

## **PRIDE IN LIBERTY**

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I'm really delighted to be with you. I'm fulfilling in my own heart a sense of obligation, because Howard Soule has asked me for more than two years to come up and visit with you, and it simply just never worked out and, this year I finally said it's going to work out and we're going to set a date and I'm going to make it no matter what I don't care where I am on the morning of the date I'm going to be in Oakland by the evening. We were able to do that because the plane wasn't any later than it was. I'm really very pleased to have the opportunity and I'm also thankful that Howard has already explained to you that I'm speaking to you tonight in my official capacity as a Commissioner, and not speaking as a former write-in candidate for governor. I should tell you that we got 25,000 votes, roughly, but I'm not sure if that doesn't mean Howard voted 25,000 times or not. I also am not speaking as a candidate for Alan Cranston's senate seat in 1992, though I may surely be.

I am speaking officially tonight as a member of the United States Commission on Civil Rights, and I want to talk to you about the work of the Commission and where things stand in this country presently, because I believe we really need to pay more attention to what's going on among us. We need to be more concerned about the direction of our laws and about the things that we sometimes take too great comfort in, when we think things are going well. I speak advisedly, because you have a congressman who serves in the neighboring district - whose name is Campbell - who has not only sponsored legislation that ultimately would have undermined the meaning of American citizenship in our civil rights - in the name of civil rights - but, finally, also voted for such legislation this, year on the same pernicious grounds.

In fact, let me just tell you a brief story about Tom Campbell, so that you'll understand where I'm coming from in the balance of these remarks tonight.

Tom Campbell introduced a bill in 1989, and had just gotten to Washington, a brand new congressman. He introduced a bill he wanted to call The Civil Rights Restoration act of 1989, and it was a bill responding to a series of Supreme Court cases that had been handed down in the spring of 1989. There were basically five cases that did such things as to overturn racial set-asides for municipal contracts in the city of Richmond, Virginia. There were decisions that overturned, or at least disallowed claims to establish mere statistical demonstrations of proof of racial discrimination, without a showing of discriminatory intent. There were more ordinary cases dealing with such questions as how much time we had to file a complaint. Another case came out of Alabama and held that, "well, of course, white males can file discrimination suits too, just like anybody else." It doesn't matter if you have a consent decree; they can go into court, say it affects them adversely, and have their day in court. And, the Supreme Court said that made sense to them. Still another case came from North Carolina where a woman sought to file a claim of racial harassment, not on the basis of Title VII of the 1964 Civil Rights Act - but on the basis of the Reconstruction era civil rights laws, to pry open the doors to punitive damages and such things.

Unfortunately, those laws didn't cover this. This whole series of cases had a lot of people up in arms, mostly civil rights who shouted, "this is it, Reagan court gone wild again, destroying and reversing the tide of civil rights in America, undermining everything we fought for all these years," and, they said, "we're going to do something about it." It was Tom Campbell who took the first step to do something about it, to satisfy these demands of the civil rights lobby. An interesting little piece of legislation that he drafted said, in effect, that it would be possible to prove discrimination with the use of mere statistics, and those mere statistics can be used only by something called "protected groups." So, if you are one of the enumerated groups, one of the protected groups (minorities and women usually are what is talked about), then you can use statistics showing a disproportion between your numbers in the population, and your numbers in a given workforce, and that will amount to discrimination. And, he thought he was doing a favor for American citizenship in the process.

I objected, and I said, "I think Mr. Campbell made a big mistake" - I know he's a Republican, and I'm a Republican, and it's not my business, ordinarily, to go around criticizing Republicans when I'm being a partisan. But, since I'm being official and nonpartisan tonight, part of my duty is to tell the truth about everybody. When I talked about Mr. Campbell I was being official and nonpartisan and I told the truth, namely, that his piece of legislation was in fact an insult to Americans. It aimed to establish different standards of law, different standards of justice for white males and other people, and that was simply incompatible with the founding vision of this society. Well, Mr. Campbell was a little bit upset upon hearing that I had said such a thing about his precious piece of legislation. He marched off to The Heritage Foundation in Washington, D.C. and gave a rather intemperate speech in which he called Bill Allen a liar. Now, I don't understand how you can become a liar because you interpret a piece of legislation as you understand it, but that's what he said, in any case. He went beyond that and published his outburst against Bill Allen to the world without, of course, publishing my comments alongside his.

Now, the reality is, that I was correct in my assessment of Tom Campbell's legislation. Not only did I not lie about its probable direction, but I didn't lie about his political possibilities. It was an utter folly for that gentleman to suppose that the civil rights lobby, and Senator Ted Kennedy, and Augustus Hawkins, the Democrats on Capitol Hill, were going to let this green Republican come in and take credit for what they have spent all these years building up the responsibility to do. Naturally, they tossed his bill out, wrote new legislation altogether - having nothing to do with him - ran it through Congress and eventually got it passed with his vote. Which meant, of course, that the legislation they wrote, which was more explicit even than his had been about disproportionate laws, unequal justice in this country, must have been compatible with what he wanted to do in the first place, because he voted for it.

So, neither was it a lie, as I characterized it, nor is it harmless, and that's the most important question. The fact of the matter is, we're living in a dangerous time when there is abroad, in this land of ours, a move to accentuate differences. It is no longer a small movement, it's no longer a mild or modest attempt to win an advantage here or there in this workplace or that workplace; it is a broad shot aimed at the heart of the culture of this country.

How do you know that's where it's aimed? Because you can look at universities, where the action is right now. And I beg you, right here, around you, look and see what's going on. Look at the regulations that have been adopted at Stanford University regarding speech, the kinds of things you may say and may not say. I happen to know the gentleman, a law professor, who drafted the regulations established. His name is Tom Grey. Very bright man, I must tell you, and by no means an extremist, but even he has drafted a regulation which he explicitly says applies to the speech used by white males about minorities and women, but does not apply to the equally offensive speech used by minorities and women about white males. It is a double standard as clear and simple as anything could be. And it's been adopted at Stanford; it's been adopted at

schools all across the country, everywhere across the country, every campus I visited.

I just arrived from Villanova, where it's going on. I held a round table with students about the very question. They are all being pushed to adopt what they call these "diversity regulations." They want not only to control speech, but they want to change the curriculum, they want to take out western civilization, and put in the civilization of oppressed cultures, as they like to call it. They want to get rid of the so-called canon in literature, get rid of the classic works and get the so-called neglected works at center stage. And it's all part of a concerted effort that's taking place throughout the country.

Is this a civil rights question? You bet it is. Why? Because, it has all been launched under the guise of pursuing civil rights objectives. Objectives that have been well before our eyes ever since the 1950s and the 1960s, and which most of us have, indeed, subscribed to, rightly so.

There was a problem in this country. There remains a problem in this country that we wanted to resolve for a long time, but we didn't want to resolve it at any cost. We didn't want to end bigotry and discrimination at the cost of our American Constitution. We didn't want to free ourselves from the legacy of oppression at the cost of freedom. And that's the danger we now face.

That's where we stand today, as we raise questions of civil rights and ask, how is it, really, our laws ought to treat people? George Washington used to say, in the 1780s when he would dream about the America he was then struggling to build, that he wanted a country in which he could count on the same justice for rich and for poor. And when you think about what he means by that, it becomes clear that's it not just a piety that he's uttering. What he means to say is that, if you don't guarantee a common standard of justice for everyone, you take away from people the reason to show regard for one another. You can't expect rich and poor to cooperate with one another if you can't promise them a common standard of judgment.

Well, in the area of civil rights, and at the Commission on Civil Rights, what we struggle with is precisely how to recapture that sense that George Washington had originally. How to insist on the same justice for rich and poor, the same justice for white and black, the same justice for men and women, rather than separating, distinguishing.

There was one young man, in the round-table discussion at Villanova yesterday, who put it very well when the question was raised, would it be of any use to him to have a regulation prohibiting people from speaking ill of his race, if he, himself, were not subject to a like regulation about them. He didn't hesitate for a moment to say, "Oh, absolutely not. It wouldn't do me any good to have that kind of distinction made, because then you'd just be saying - in a different way - that I'm inferior. I am to be held to the same high standard as everyone else, before the standard can do me any good," is what he told us in that roundtable discussion. I happen to believe he's correct.

But we are not, in fact, raising that standard in our laws and policies today. We're headed in the opposite direction, we're headed in the direction of something I call race management, instead of common citizenship, and I regret to have to report this to you. I would like to say that in my official position I have been a good watchman and have kept the wolves away from the sheep, but the truth is, the wolves are within the sheepfold. And they're not all civil rights lobbyists, or leftist Democrats. They are among us.

I say that because I know that we've all been taken advantage of this year. We all celebrated together upon the veto of the 1990 Civil Rights Act, because we said it killed quotas. The President was very strong in his statement. He announced, "I won't sign this quota bill, which is going to impose quotas on American business." We all oppose quotas, we all know what's wrong with quotas, why they mistreat people, so we applauded the President and we

probably felt a little safer after he vetoed that bill. We probably felt, that, at least for the time being, Senator Kennedy hasn't imposed quotas on this country, so we can breathe a little easier.

I must report to you, that is not true. I'm sad to report it to you because I worked hard to elect this President, but, the fact of the matter is, he did not rescue us from quotas. The President himself, in his veto message, proposed an alternative bill. He said, "what I want to do, instead of what Kennedy wants to do, is to codify the decision in *Griggs vs. Duke Power Company* from 1972.

Now, he didn't tell you what that decision was, he just said he wanted to do that. If he had told you what the decision was, if he had said, "in 1972 the Supreme Court established that you could prove discrimination without proving discriminatory intent, by using statistics, and that the only reasonable defense when an employer faces such a charge, would be to have statistics already in place that would show him not discriminating, i.e., "quotas," then you would have wondered, what is he talking about? Doesn't that sound like quotas? How can you save me from quotas if your plan delivers me into quotas? It's also the case that we have been living with those quotas since 1972, since the *Griggs* decision, which was an interpretation of Title VII of the 1964 Civil Rights Act. The veto of the 1990 Act did not liberate us, or free us, from quotas. Nor was the threat of quotas the biggest threat in the bill.

What was the big threat in that bill? It's what I've already described to you, the same problem that existed in Tom Campbell's bill. Nothing on the face of the legislation shows you this, but things operate differently in Washington than they do where you and I live. People in Washington have secret ways of reaching their ends and expressing themselves and hiding it from you all the time.

When they introduced this bill on the floor of the Senate last February, Senator Kennedy and all of the others who got up to speak of it, praised it to the skies. The bill was written in broad, flowing, and general language talking about fairness and equality for all. Every one of the senators who spoke about the bill on the floor, spoke about it as a bill for minorities and women. Not one of them said it protected everyone. When they had the staff draft the official summary of the bill, the official summary said this legislation is for minorities and women; nowhere in it did it say it protected everyone.

Now, when your courts have to enforce legislation - whether it's drafted by your state legislature, or your national congress - they do a very simple thing. First, they read, the bill, and if the bill isn't perfectly clear about what it intends to do, they take the next step. They say, "Well, let's figure out what the legislators intended, let's look for the legislative intent." They do it every time. And where do you think they go to look for the legislative intent? They, go to the legislative records, to the base, the hearings, and the official summaries. And so, what's contained in that record is what determines how the bill will be applied. That is why Justice Brennan, when he decided the *Weber* case many years ago, was able to say about the 1964 Civil Rights Act, that Congress meant, Congress intended Title VII of the 1564 Civil Rights Act, as a special protection for black people. Now that's nowhere written in the law, and you remember Senator Humphrey, and all the rest, standing up and saying "this is not meant to give anybody special protections, it's just meant to create a color-blind law, standard of fairness for everyone." They all declared it publicly.

But now just as then, we'll be able to go back to the records and see what they have said on the official record. When we see what they aimed to do, then we say, "this was the purpose and, therefore, that was the meaning of the law."

And so, when the 1990 Civil Rights Act was introduced last February, the Senators who introduced it, and the House Members who introduced it, created a record that would permit sub-

sequent courts to say the purpose of the law is to protect minorities and women and, therefore, the logical conclusion excludes the same protection for white males.

Now, we don't have just to deduce this. This long story has official tracks in the snow everywhere you look, I assure you. You see, because the whole argument in this bill is not over quotas, it's over what they call "burden of proof" in a trial. You're a plaintiff, you have a complaint against someone. You go into court, you say, "Give me my day of justice, hear my case." Then the judge says to you, "Okay, present your case. Now here's what you must do to prove it." And that's called a burden of proof. You present your case, lay it out according to the rules for what you must show in order to prove it, and then we'll give you your day of justice.

Well, the court did that. They did that in a 1987 case called *Johnson vs. Santa Clara County Transportation Agency*. It's a case where a young man named Paul Johnson lost his job as a road dispatcher in Santa Clara County to a woman named Diane Joyce. Miss Joyce and Mr. Johnson had both been put through a trial of tests and interviews and Mr. Johnson came out on top. He was the highest rated. But Miss Joyce got the job. So Mr. Johnson sued. He said "I've got my rights. I'm going to court." Unfortunately, the Supreme Court said to Mr. Johnson, "Sorry." Because when he got there he was told he had to follow certain steps to prove his case. The burden of proof remained on his shoulders. So Mr. Johnson, who was a white male, had it clearly stated what the burden of proof was. The legislation in the 1990 Civil Rights Act layed out exactly the opposite burden of proof for minorities and women. Meaning, that in this country, if that Act had become law, we would have had two different standards of justice for the same kind of crime. That was, the real danger of the law, not the quotas.

Why, then, did the President speak of quotas, rather than this disproportionate burden of proof? Unfortunately, I think I know the answer to that, too, and it's not heartening. In the veto message, the President goes step by step through the bill with his substitute provisions. There's one of those that stands out like a clarion call in the night and tells us what's going on. It's the comment on Section VIII.

Section VIII of the Bill did something unusual for Civil Rights legislation in the modern era. It opened the door to tort-like procedures. To compensatory and punitive damages in cases where discrimination has been proved. So you must bear this in mind as we think about this now. Section VIII only deals with people who have already been found guilty of having discriminated, and it says, "Courts may impose compensatory and punitive damages. Juries may impose compensatory and punitive damages on people who have been found guilty of discrimination." Now, why is that significant? Because, in 1964 when the Civil Rights Act was adopted, that kind of language wasn't part of it.

The 1964 Civil Rights Act was designed intentionally to discourage use of tort-like procedures in discrimination cases based on race. What did it offer instead? It offered bureaucracies, administrations, equal employment opportunity commissions, fair housing commissions in the states - regulations, not trials. Why? Well, you know, one of the people who was in the Justice Department back then was a man named Burke Marshall. Five years ago, Burke and I sat together at a conference in Washington, D.C. We were debating affirmative action, and the discussion got pretty hot, you can imagine how these things happen. I turned to Mr. Marshall at one point and said, "Just tell me one thing, why is it you wrote the legislation in such a way as to discourage reliance upon direct litigation with damages and, instead, created this government bureaucracy?" And he looked at me, and shrugged his shoulders and said, "Are you crazy? That would bankrupt the society." I looked back at him and I said "I don't quite follow you. How does it bankrupt the society to take money out of the pockets of one society member and put it into the pockets of another member of the same society?" And, of course, the reality is it doesn't, does it? Yes, it may be costly for people who are guilty of discrimination, but it does not bankrupt the society. The

real truth of the matter is, there was a conscious decision to discourage reliance upon tort-like processes.

What would have happened had that not been discouraged? I ask you to remember the Ray children in Florida, who, two and a half years ago, sued a school district because they had been kept out of school - impermissibly segregated, because they were victims of the HIV infection. They had AIDS. They sued. The court doors were still open to them. And what did they get? A settlement. The school district didn't have a chance; it didn't even wait to go to trial; it settled at \$1.1 million. Yes, it would have been costly, but remember what trials are for Americans and for Englishmen!

Don't be blinded by the notion that it's going to cost. Don't be blinded by the fear of our liability explosion of recent years. Think farther back and ask yourself how this civilization came to be. Where the common law came from, what Anglo-American legal procedures really mean and what are they worth? What they meant, originally, was that these decisions were made by the people, and not by government bureaucrats.

Anglo-American, tort-like procedures are the backbone of the rule of law, dependent upon juries. It's the very heart of our confidence in self-government. And all those who, in recent years, have tried to put bureaucracy in place of self-government, administrators in place of the juries, regulations in place of damages, have been slowly tearing the heart out of our civilization.

What did the administration say about Section VIII's compensatory and punitive damages? It said, "We are vetoing this legislation in order to strengthen and enhance Chapter VII of the 1964 Civil Rights Act. And, also, to avoid relying upon tort-like processes in civil rights." To avoid it. To continue the process of undermining the Anglo-American legal traditions among us, so we begin to resemble more the civil proceedings of European nations, rather than the tradition we have inherited. That was the President's stated objective.

Now, if I seem to state this somewhat forcefully, I'm going to tell you that there's a reason for it, of course; something personal invested in all of this. I have spent, now, three and a half years taking my mission on the commission very seriously and traveling the country, and speaking on behalf of a restoration of reliance upon traditional Anglo-American processes. I say, if we're going to have civil rights, let's understand what they are. The word "civil" comes from the Latin word for "city." Rights of the city, rights of common citizenship - we're all in this boat together. Let's go back to that. Let's not resort to processes of race management as if there were some super wise bureaucrat somewhere who would tell everyone where they belong, based on what they looked like. Let's, once again, cast our fellow citizens upon their own resources, and invite them, when they think they've been injured, to go and take their day in court and invite their fellow citizens to judge their case. Let's not ship it off to Washington, D.C.

So let's go back to principles of contracts, let's go back to principles of genuine lawsuits with compensatory and punitive damages where real damage has been found. Let's reaffirm our commitment to the Anglo-American tradition.

That's what I've been preaching for three and a half years and, guess what? Without making headlines in *The New York Times*, I've gotten somewhere. I even cracked through the Congress. In this terrible piece of legislation, there was nevertheless this one section that begins the process of taking us home again. And the President, for whom I fought, rejected it. Rejected it in favor of what? In favor of the 1964 Civil Rights Act Title VII. In favor of Justice Brennan's interpretation of that title. In favor of race management.

When I say I think we've got a problem, I'm very serious. Because those in charge have not believed us when we said we wanted to have a color blind society, a color blind Constitution. They are not color blind. Nor do they believe it will work on colorblind principles, and until we

convey to them how earnestly we insist upon color-blind principles, they will continue tearing the heart out of our traditions.

They're not liberal, they're not conservative, they are both. They are on both sides of the aisle and, in both parties. They are all mistaken, tragically so. And citizens of this country have simply got to accept the responsibility to try to turn them around. To send them the message that all the various forms of tokenism, all the various forms of race management, all the supposedly benign programs, rules, and regulations that seek to take advantage of differences in this country, have got to stop.

We're coming towards a period of redistricting, to redraw legislative boundaries, and you know what that's going to be like. It's a real fight. People in the parties have been anticipating it and wondering what's going to happen, particularly given the imbalance, in part, in the legislature. And I'll tell you something, there's a greater danger than in gerrymandering, which is going to happen anyway, because both parties have an interest in protecting the party leaderships. They're going to get together, they always do, and come to an accommodation that serves their interest, not yours and mine.

But, one thing they're going to do in addition is to conjure very heavily with this question of race and ethnicity. They're going to use the policy of pitting one group against another in order to advance their own interest. You're going to see Democrats who try, of course, to increase the number of Democratic districts, and that means to spread Democratic votes out as far as they can. They're going to be trying to design hispanic districts because that will spread votes out and they're going to try to avoid designing black districts because that concentrates democratic votes. And you're going to see Republicans, you're going to see members of our own Party, our experts that we've hired, going into black communities carrying a song, "we can give you an assemblyman, we can give you a congressman, if you'll just go along with us and allow us to draw a district with all of you in it." And we have to convey the message that this is unacceptable in our country. Mere party advantage does, not advance the claims of this country. There's something higher than mere party advantage.

This is a wonderful country, of wonderful promise, but its promises are not self-executing. The promise of America does not fly on automatic pilot, it remains in our hands, and the demands we make can alone vindicate those promises and deliver on them. We have to take self-denying oaths, therefore, to say to our party leaders, "We don't want that kind of leadership, we don't need token efforts towards making a big tent." What we need is an honest reassertion of the fundamental principles of the constitution and a general invitation for everyone to join. Only when we can act that way can we purge ourselves of the poison that is now spreading through our veins.

I suppose there is some good news on the civil rights front. Namely, though we are all concerned about the increasing evidence of rising racial events and tensions in the country, it is nevertheless true that the general progress of people becomes more marked every day. You can read stories, I think yesterday's headlines was a supposed gap in mortality rates between blacks and whites and you will read stories about gaps in educational rates or graduation rates from universities. These things are transitory. The underlying trends I want to assure you are much more healthy.

What do I mean by "healthy"? I mean we can now foresee the day when across the board we're talking about people whose personal circumstances give them an interest to defend this country, when they can be seen as solid citizens with something to fight for, rather than objects of charity with nothing to live for. And that's, of course, what we wanted to get to, isn't it? Wanting to see a day when all would be citizens with something to fight for. To take pride in what they possess and where they stand among us. And, who, on the strength of that pride, would hold up

the banner of American freedom for the world to see.

Well, I do believe we're headed that way and the only thing I see that could prevent our progress, our march forward now is such a moral decline as to make our material progress irrelevant. If we end up abandoning the moral ground, just as our material progress begins to appear, we will be nearly corrupt, nearly depraved - people with the means to do great things and no awareness of what to do.

Civil Rights really is at the heart of the meaning of America. It's not a question of race, religion, it's not a question of ethnicity; it's not a question of gender. It's a question of the reality of American freedom and a continuing vindication of that freedom throughout the world.

Now, we at the Commission on Civil Rights are unable to make these dreams come true through any power that we possess. Why? Because Congress has granted us no power, other than the power to speak. That's why they created the Commission in 1957. It is a worthy purpose. I frankly am pleased to have it so. I would not wish to be a bureaucrat seeking to manage the civil rights relations of this country. But, I'm perfectly willing to undertake the task of speaking far and wide about the glories of this country and why we should be willing to unite around them. Not that the Commission does; it's been asked by Congress to make recommendations to the President and Congress as to the probable cause of America's civil rights laws, where we're doing well, where we're not doing well, how we should correct things. And we do that.

We don't always do it the way I would like to see it done, because it's a badly divided body. It's a body which, during the Reagan administration, was subject to ideological wars between the administration and the legislature and, as you know, the ideological wars ended with Congress creating a divided commission, four members appointed by the President, four appointed by Congress. And then, of course, subsequent to the Reagan administration there've been changes on the Commission in the subsequent administration that have undermined to some degree that voice that takes pride in American liberty.

Nevertheless, I'm there, much the way Abraham Lincoln was in his legislature when he gave his sub-treasury speech back in 1848, in which he was moved to say that he would be pleased, even if it turned out that his was the last voice defending the hope of liberty. It would give him the greatest consolation conceivable to be able to say, when all was done, that he at least had not abandoned his country.

That's what I have come to say tonight. I have not abandoned this country.