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CIVIL RIGHTS ENFORCEMENT ACTIVITY OF THE DEPARTMENT OF JUSTICE*

Jack Greenberg**

I am, and have been since 1961, the Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF). I am here to testify at the request of this Subcommittee which has oversight responsibilities for the Civil Rights Division of the United States Department of Justice. I have been asked to give an historical overview of the role of the Department of Justice and the Civil Rights Division in the enforcement of the civil and constitutional rights of minorities.

I have been personally and professionally in civil rights enforcement and protection since 1945 when, as a law student at Columbia, I did volunteer work for LDF, the Japanese-American Citizens League and the American Jewish Congress. I have worked full time for LDF since 1949 when I joined Thurgood Marshall, a founder of LDF, as an associate and immediately began work on cases that integrated law schools and graduate schools (*Sweatt v. Painter*¹ and *McLaurin v. Oklahoma State Regents*²). I have argued approximately forty cases in the Supreme Court of the United States, including *Brown v. Board of Education*³ (the Delaware portion), and *Griggs v. Duke Power*.⁴ I have tried cases which struck down segregation in public parks, beaches and transportation, and in racial discrimination in voting, jury selection and criminal trials. Perhaps of greatest significance to my testimony today is that I have been acutely and personally aware of the civil rights program of the Department of Justice during eight Administrations, including four Republican Administrations.

I come before you today, therefore, to offer my perspective on the civil rights enforcement activity of the Department of Justice since January 20, 1981. I wholeheartedly share the views set forth in the Leadership Conference on Civil Rights' report, *Without Justice*, a report to which LDF contributed. I hope my testimony will underscore the report's conclusions.

Privately fought lawsuits and legislation such as the Voting Rights Act of 1965,⁵ responsive to the limitations of private litigation, are essential vehicles for protection of minority rights. Nevertheless, vigorous enforcement of the law by the federal government is absolutely critical. No private organi-

* Testimony on the Fiscal Year 1983 Authorization Request for the Civil Rights Division of the United States Department of Justice before the House Subcommittee on Civil and Constitutional Rights, March 23, 1982. The BLACK LAW JOURNAL has edited this testimony for publication purposes. Lani Guinier and Theodore Shaw assisted in the preparation of this testimony.

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1. 339 U.S. 629 (1950).
2. 339 U.S. 637 (1950).
3. 347 U.S. 483 (1954).
4. 401 U.S. 424 (1971).
5. 42 U.S.C. § 1973 (1965).

zation or combination of private organizations can compete with the resources of the federal government to enforce the law. Private agencies simply cannot act effectively in the enormous number of instances where the law is being violated.

While the Constitution does not list specifically all the rights to be protected by the federal government, at least since 1957, during the Eisenhower Administration, Congress has successively enacted civil rights legislation enumerating the Attorney General's responsibilities in this area. Prior to 1957, the Department played a constructive, though limited role. There was a civil rights section within the Criminal Division, but the most significant civil rights participation was as *amicus curiae*. The Department weighed in on the side of civil rights plaintiffs in many important cases including *Brown v. Board of Education*⁶ and *Shelley v. Kraemer*.⁷

The Civil Rights Division of the Justice Department was established in 1957 to enforce the first civil rights statute enacted by Congress since Reconstruction. Since then, Congress has given the Assistant Attorney General in charge of the Division the responsibility for enforcing the Civil Rights Acts of 1960, 1964, and 1968; the Voting Rights Act of 1965, as amended in 1970, 1975 and presently before the Congress in 1982; and civil rights provisions in numerous other statutes.⁸

Since the Kennedy Administration, the government has enforced civil rights with considerable vigor, except on a few occasions during the Nixon Administration. The Justice Department until now has never opposed civil rights goals, and, in my memory, has never taken an across-the-board approach to demolishing civil rights gains. Usually private civil rights lawyers have worked cooperatively and effectively with the Department of Justice and the Cabinet agencies. The situation has now changed.

In their first year in office, both the Attorney General and Assistant Attorney General for Civil Rights have announced their commitment to reversing the course of civil rights enforcement. The political appointees in the Reagan Justice Department are engaged, in my opinion, in a concerted effort to sabotage the gains made since 1954 by minorities and women pursuant to congressional mandate, Supreme Court decisions and established legal principles. This Justice Department sees itself as above the law. Instead of enforcing the law in matters of civil rights, it claims to write on a clean slate, unimpeded by well settled judicial interpretations of legal principles.

This attempt to change the law by administrative and political fiat is contrary to the historic role of the Attorney General and, coincidentally, inconsistent with the rationale, transparent as it may be, advanced by the Assistant Attorney General in the Department's February 1982 brief in the U.S. Supreme Court in *Bob Jones University v. United States* and *Goldsboro*

6. 347 U.S. 483 (1954).

7. 334 U.S. 1 (1948).

8. These laws prohibit discrimination in education, employment, credit, housing, public accommodations and facilities, voting and certain federally funded and conducted programs. The division also now enforces the Civil Rights of Institutionalized Persons Act of 1980 which gave the Attorney General the right to sue to redress systemic deprivations of constitutional rights of persons confined in state and local mental and penal institutions.

Christian Schools v. United States.⁹ In the brief with which the Acting Solicitor General openly disassociated himself, the Assistant Attorney General for Civil Rights assails the eleven year old policy of the IRS to deny tax exempt status to schools with racially discriminatory policies as agency abuse of discretion, unsupported by congressional or constitutional mandate.¹⁰ This is the same Assistant Attorney General who has committed his agency to disregarding established precedents and substituting instead political or ideological considerations about what is popular or what the will of the majority demands.

The Department of Justice now actively opposes many civil rights goals. It has slowed enforcement almost to a halt. Indeed, during the first six months of the Nixon Administration the Civil Rights Division filed twenty-four civil suits; during Carter's first six months it filed seventeen; during Reagan's the Administration claims to have filed five.¹¹ Based on this data, I have eight general observations about the Reagan Justice Department.

1) There is a basic lack of understanding on the part of this administration of the fundamental nature of fourteenth amendment-type protections. Specifically, the Attorney General and Assistant Attorney General for Civil Rights have on numerous occasions justified their recidivist policies by reference to a political "mandate" and other expressions of public opinion. This approach ignores the essential nature of the fourteenth amendment and anti-discrimination statutes which seek to ensure that majority will does not violate the rights of minorities. The very nature of civil rights enforcement dictates that political or public opinion shall not determine the rights of the protected class.

However, the Civil Rights Division apparently does not consider itself to be an advocate of those whose civil rights may have been violated. Instead it now operates as a conduit through which civil rights laws and policies which are purportedly unpopular can be undone. In my view this represents a posture which is fundamentally different than that assumed by the Justice Department during the years since the *Brown* decision. Moreover, the adoption of such a posture toward civil rights enforcement responsibilities statutorily conferred upon the Justice Department means, in some instances, a realignment of support away from civil rights plaintiffs and towards defendants.¹²

9. 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 454 U.S. 892 (1981), 644 F.2d 879 (4th Cir. 1981), *cert. granted*, 454 U.S. 892 (1981) (consolidated).

10. "Thus, the denial of tax exemptions to Bob Jones University and Goldsboro Christian Schools is, we submit, unauthorized agency action that should not, in the absence of congressional action, be countenanced. Neither the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, nor prior case law compels [sic] a different result." Brief for the United States at 12-13.

11. In a speech to the Delaware Bar Association, Mr. Reynolds stated that the Division filed 50 new cases since January 29, 1981, 43 of which are criminal. Of the seven civil cases, only two have been filed in the second half of the Administration's first year—the period when Reynolds was in charge. Reynolds was not sworn in until July 27, 1981. Of the 43 criminal cases, 24 were filed by United States Attorneys who generally act independently of the Civil Rights Division, and 18 were filed before July 27, 1981.

12. Indeed, such an assertion is not merely speculative. The Justice Department's reversal of previous government positions in *Bob Jones University v. United States* and *Goldsboro Christian Schools, Inc. v. United States*, and in *Washington v. Seattle School Dist. No. 1*, 458 U.S. — (1982), 102 S. Ct. 3187 (1982) are clear examples.

2) The Reagan Administration, in a manner unlike previous administrations, is flatly refusing to enforce the law. Prior Assistant Attorneys General, in spite of political pressures and public statements by administrative officials, recognized their responsibilities to enforce the law *as it exists*. The Assistant Attorney General has publicly announced that the Justice Department will no longer pursue certain remedies which have been sanctioned and in some instances are necessitated by Supreme Court decisions. In doing so, the Civil Rights Division has not only announced its refusal to enforce effectively the law as it exists, it also presumes to sit in judgment of Supreme Court decisions and to decide which will or will not be enforced by the federal government. In addition, the Civil Rights Division has decided that it will no longer use certain legal tools available to civil rights lawyers which have been approved by the courts. This decision makes it more difficult for government attorneys to prove civil rights violations and it hampers their ability to provide the best possible representation in their attempts to vindicate the rights of victims of discrimination.

3) In the area of education, the Civil Rights Division has announced that it will no longer pursue remedies which include transportation in school desegregation cases. Instead, the Assistant Attorney General intends to employ voluntary desegregation methods. The rationale advanced for this policy shift is that:

- a) school desegregation orders that include "busing" plans don't work;
- b) "busing" is unpopular among the majority of blacks and whites; and
- c) "busing" is not a constitutionally mandated remedy for *de jure* segregation.

Extensive research by sociologists and studies by desegregation experts belie the first contention,¹³ and the second has already been addressed. As for the third, the Reagan Justice Department's position is squarely at odds with Supreme Court mandates.

In *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁴ the Court not only sanctioned the use of transportation in school desegregation remedies, it indicated that in some instances it may be required. Nevertheless, the Justice Department's pronounced policy is that it will no longer seek to desegregate schools by using "busing" remedies. Instead the Department of Justice has announced that it is pursuing the same voluntary techniques which have been tried and which have failed to provide comprehensive desegregative results. Moreover, the Supreme Court specifically rejected the adequacy of such voluntary remedies in its holding in *Green v. New Kent County School Board*.¹⁵

Although the Assistant Attorney General has stated that the Administration differs from the approach of previous Administrations to school desegregation only on the question of remedy, another policy pronouncement belies that claim. The Department has announced that it will no longer use

13. Hawley, *Strategies for Effective Desegregation: A Synthesis of Findings*, in 1 ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF SCHOOL DESEGREGATION STRATEGIES 1981; Rossell, *A Review of the Empirical Research of Desegregation: Community Response, Race Relations, Academic Achievement and Resegregation*, in 5 ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF SCHOOL DESEGREGATION STRATEGIES (1981).

14. 402 U.S. 1 (1971).

15. 391 U.S. 430 (1968).

a presumption, afforded by the Supreme Court in *Keyes v. School District No. 1*,¹⁶ that once schools in a meaningful part of a school system have been proven to be intentionally segregated, segregated schools in the remainder of the system will also be presumed to have been intentionally segregated. Thus, under the *Keyes* ruling the burden would then fall to the school board to prove that the remaining segregated schools are not the result of intentionally segregative actions. The Justice Department now takes the position that school boards should be relieved of that burden, and that plaintiffs should have to prove intentional segregation with respect to each school in the district. This approach not only rejects the basic principles of "common sense" and "fairness" underlying the presumption,¹⁷ it also deprives victims of discrimination of comprehensive remedies for systemwide violations.

Generally, the Assistant Attorney General has indicated that instead of focusing on the racial composition of student assignments, the Department will seek to guarantee that all students have equal quality of education. What the Assistant Attorney General means is unclear. What is clear is that the Reagan Administration's cuts in funding educational programs and the elimination of Emergency School Assistance Act¹⁸ grants directly contradict the Assistant Attorney General's stated intention. Thus, the Justice Department's policies in school desegregation cases amount to "separate but equal" and Administration cuts reduce that approach to "separate and unequal."

4) In the area of housing discrimination, Justice Department enforcement efforts have virtually ground to a halt. One suit has been filed since the Reagan Administration took office.¹⁹ In addition, in a policy analogous to the abandonment of the *Keyes* presumption, the Department is no longer relying on the legitimacy of the "effects test" in Fair Housing Act cases, even though it has been upheld in each of the six circuits in which it has been presented.

5) The ideological commitment of this Justice Department simply prevents the occupants of the office from acting as good lawyers. They resist the case by case analysis of our common law tradition. Facts and fact patterns do not make any difference. They are against "goals and timetables" no matter how egregious the violation and no matter how callous the violator. They are against an "effects" or "results" test no matter how impossible it is to prove discrimination otherwise. Even where intentional discrimination has been found by two lower courts, they refuse to file a brief supporting the black plaintiffs in Burke County (*Lodge v. Buxton*).²⁰ And in fact, the Assistant Attorney General dismisses the case on a national TV show, and subsequently in Senate testimony, as "not a violation of the law." When questioned by Senators about this statement, the Assistant Attorney General resorts to subtle distinction—he was not talking about Burke County in particular but about at-large elections across the country. Yet when asked repeatedly about his views on Burke County, he admitted to the Senate Subcommittee he was familiar with the record but was restrained, by

16. 413 U.S. 189 (1973).

17. *Id.* at 203, 209.

18. Pub. L. No. 92-318, § 701, 86 Stat. 235 (1972).

19. *United States v. Commonwealth Ave. Assocs.* was filed on February 4, 1982.

20. 639 F.2d 1358 (5th Cir. 1981), *aff'd*, — U.S. — (1982), 102 S. Ct. 3272 (1982).

an undisclosed canon of ethics, from discussing before the Senate the case to which he was not a party.

Moreover, in proving intent, where it is constitutionally required, the Assistant Attorney General refuses to take advantage, on behalf of minority plaintiffs, of presumptions afforded by existing law. In briefs filed in the Supreme Court, the Assistant Attorney General unflinchingly embraces the most restrictive and burdensome view of the law. He rejects, for example, the *Keyes* presumption (*Swint v. Pullman Standard*)²¹ and rejects the lower court's finding of intentional discrimination on the basis of the most narrow reading of the proof in *Washington v. Seattle School District No. 1*.²²

6) The Division no longer views itself as an advocate for minorities and other victims of discrimination.²³ Their position on extension of the Voting Rights Act is illustrative. They claim to favor extension without modification; yet they endorse changes in the Voting Rights Act that will make it easier for white dominated county governments to continue to discriminate while "bailing out" of the law's protections. What that must mean is that they only object to changes to strengthen the protections for minority voters.

For example, they object to the "results test" in section 2 of the House bill, H.R. 3112.²⁴ They forecast thousands of lawsuits against cities and counties on the basis of "election results." This prediction is based on the fact that the bill, in incorporating a "totality of the circumstances" test uses the word "results." Nowhere, however, in the express terms of the Kennedy-Mathias bill²⁵ or in H.R. 3112 is the phrase "election results" used. Nor does the legislative history support that construction. In fact, every minority group member, and every attorney who has litigated cases on behalf of minority voters, stated forthrightly to this Subcommittee and in testimony before the Senate, they were not seeking rights based purely on "election results." That phrase is a gross misstatement of the position of the civil rights community, of the 389 members of the House who voted for the bill, and of the bill itself since a disclaimer of the "election results" thesis is included in both H.R. 3112 and S. 1992.

Yet the head of the Civil Rights Division persists in this doomsday scenario. I suggest a possible explanation. Because of this Administration's preoccupation with law enforcement by majority will, they cannot accept the fact that others of us are governed by a rule of law as construed by the courts and legislated by the Congress. In fact, it is this Administration alone that is concerned exclusively with "election results."

7) The actions of this Administration indicate that they have no un-

21. — U.S. — (1982), 102 S. Ct. 1781 (1982). Brief filed by United States Department of Justice.

22. — U.S. — (1982), 102 S. Ct. 3187 (1982). Brief filed by United States Department of Justice.

23. The failure of the Department to make use of the legal tools available to them deprives the protected party or class of victims of discrimination of the best possible representation. While it is true that the Justice Department's client technically is the Government, it has long been recognized that the Department's civil rights responsibilities are exercised on behalf of aggrieved citizens. For example, Title IV confers upon the Attorney General authority to sue where he certifies that the victims or discrimination in education are unable to initiate or maintain private litigation.

24. H.R. 3112, 97th Cong., 2d Sess. (1982).

25. S. 1992, 97th Cong., 2d Sess. (1982).

derstanding of what the law really requires. This is evident in this Administration's notion of affirmative action. One must start by questioning their approach to "non-affirmative action merit selection." I point to the firing of the eminently qualified Dr. Arthur Flemming, and the proposed hiring of others who lack the basic qualifications to do the job.

In the area of employment discrimination their attitude was evident even before the new Administration took office. LDF and other civil rights organizations in the last days of the Carter Administration settled a major employment discrimination case against the Government which abolished the use of the PACE²⁶ examination for screening entry level applicants for over 100 job classifications. The outcome of the case opened more than 1000 positions to minorities and facilitated their promotion into higher managerial grades. The transition team attempted unsuccessfully to intervene in the case in an effort to overturn the decree. After taking office they repeated this effort. A series of meetings between LDF and other civil rights groups and high officials of the Justice Department, convinced them that they had no chance of success and they have since ceased trying to undo the order. But in view of this attitude, it will be necessary to monitor compliance very carefully to be certain that the decree is being properly obeyed. The PACE examination case was beyond their control, but other steps continue to be taken to threaten affirmative action across a wide range.

8) The Administration's so-called commitment to voluntary remediation is more theory than practice. When actually confronted with a case of a voluntary student transportation plan, the Justice Department reversed positions and filed a brief in the Supreme Court against the plan at the urging of policy-makers in the White House.

Similarly, the Assistant Attorney General announced his intentions to try to persuade the Supreme Court to overrule *United Steelworkers v. Weber*,²⁷ another case of voluntary action. Since this Supreme Court case is less than four years old and involves a question of statutory construction, the assertion of the Assistant Attorney General shows how little the Department values precedent and the Courts' strong allegiance to *stare decisis* on questions of statutory interpretation. His litigation strategy can only be justified as the symbolic, political stand of a propagandist against civil rights.

CONCLUSION

It is my observation that the positions taken by the Department of Justice in matters of civil rights are callous and insensitive. They are "morally mean," bending to and being shaped by moral and political imperatives that have never been codified by Congress, that run counter to the Department's mission to do justice and that fundamentally ignore the rights of the Division's statutory constituency—the victims of discrimination. In fact, the chief federal law enforcer, in disregarding both a body of law as well as the intended beneficiaries of those laws, seems to be substituting purely ideological considerations in lieu of lawyerly judgments. In this sense, as "radical

26. Professional and Administrative Career Examination.

27. 443 U.S. 193 (1979).

activists" on behalf of the Reagan electorate, they are totally abdicating their law enforcement responsibilities.

The positions of the Department, catalogued in the *Without Justice* report, and observed by LDF, suggest that the Justice Department officials are either totally cynical or totally isolated both before and after joining the government from the people affected by their policies. I submit that their world view seems to be that minorities, women and handicapped people have come far enough and it is their duty to maintain the status quo.

Previous occupants of the office of Assistant Attorney General for Civil Rights have almost uniformly considered it their role to be advocates of the civil rights of minorities and other disadvantaged persons. True, as government representatives they had an obligation to the whole public. Recognition of this obligation tempered, of course, their enforcement activities. It did not, however, as in this Administration transform civil rights division lawyers into propagandists against civil rights.

The Assistant Attorney General has never been the leader of the civil rights movement. The Division has been extremely cautious, sometimes fainthearted, in its approach to law enforcement. All of Mr. Reynolds' predecessors have disagreed with LDF and other civil rights groups on one issue or another. Never before, however, has an across-the-board foe of civil rights occupied that office.

Wherever the law presently provides assistance and support for ferretting out discrimination, Division Leadership now reject that assistance. The Assistant Attorney General uniformly rejects the legal presumptions developed by the courts over the years to make proof of discrimination easier. Those presumptions and tools were borne out of painful experience. The Assistant Attorney General rejects that learning.

While the Civil Rights Division, under this Administration's leadership, goes about maintaining the status quo, many victims of discrimination are without relief. Black people, and other traditionally disadvantaged groups remain unrecognized by the Divisions' leadership, unprotected by their ideology, and unsettled by their failure to enforce the law.