REMARKS OF THE ATTORNEY GENERAL
UNITED JEWISH APPEAL
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In recent weeks, there has been substantial public discussion of the civil rights enforcement policies of this Administration. Discussion, and even criticism, on so important a topic can be helpful indeed. The opportunity for full public discourse on important government policies distinguishes this Nation from many other countries in the world. In this country, the views of every citizen -- irrespective of race, religion, sex, or ethnic background -- count in the public debate. Our country is strengthened by our diversity -- and by national policy that respects and derives from that diversity. Nevertheless, all who participate in the public debate should also ensure that it is an informed debate, one that illuminates differences of opinion without mischaracterizing honest differences of principle or unfairly impugning the integrity of the participants.

There is an old story about Franklin Delano Roosevelt's first trial as a young lawyer. FDR was convinced that the facts were on his side. Opposing counsel, however, orated eloquently to the jury for several hours during his closing argument. Much of his rhetoric -- though moving -- strayed somewhat from the facts of the case.

At last, it was FDR's turn to close. He rose and said:

> "You have heard the evidence. You also have listened to my distinguished colleague, a brilliant orator. If you believe him, and disbelieve the evidence, you will decide in his favor."

Tradition has it that the jury chose to believe the evidence.

Today, in adding more words to the national debate over civil rights policy, I intend to present the facts simply and clearly both to you and to the Nation. The evidence fully demonstrates our abiding commitment to

effective enforcement of civil rights law and to the ideal of equal opportunity for all Americans.

Twenty-five years ago the Civil Rights Act of 1957 -- the Nation's first modern civil rights law -- created a Civil Rights Division within the Department of Justice. Each of the major civil rights acts since then has added to the Department's responsibilities. Since the Nation first roused from its long neglect of blatant racial discrimination, the Department of Justice has been in the forefront of the struggle to achieve equal opportunity for all Americans. That leadership role continues.

Our efforts in the area of civil rights are guided by a single principle: individuals should be treated as individuals, without regard to race, creed, or ethnic background. Freedom from discrimination consists of the right to participate fully in American society on the basis of individual merit and desire. That right engenders a guarantee that no one's path should be blocked because of racial or ethnic characteristics. Our Nation is a pluralistic society formed by successive waves of immigrants from vastly different backgrounds -- including some forced to come here in chains. Before the law, however, we do not today stand as black or white, Gentile or Jew, Hispanic or Anglo, but only as Americans entitled to equal justice. As Justice Harlan wrote in his dissent in Plessy v. Ferguson, "The law regards man as man, and takes no account of his surroundings or of his color." Today, the law regards persons as persons -- and should take no account of irrelevant distinctions based on, for example, color, gender, or religion.

This guiding principle, of course, has not always prevailed over bigotry. Some were enslaved simply because they were black. During the historic waves of unrestricted immigration, many new arrivals were greeted with intolerance simply because they belonged to a different faith or came from a different country. Large numbers of our fellow citizens were interned during the Second World War simply because of their ancestry. Equal opportunity was denied to women who wished to work simply because of archaic notions about their "proper place."

The great ideal of equal opportunity underlying the constitutional guarantee of equal protection and the civil rights laws, however, has always emerged from the darkness and ignorance. As Chief Justice Stone once wrote, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free

people whose institutions are founded upon the doctrine of equality."

Just to give you an idea of what we are doing, the Department of Justice is actively prosecuting nearly 240 civil rights actions at this time.

President Reagan, in his address last June to the NAACP, stated that this "administration will vigorously investigate and prosecute those who, by violence or intimidation, would attempt to deny Americans their constitutional rights." We have done so. Since January 20, 1981, our level of activity in that regard has exceeded every other Administration's. The Department has filed forty-three new criminal civil rights cases and has conducted trials in eleven others previously under indictment. And the actual prosecutions are only the tip of the iceberg. There are currently pending in the Civil Rights Division over 1400 investigations of alleged criminal violations of the civil rights laws, and over $11.5 million is budgeted for fiscal year 1983 for FBI investigations of such violations.

The largely unheralded Community Relations Service of the Department of Justice has also been actively working to defuse tensions before they erupt into violent confrontations. The Community Relations Service works with local groups to develop a community spirit that, to quote George Washington's letter to the Jewish Congregation of Newport, "gives to bigotry no sanction, to persecution no assistance." In the past year the Service has, to cite just a few examples, worked to ease tensions in Atlanta growing out of the tragic murders of black youths in that city, mediated disputes between new refugees from southeast Asia and other citizens, and sought to stem the unacceptable growth of harassment and intimidation in some areas of the country. The Service has also recently completed a highly successful test program of mediation in civil rights disputes. That program produced broader, quicker, and more amicable solutions than could possibly have been attained through litigation. We will continue to do everything within our power -- both through criminal prosecutions and the work of the Community Relations Service -- to guarantee that no American is subjected to threats or violence because of his race, religion, or ethnic background.

One of the most basic individual rights is the right to vote, and the Department of Justice has been

active during the past year to secure this right for all Americans. In addition to participating in twenty-seven court cases, we have reviewed over 8400 electoral changes to determine if they complied with the Voting Rights Act. We have filed objections to redistricting plans submitted by the states of Texas, North Carolina, Georgia, Arizona, Virginia, and South Carolina, and the City of New York. The Administration has also actively supported extension of the existing Voting Rights Act for an unprecedented ten-year period.

Our efforts have been no less vigorous in guaranteeing all Americans the right to be considered for employment on the basis of individual ability, irrespective of group characteristics such as race, religion, or sex. In the past year the Department filed six new discrimination cases against public employers, including suits against the state police departments of Vermont and New Hampshire as well as local police and fire departments in North Carolina and New York City. Eight other suits have been authorized and are currently in negotiation -- and nine new investigations involve some thirty other state and municipal agencies. We have also tried and won numerous cases previously filed. For example, the case against the government of Fairfax County, Virginia, resulted in a successful verdict with 1825 claimants for individual relief.

In the field of public education we have been working to ensure that no individual is denied equal educational opportunity because of race. We have proceeded with the four school desegregation cases filed at the very end of the last Administration. Either through settlements or court orders, we have obtained real relief in nine cases involving school districts from Texas to Indiana. We reached a very favorable settlement in the Louisiana higher education case and are pursuing similar cases in other states. We have also begun investigations in three cases to determine if the quality of education offered to predominantly black schools was intentionally and illegally inferior to that offered to predominantly white schools.

We have been active in other areas as well. We have begun sixteen new investigations of state and local institutions under the Civil Rights of Institutionalized Persons Act -- and one has already resulted in the closing of a state institution. We successfully prosecuted a suit in Arizona under the Equal Credit Opportunity Act that succeeded in stopping lenders from discriminating against Native Americans.

We have also actively attacked discrimination in housing. We opened more than eighty new pattern-and-practice discrimination investigations. In the Havens Realty case, we appeared as an amicus before the Supreme Court and took the position, with which the Court agreed, that under proper circumstances "testers" have standing to bring housing discrimination suits.

Although we have brought numerous suits in the past year, we believe that more progress can often be made toward solving current civil rights problems through negotiated settlements among the interested parties. A negotiated settlement can resolve broader issues between the parties than the narrowly defined conflicts which may be presented to a court. Such settlements can provide real relief immediately -- while lawsuits hold out only the possibility of relief, and then after long months or years of litigation. The parties are freer to communicate during negotiations than during litigation -- and after a negotiated settlement, no spirit of enmity taints future relations between the parties. When negotiations fail and a suit is necessary, we will bring it. But we will always try to achieve real and immediate progress through settlement first.

We in the Justice Department are quite proud of our record. It stands as clear and objective evidence of our commitment to guarantee the civil rights of all individuals, and to keep the doors of opportunity open to all regardless of membership in any racial, religious, or ethnic group.

In spite of this record of accomplishments, some have recently mischaracterized the civil rights efforts and objectives of the Department of Justice. They have chosen to brand a debate over remedies as a difference over rights. Clearly, we have been in the process of evaluating the means by which government has sought to promote equality of opportunity during the last decade. Just as clearly, we have found some of those means ineffective. And we are therefore seeking new ways to promote and ensure the right of equal justice under law.

None of that suggests, however, that we are any less committed to the goal of equal opportunity than our critics. As often occurs in American politics, some have become so associated with certain means of doing things that they see any attempt to find new and more effective means as an attack on basic goals. Nothing could be further from the truth where civil rights are concerned.

And nothing is more dangerous to progress on civil rights than the use of inflated rhetoric charging a government retreat that has not occurred. As Benjamin Disraeli once observed: "This shows how much easier it is to be critical than to be correct."

The mere enunciation of a charge does not make it so. Rhetoric is no substitute for reality. Abraham Lincoln once asked a man with whom he differed, "How many legs has a cow?"

"Four, of course," the man answered.

"Now suppose," Lincoln said, "we call the cow's tail a leg. How many legs would the cow have then?"

"Why, five, of course."

"That's where you make an error," answered Lincoln. "Simply calling a cow's tail a leg doesn't make it one."

In the same way, charging this Administration with a retreat on civil rights does not make it so. It serves only to divide the Nation. It fails to promote progress on civil rights.

As I have explained, we view civil rights as a personal right -- the right of the individual to be treated as an individual and not as a member of a group. The focus on certain "remedial" devices by some, however, suggests that they believe civil rights law should primarily concern group results, not individual opportunity.

The difference in viewpoint is perhaps clearest in the employment discrimination area. We work to ensure that individuals are treated on the basis of merit, not as members of some favored or disfavored group. Some in the civil rights community have criticized us because we no longer seek to impose hiring or promotion quotas -- in other words, precisely because we will not seek to have individuals treated as members of some group and marked for different treatment because of their race or sex.

Quotas have not proven effective, and they have exacerbated racial tensions. More basically, they are contrary to our guiding principle of equal individual opportunity. As Professor Alexander Bickel wrote:

> "The history of the racial quota is
> a history of subjugation, not

> beneficence. Its evil lies not in its name but in its effect; a 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."

Support for quotas confuses an individual right with a group remedy -- a group remedy which violates the principle underlying the individual right.

In our employment cases we seek full relief for those individuals who have been discriminated against, not arbitrary preferences for members of a group. For example, when an individual has been proved to be a victim of illegal discrimination, we seek affirmative remedies such as backpay, retroactive seniority, reinstatement, and hiring and promotional priorities. We attempt to ensure that the individual victim is placed in the position he or she would have attained in the absence of the illegal discrimination. We seek appropriate relief for those qualified individuals who prove that they were discouraged from applying for specific positions because of past unlawful discrimination by the employer. Our remedial formula also includes recruitment efforts to increase the pool of applicants and injunctive relief requiring that future hiring and promotional decisions not be made on the impermissible basis of race or gender.

Confusion is also evident concerning our efforts to ensure equal educational opportunity regardless of race. No child should be assigned to a particular school solely because of race, and no child should receive less of an educational opportunity because of race. This is the mandate of Brown v. Board of Education, to which we are fully committed. That landmark decision vindicated the "personal interest" of pupils "in admission to public schools ...on a [racially] nondiscriminatory basis." Some, however, focus not on this "personal interest," but on racial balance within the schools. They advocate mandatory busing of students on the basis of race to "correct" any perceived imbalance. Experience has demonstrated, however, that such busing does not guarantee equal educational opportunity and often promotes segregation by encouraging many to leave the public schools.

Before the imposition of forced busing in Los Angeles, white enrollment stood at thirty-seven percent. By 1980 it had dropped to twenty-four percent. When busing was imposed in Boston, white enrollment dropped from fifty-seven to thirty-five percent; in Dayton, from fifty-three to forty-three percent; and in Denver, from fifty-seven to forty-one percent. Some of this was the result of normal demographic change, but much is clearly attributable to the public's reaction to forced busing. I do not consider it progress to act against one-race schools in a way that produces one-race school systems. Those who argue that we do not believe in equal education because we do not advocate busing to achieve racial balance have once again confused the right with a remedy. They have disserved the protected individual interest through their concern for group results.

Some have suggested that we are violating constitutional rights in re-examining the use of quotas and busing. The Constitution, of course, says nothing about quotas or busing. These devices are simply equitable remedies used in an attempt to secure rights. The sole legal basis for their use is effectiveness in redressing a proven violation. As the Supreme Court wrote in the Swann case:

> "[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."

Or, as the Court had written earlier in Brown II:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

If specific remedies have not been effective, vindication of the underlying right requires resort to new and different remedies. Any other view perversely elevates

the remedy above the right. And, what is even more troubling, such a view may actually undermine the right itself by drawing racial distinctions.

The same sort of confusion underlies disagreements which have arisen on the question of amending the Voting Rights Act. The right to vote is the most cherished right of free men and women -- and correctly so, for it is preservative of all other rights. Since the Voting Rights Act became law seventeen years ago, minorities have made dramatic strides in voter registration and election to public office. Despite these gains, the need persists to continue the protection of the Act. The Administration has therefore endorsed extension of the existing Act, which has proven so effective, for an unprecedented ten-year period. We have also supported extension of the minority-language provisions to bring them into line with the rest of the Act.

Despite our ringing endorsement of the Voting Rights Act, some have attempted to portray us as weak on voting rights because we do not support the particular bill passed by the House of Representatives. The House bill, however, would go beyond extension of the Act and change the already permanent nationwide protection of the right to vote. The current law focuses on intent to discriminate, but the House bill would focus instead on election results. The Act would be triggered whenever election results failed to mirror the racial or language makeup of a particular jurisdiction. The end result could well be quotas in electoral politics. Election rules and systems could then be restructured by the courts to mandate legislatures, city councils, or school boards that mirror the racial composition of the population. To those who doubt the likelihood of that result, I commend the reading of an article in the current issue of Commentary magazine entitled "Voting Rights and Wrongs."

Under the House bill, the focus would be on the group's right to have one of its members elected to office, not the individual's right to cast his vote free from discrimination. The proposed amendment is based on the abhorrent notion that blacks can only be represented by blacks and whites only by whites. Our society has moved well beyond that. Such a notion is the logical culmination of viewing civil rights law as a means of promoting identifiable groups of people, rather than a means of ensuring that all individuals are treated as individuals regardless of their race.

Some of the confusion about whether the so-called "intent" test in the existing Voting Rights Act needs to be changed arises from the argument by some that discriminatory intent cannot be proved. That is simply not correct. Intent can be proved -- and without a smoking gun. In fact, results or effects can be evidence of discriminatory intent under the present law. Just last week, for example, the Department of Justice intervened in the New Mexico redistricting case maintaining that discriminatory intent can be proved there.

I have suggested this evening that much of the commentary concerning this Administration's efforts to promote civil rights has arisen not from any lack of concern for individual rights on our part but from our attempts to find different and better remedies. A great deal of confusion concerning the civil rights record of this Administration has also been engendered by the Goldsboro Schools and Bob Jones litigation. In that litigation we have taken the position, as stated in our brief, that Congress has not authorized the IRS to deny tax exemptions to discriminatory institutions.

Because the case is pending before the Supreme Court, I cannot comment in detail on the merits. I can mention, however, the broader issue that transcends the narrow confines of that case. Decisions about engrafting social policies upon provisions of the Internal Revenue Code should be made by the elected members of Congress and not by the Nation's tax-collector. The tax laws should only be made a vehicle for the implementation of broad social policy upon the clearest direction of Congress. Our position in this case is based on that principle, with which surely few can disagree.

I want to emphasize that nothing in our position constitutes approval of discriminatory practices. I abhor such practices, but our liberties are not advanced by taking action -- even action to root out discrimination -- not authorized by law. As the lawyers for the National Jewish Commission on Law and Public Affairs wrote in their amicus brief supporting our current statutory position, "we underscore our repudiation of the practices of the petitioners in these cases, and regret that it is necessary...to defend the rights of those with whom we so strongly disagree." It is simply quite wrong to view our position in this case as a retrenchment on our guiding principle of equal justice under law. As Justice Jackson once observed, "I

know of no way we can have equal justice under law, except we have some law."

This evening, I have reviewed our record in the area of civil rights and suggested why that record does not satisfy some critics in the civil rights community. Those critics would have us embrace remedies designed to achieve equal group results rather than secure the right of individuals to equal opportunity. They contend that we have abandoned civil rights because we have renounced quotas, busing for racial balance, and proportional representation based on race. We believe that those remedies betray the Constitutional and statutory guarantees of freedom to participate in our society as an individual regardless of race, religion, sex, or ethnic background. The Department of Justice continues to lead the fight for that freedom, and for a more just and equal America.

We are willing to learn about civil rights problems and solutions not only from leaders and organizations active in the area, but also from experience, which Alexander Hamilton termed "the least fallible guide of human opinions." We ask only that our critics do the same. We are willing to work with them to help attain the promise of equality, but we will not abandon our commitment to the principle of equal individual opportunity to obtain their approval. That price is too high.

In 1882 -- 100 years ago -- the first "separate-but-equal" state law was passed. It has taken us the better part of the last century to eliminate the vestiges of the pernicious doctrine that separation enforced by law could ever mean equality. Today, in ensuring the civil rights of all Americans, we are concerned that the law not be used to separate society by treating persons differently according to their race. Surely, our future as a Nation would be best served by government action that treats individuals alike -- that forswears and combats efforts to treat them differently because of their race. We are working to make that future a reality.