required to make special efforts to recruit minority workers from those communities that had been ignored in the past, and to file periodic reports on the recruitment efforts. Such relief is, as it must be, tailored to fit the violation, since in virtually every instance of unlawful employment discrimination, the employer's search for new employees has been confined -- geographically and otherwise -- in a manner that produces few minority applicants. Such comprehensive outreach programs are designed to break that stranglehold, and force employers to make known to the entire relevant labor market that employment opportunities are available to all qualified persons.

In a recent opinion approving a Justice Department consent decree providing for the above relief, a federal district court had this to say:

> The . . . Consent Decree retains the requirement that the [employer] seek out and recompense those who may have been the victims of past sex and race discrimination. It also requires, quite properly, that the [employer] intensify its recruitment of females and blacks in view of their historical exclusion from many areas of . . . work. But the decree makes clear, in obedience to statute and the Constitution, that employment decisions must not be based on race and sex.
>
> Whoever gets ahead in the [employer's workforce] under this decree can rest assured that he or she, black or white, earned it on merit.

How effective have these "affirmative action" recruitment requirements been? We now have a few preliminary results based on some of the decrees entered during the Administration's first year in office. In those decrees, the Department and the employer undertook to assess generally the likely applicant flow that might be expected in response to a vigorous recruitment effort. These projections -- expressed in terms of recruitment goals, or the likely percentage of qualified minority applicants who would be in the available pool of those eligible for hire on a nondiscriminatory basis -- have for the most part been exceeded under our decrees. Thus, "affirmative action" recruitment requirements -- when conscientiously implemented -- have produced greater numbers of qualified minorities applying for employment. And, as would be expected, a nondiscriminatory hiring process brings more of those minorities into the workforce.

There is, under this approach, no resort to hiring quotas or numerical goals. We are finding that, with that so-called "affirmative action" feature removed, the employer no longer has a convenient ceiling to hide under. He now cannot, under our approach, hire a set number of black employees (without regard to their qualifications) in order "to get the government off his back;" and then ignore other minority prospects who, by all objective criteria, fully deserve employment.

That is, of course, the practical side of the argument for abandoning the use of hiring and promotion quotas or other

statistical formulae. There are, as well, compelling moral and legal reasons.

The legal arguments have recently been spelled out in briefs filed by the Justice Department in two pending cases -- the Boston Firefighters and Police case in the Supreme Court of the United States and, the New Orleans Police case in the Fifth Circuit Court of Appeals. Read together, those filings state unequivocally our view that court-ordered or court-sanctioned racial preferences for nonvictims of discrimination, whether in the guise of quotas or otherwise, (1) exceed the permissible limits of judicial remedial authority under Title VII, and (2) tread unfairly on the interests of innocent non-preferred employees in violation of the equal protection guaranties of the Constitution.

In the Boston Firefighters and Police case, findings of discrimination were made against Boston's police department in 1971 and against its fire department in 1974. Courts ordered both the fire and police departments to hire minorities on a racially preferential basis until a certain racial balance was achieved. Under these quota plans, the percentage of minorities did increase. In 1981, both Departments faced a budget crisis and the need to layoff employees. The Court of Appeals for the First Circuit affirmed a district court order that these layoffs be made in such a fashion as to preserve then existing racial balance in each department, in derogation of State law requiring layoffs to be made in order of reverse seniority. As a consequence,

some white police officers with as many as 10 years on the job were laid off in favor of minority officers with less than 2 years on the job. Most of the preferred minority officers were not, themselves, victims of the employer's discrimination.

In its Supreme Court brief, the Justice Department takes the position that Section 706(g) of Title VII does not tolerate remedial action by courts that would grant to nonvictims of discrimination -- at the expense of wholly innocent employees or potential employees -- an employment preference based solely on the fact that they are members of a particular race. We arrived at this position only after the most meticulous review of the statute and its legislative history, as well as a careful study of Supreme Court precedents. That legal analysis argues overwhelmingly for the proposition that Congress intended Title VII to have evenhanded application as to all individuals in, or seeking entry to, the workforce. Preferential treatment based on race was the very practice that Congress sought to condemn by the statute, and quota relief as a possible judicial remedy was explicitly rejected by the chief sponsors of the 1964 legislation. Moreover, the history of the 1972 amendments to the Act provide no support for overturning that original legislative intent. Thus, we believe that a court is simply not at liberty, in the interest of maintaining racial balance, to grant preferential treatment to one group of employees based solely on race; to do

so would ride roughshod over legitimate seniority rights of another group of wholly innocent employees.

In the New Orleans Police case, the complaint was filed in 1973 by thirteen named black police officers, and by applicants for appointment as police officers, in the New Orleans Police Department (NOPD). Plaintiffs alleged that the City of New Orleans and various other government defendants had engaged in racially discriminatory employment practices in violation of, inter alia, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. Before commencement of trial, the parties submitted for the District Court's approval a consent decree governing "virtually every phase of an officer's employment by the NOPD." 543 F. Supp. at 668. The proposed consent decree included a provision requiring the promotion of one black officer for every white officer until blacks constituted 50% of the sworn officers in all ranks of the NOPD.

Objections to the decree, particularly the one-to-one promotion quota, were filed by classes of female officers, Hispanic officers, and white officers, which had been permitted to intervene for the limited purpose of challenging the decree. The district court approved the decree's extensive provisions pertaining to recruiting, hiring, training, and testing, but refused to approve the proposed one-to-one quota. A divided panel of the Court of Appeals for the Fifth Circuit reversed, holding that the district

court had abused its discretion in refusing to approve the proposed promotion quota.

In challenging that panel decision, the Department reiterated its position in Boston regarding the limits on judicial remedial authority imposed by Section 706(g). A one-for-one quota promotion that works to the advantage of one group -- not as victims of the original discriminatory practices but solely as members of a particular race -- while so obviously disadvantaging other groups of innocent employees on account of their sex or skin color, fails under any cons ruction of the statute's remedial provision. It is neither desig ned to "make whole" individual victims of discrimination nor calculated to advance "equitable" remedial objectives. Indeed, its principal feature is remarkably "inequitable." And, as developed in our New Orleans brief, where such race-conscious inequities are fashioned or approved by the government, including the Judiciary, equal protection guarantees of the United States Constitution are offended.

Nor should the moral imperatives of this position be lost in a discussion of legal principles. Racial discrimination, based as it is on a personal characteristic that is both immutable and irrelevant to employment decisions, is offensive regardless of which race is victimized. It is no answer to the victim of reverse discrimination to say that quotas lack the invidious character -- the stigmatizing effect -- of discrimination against minorities. The consequences of racial discrimination are as

real and as unjust no matter who is being victimized. As one Supreme Court Justice had put it: "no discrimination based on race is benign, . . . no action disadvantaging a person because of his color is affirmative."

Proponents of racial preferences maintain that regulation and allocation by race are not wrong per se, rather, they depend for validity upon who is being regulated, on what is being allocated, and on the purpose of the arrangement. Thus, regulation by race has been promoted as an unfortunate but necessary means of achieving a truly race-neutral society. Race must be considered, so the argument goes, "[i]n order to get beyond racism." 1/

With characteristic eloquence, Professor Alexander Bickel exposed the fundamental flaw in this argument, remarking:

> The lesson of the great decisions of Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal; immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. . . . Having found support in the Constitution for equality, [proponents of racial preferences] now claim support for inequality under the same Constitution. 2/

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

2/ A. Bickel, The Morality of Consent, 133 (1975).

And, sadly, by taking such a stand, those who cling to race-consciousness as the necessary means to a race-neutral society, disserve the very dream that they claim to hold dear. For, a decade of experience with such "affirmative action" relief has taught but one lesson. To use again the words of Professor Bickel: "The history of the racial quota is a history of subjugation, not beneficence. . . . [The] 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." Id.

Let me expand on that point. The quota issue is not, as some would have it, a matter of pitting blacks against whites. That is a false dividing line. Quotas divide the individuals in the preferred group -- whichever group it is -- from the individuals in all of the non-preferred groups. In point of fact the use of race in the distribution of limited economic and educational resources in the past decade has led to the creation of a kind of racial spoils system in America, fostering competition not only among individual members of contending groups, but among the groups themselves. As noted commentator George Will aptly put it, this sort of allocation of opportunity has operated "to divide the majestic national river into little racial and ethnic creeks," making the United States "less a Nation than an angry menagerie of factions scrambling for preference . . . ."

How does one in fairness resolve such controversies? In the New Orleans Police case, for example, separate groups of Hispanic and women police officers intervened in the case for the purpose of objecting to the promotion quota, joining a separate group of objecting white officers. Is the proper solution to carve out pieces of the promotional pie for additional groups in this case and, if so, where does it end? Or, is the proper solution a race- and sex-neutral policy based on nondiscriminatory criteria? And, in the Boston Firefighters and Police case, what does one say to a ten-year veteran of the Boston police force, who engaged in no wrong, but who is laid-off solely on the basis of his race in favor of a two-year member of the police force, especially when the latter had not been victimized by their employer's discrimination? What larger principle does one deploy to explain to the ten-year veteran officer that "simple justice" has been served in his case?

There is, I submit, but one way out of this dilemma. It is the way shown by our Constitution, which tolerates no distinctions, nor permits any preferences, based on race. It is the way charted by Congress when it legislated against discrimination in the Civil Rights Act of 1964, including Title VII. 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 an individual's rights rise no higher nor fall any lower than the rights of others because of race.

Preferential treatment due to race or sex -- whether it serves to get an individual hired, promoted, or terminated -- cuts against the grain of equal opportunity. That uniquely American ideal has no greater tolerance for discrimination that favors minorities or women than it does for discriminatory behavior that works to their disadvantage. Whichever way the windmill tilts, no quota system that rests on color or gender distinctions adds up to fairness, no goal demanding racial or sexual preferences is worthy of attainment.

It is on these terms that we at the Justice Department have shaped our Title VII enforcement activities over the past two years, and it is on these terms that we will proceed in the months ahead. The results to date have been encouraging. There is, I think, a far greater appreciation of the strengths -- both legal and moral -- in our position as a result of the public debate that has been generated around the "affirmative action" issue. Courts are beginning to look more carefully at the questions raised. And, it is becoming increasingly apparent to the citizens of this country, both black and white, that the Department's policies in this area are driven not by any animus towards particular groups, as some editorialists have falsely suggested, but rather by an abiding fidelity to the overarching principle of fairness to <u>all</u> individuals, whatever their race, color, sex, or national origin.

Simply put, we believe in the ideal of <u>equal</u> employment opportunity. And that ideal requires that every person receive an equal opportunity for employment on the strength of his or her individual merit. Any compromise of that command, such as resort to racially preferential hirings, promotions or job terminations -- whether the motives be benign or pernicious -- cannot fairly be described as "affirmative."

Thank you.

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