

**REMARKS MADE BEFORE
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The Equal Opportunity/Affirmative Action Coalition, Inc.
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by

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Thank you for the kind welcome. I am glad to be with you. I consider myself most unfortunate as I look upon this crowd to have to say that I am coming in and running out as I need to be in Washington first thing tomorrow morning. There is no way to accomplish that except by being on the airplane at 3:15 this afternoon. I am nevertheless happy to be with you, although most unhappy that I lack time to meet and speak with you all individually. I am hoping that if I put on a long face and talk about this long enough, Mr. Adams and Ms Jackson will surely invite me back next year, when I will have time to do that.

I wish to spend my time with you today discussing the status of civil rights in America in general and equal employment opportunity and affirmative action in particular in our country. But this is a speech without a title. I will forbear titles for a while. In my experience, I've never given a speech that wasn't liked, but titles are a different matter. So let us go straight to the heart of the matter.

Permit me to digress just long enough to offer for your particular information what the public in general deserves to know. The President did finally accept the resignation that I submitted on the eighth of September in the past week. And we effected a transfer in the offices of the U. S. Commission on Civil Rights this past Monday morning. I remain a member of the Commission and my term will expire in 1992. I am looking forward to devoting these remaining years on the Commission to precisely the same kinds of concerns that have inspired me for the past two years. In sum, that is very broadly to remind Americans that every American in every corner of this land must be comprehended in our conception of fairness. Anything less than that is not only inadequate; it is a moral failure. I am committed to carrying that message throughout this land.

Today I want to focus upon, and to share with you what I think is going on, why we are having troubles in some respects, and why, in my opinion, civil rights is going backwards and not forward. This is probably hard for you to see, for you are putting forth your best efforts on the front lines. I have met all across this country the many persons who do the kind of work you do, whether with Quad-A or in city and regional gatherings not unlike the one you hold here now. I have always been impressed that the people who are out there on the front lines, and who have their eyes set on the goal, tend to develop a view that sometimes does not encompass the broad objectives of the society but is nevertheless healthy with respect to the goal they think to accomplish. They tend, for example, not to be confused by all the misleading definitions of affirmative action throughout the society. Back in Washington, D. C. people spill blood over those two words, affirmative action, while out in the country people are busy giving full-blooded meaning to those words, a meaning that I characterize as good old-fashioned American open-heartedness.

I have always sought to reinforce that broad and generous understanding of the term, affirmative action—just as I have equally resisted having the term reduced and assimilated to mere racial preferences. One of the reasons we are getting into trouble is that the debate back in Washington over mere racial

preferences is beginning to take the lead over your honest efforts in deciding for Americans at large what affirmative action is about. And Americans at large are reacting precisely to the textures of that debate rather than to your good efforts.

You see on university campuses the most dramatic evidence of this rising tension and the ugly poisons that spill out of it. And when I speak of university campuses I do not mean, by the way, the University of Mississippi at Oxford, or the University of Alabama at Montgomery, or Georgia or Florida—those names that became familiar twenty-five years ago. I mean rather the University of Wisconsin at Madison, the University of Michigan at Ann Arbor, the University of California at Berkeley, the University of Massachusetts, Stanford University—which is to say, what have been long regarded as among the leading institutions of higher education in this society and the most progressive. Those are now the scenes of the greatest racial tension and turmoil on our university campuses, and that should begin to teach us something. For the youngsters on those campuses are not the children of so-called red-necks, and they did not imbibe their racial fears with their mothers' milk. If we continue to pretend that they did do so, we will continue to miss the real cause of the retrograde motion of civil rights in the United States to day.

They, like people outside university campuses, are reacting to an increasing segmentation of American society. What I take to be one of the most palpable examples of this segmentation occurs now in California—pretending to be a great innovation. In the city of Pasadena there are people who perform the same functions that you generally perform, but they do so under certain political impulses. They have defined an affirmative action policy for the city in which they have listed the groups of people who are covered by this affirmative action policy. The list in the city of Pasadena includes Armenian-Americans. They are serious about this; hence, they have included Armenian-Americans in their set-aside provisions and in their employment programs. There is a problem, however. The United States census does not count Armenian-Americans—nobody knows how many there are in the city. But that has not stopped progressive minds who are intent on realizing, in their view, the truest possible objectives of affirmative action. Accordingly, the city of Pasadena will conduct its own census! And presumably then carve out to Armenian-Americans their proportionate share of the city's resources.

It doesn't take the imagination of a frightened Neanderthal to envision where that process must end, once we accept that any and every jurisdiction in America can define any category of persons it wishes to whom to extend special protections or preferences. This is the abuse of the healthy impulses of the legislation of the 1960 that is at the root of the regression we now experience in civil rights in this country.

We face the task of reforming healthy purposes, healthy goals for affirmative action, not only in order to save civil rights but to save America itself in the long run. This has come to light this year most dramatically in the form of Supreme Court decisions. It is already well known to you that several decisions this past winter and spring troubled many people in civil rights work. Further, there are divided opinions about what the effects of these decisions are.

To give an example, the first of these decisions issued in January and dealt with minority business set-asides. That opinion, *Richmond v. Croson*, held that the city of Richmond had not adequately demonstrated a history of discrimination to justify racial set-asides. The decision was based on a well-established judicial rule called "strict scrutiny." That rule means that whenever a state or municipality resorts to racial categorizations, that legislative or administrative effort is subject to strict federal scrutiny. The reason: we do not trust states and municipalities to make racial judgments. The history of this country does not permit us to trust them to make such judgments, for they have generally made them to the harm of persons who were otherwise disadvantaged. Thus, strict scrutiny must still prevail, according to the Court. We cannot open the doors for states to feel free to deal any way they choose with these questions simply because they now urge that their efforts are benign rather than malign. It is the rule from

Richmond v. Croson, of course, that Pasadena's affirmative action for Armenians presently violates, though it has not yet been challenged in court.

Some people assert that *Richmond v. Croson* is a threat to genuine civil rights protections, but I hold that it is a protection against the abuse of genuine civil rights protections. It allows us to separate the wheat from the chaff and to keep the country on a steady course. And if we do not understand that, if we do not stop acting and reacting reflexively, instinctively, and begin to think about some of these things, we may well threaten to lose it all to the constantly expanding claims of so-called minorities.

Another area in which the same kind of reasoning takes place derives from the Supreme Court decision, *Wards Cove v. Atonio*. This Alaska case especially disturbed some people, for in it the Court laid out a rule for determining in court when someone is guilty of discrimination or not. They said that the burden of proof cannot simply be removed from plaintiffs, who initiate the suits, and placed on defendants, the firms. Rather, plaintiffs have to go through certain steps besides simply citing disparate statistics. They must moreover point to discriminatory practices. The reaction to this ruling was to say that this Supreme Court decision made it much harder to prove discrimination. In one sense that is true, and I think that I can show you how.

We need only to remind ourselves of the last emphatic endorsement of affirmative action by the Supreme Court. In 1987 the Court did just that in a California case, *Johnson v. Santa Clara County Transportation Agency*. The Court there decided that the County could implement an affirmative action plan which led to an appointment of a female over a more qualified male. In writing the opinion for the majority, Justice Brennan, speaking for the Court, explained what Mr. Johnson would have had to do in order to prove that he had suffered impermissible gender (or racial) discrimination. He reasoned that it was not enough for Mr. Johnson to show that gender was taken into account; it's not enough for him to point to statistics (or job experience), and it's not enough for him simply to argue that he was better qualified. What he required to do was to demonstrate a concrete act or practice of discrimination and to show besides that the existence of an affirmative action plan does not rebut his charge of discrimination. In short, Justice Brennan for the court, in the Johnson case, laid down the same burden of proof that, in *Wards Cove*, was applied to the plaintiffs. What is the difference? In the *Johnson* case the plaintiff was a white male, while in *Wards Cove* the plaintiffs were Filipinos and Alaskan natives—minorities.

The objectors to *Wards Cove*—including Justice Brennan, who dissented—are asking this society to accept differing rules for differing people on the basis of race. They say they have good reasons to do that, they have benevolent purposes. But the fact of the matter is, it is a different rule for different people on the basis of race—a different reading of the law. The law changes as your skin color or your gender changes. Now I submit that ordinary humanity cannot abide such a distinction and that it is too great a trial to subject ordinary humanity to. While citizens will accept the need for governmental intervention to insure fairness, they will not accept different rules for different people that begin to appear to them as merely arbitrary, as merely examples of power and not examples of law.

The remaining cases from last spring are subject to like reasoning and lead us to certain general propositions; namely, how in these United States will it be possible for us to keep civil rights on track, if we cannot keep Americans united? And that is the proposition, as question, that I bring to you. Is there a future for civil rights if there is not a future American people that identifies itself as one? Have we taken the time to think about how we are going to reach that goal, when the American people are one people? It is all very easy to say, "*E Pluribus Unum*," "valuing our diversity," "out of many one," but what are the concrete steps that will allow us to see past the diversity to our unity? Who is legislating those steps? Who articulates them? Who is bringing them to the rescue of the fears which are now rife in this society?

I submit to you that that job is not now being done, and that we are, quite frankly, living on borrowed time. While we carry on sincere efforts to project a future in which unfairness no longer characterizes American life—a future in which you put yourselves out of work—we don't see anyone consistently working at that goal. From the Administration at the top all the way down to the lowest levels

of our society, the standard thinking today is racialistic (and I said, “racialistic,” not “racist”—a term that is overused and abused). We wish to accommodate peoples’ own senses of their differences, their own senses of their interests. We wish to treat them more as lobbies than as free and independent citizens.

Reality imposes on us certain limits. We know that we cannot abstract from the history of discrimination. We cannot deny the reality of prejudice. But it does not follow from that that we cannot think about how to cure those ancient ills. We are still free to think; we are still free to debate, to discuss; and we are still free to insist that whatever solutions we arrive at be submitted to a test of their devotion to (their compatibility with) a future for the United States that is no less glorious than we have always longed for. That is why I submit that we are now arrived at a time when we require to rethink some solutions, to rescue some old discarded ones, and perhaps to retire some we have relied upon.

I only have time to give you one example carefully today. That is the example of good old fashioned injury litigation-lawsuits, going into court and winning big judgments. Immediately folk will say, “but we still do that; what are you talking about?” Let me share with you something that is not widely enough known. We do not, in fact, make a traditional use of litigation today. Our litigation (in civil rights) is driven—as in the case of *Lorance v. A.T.&T.* last spring—more by the regulatory environment than by good old-fashioned Anglo-American tort principles. Tort principles are very simple: if you hurt an individual, that individual can go into court and ask to be made whole. To be made whole means more than just to receive back pay; it means also punitive damages and compensatory damages. That is a system that is not just two hundred years old, like our Constitution. It is a thousand years old, and more. For a thousand years it has worked to deter injurious conduct, but we have avoided to use it in this last thirty years. We have instead placed caps on what people can gain in (civil rights) lawsuits. In the EEO area we have basically limited them to back pay, which is really a favor to discriminating enterprises. That is hardly a protection of anybody’s rights at all. Not only have we limited judgments, but we have raised administrative barriers to people being able to go into court at all, and simply saying, “I have been hurt; protect me.”

We have failed to use such litigation in the cases that are most obvious, wherein no one would have a problem proving injury in violation of the law—namely, public school segregation throughout most of this century. Not once in the whole history of racial public school segregation do we ever find filed a simple suit asking for damages as a result of the injuries thus inflicted. Linda Brown, in 1954, received no such compensation—not a penny, *nada*. Linda Brown did not even get to attend the school she wished to attend. She received no money, and she didn’t receive the education she sought. What then did she get, and doesn’t it matter to us that she didn’t get anything and is back in court today defending her grandchild on the very same grounds?

Are we so thrilled with the general principle enunciated by the Court in 1954; is that enough to satisfy us? Or, shouldn’t we insist that each individual who suffers ought to be repaired? Well, that is what we have lost; that’s what we forgot to insist upon. That is what is incompatible with the present framework of our laws, our administrative agencies, and the predominant civil rights agenda. We are not prepared to demand satisfaction. Now, we saw just a year or so ago a case in Florida, in which three youngsters were impermissibly segregated. They went to court and filed suit. The school district did not even wait for the trial; they settled the case for approximately 1.1 million dollars, as I recall. They were not black children. They were three youngsters who suffered from the HIV infection, which they contracted from the blood supply.

Remarkable isn’t it? You can hardly find a school district anywhere in the country that still segregates youngsters with HIV infection! It didn’t take much of an example to persuade them that that was not a wise thing to do. Yet, not once in the whole history of segregation of blacks and Latinos has there ever been a like award. Isn’t it time our country asked itself why? Isn’t it time we stopped hiding behind the traditional civil rights fears, the traditional sermons, and asked people to be real thinkers again? It’s time to say, “we want measurable results and not measurable rhetoric.”

In California, the case *Bakke v. the Regents of the University of California* (1978) opened the door to vigorous affirmative action in the university system. And they did, indeed, proceed at the level of students to follow a consistent pattern of affirmative action. This led quite recently, of course, to the discovery that Asians were being kept out because they had been coming in in too great numbers. The reverse quota had applied. But there was also something more interesting that came out of this decade of vigorous affirmative action at the University of California. At the time it began in 1978 there were approximately 117 black male faculty in the system. Tell me please, how many you think there might be today, after a decade of vigorous affirmative action? No, it is not even 130; it's nearer 127, one for each year! Mere chance would have given us better numbers than that. It's time to say, rhetoric is not enough. And why should people spill their blood so that the defenders of so-called "generous" policies go on getting to make decisions that don't do anybody any good.

It seems to me that, if we are in trouble today in this country, in civil rights, it is for the kinds of reasons I have laid out this afternoon. It is because the work is every bit as difficult as it was thirty years ago. The need for honest speech is as great today, as it was thirty years ago. The interference of taboos in carrying on the conversation is as great today as it was thirty years ago. A lot of the faces have changed; a lot of obstacles to social progress have changed. But the fact remains that the country has not been cleansed. I believe we can pick up where left off—that we can cleanse the soul of this nation; that a combination of modesty on our parts (modesty in our expectations from our own efforts and a willingness to deal with others on the same terms we ask to be dealt with), coupled with an almost revolutionary approach to solutions, will do the job.

I know that I am thought by some people perhaps to be intemperate in my speech. They say that I should be more politic. I admit that I am not always politic; I am not part of Washington, nor do I live back there. I am not part of that world, nor do I really care about its standards of judgment. Besides, it is probably no accident that a man who has spent his entire adult life reading revolutionary literature sometimes will speak in a revolutionary voice. But the key for us is to get the speaking started. So what, if one is a little clumsy now and again; so what if I do not get the words always right? So what if none of us has a gloss that comes with a stamp of approval from the Harvard Business School? The point is to get the speaking started again and to recognize that there's nobody out there, that we're used to hearing from, who's saying anything worth hearing!

Question from Audience:

"What is the future for affirmative action and EEO practices?"

I believe—and I did not speak of this today, but I have appeared before a number of the Quad-A sessions and I have said it to them—there is one sense in which what I said humorously in my formal remarks is actually true; that is, we all look forward to the day when you are all out of work! But there is another sense in which that is not true, and that is the sense in which what you are really doing, whether in private enterprise or government, is trying to introduce efficient, rational methods of employee selection that are fair in their consequences because they are effective in the enterprises in which you employ them and which indeed give people fair opportunities because they place the emphasis on your companies or your institutions doing their jobs well.

Insofar as that is the case, there will always be a job for you. It won't be a job of making up for past injuries but a job of keeping things on track. I think that affirmative action ought to be redefined, therefore, as a fundamental approach to personnel; it ought to become personnel itself. Get rid of the name, personnel, and call that whole shop affirmative action, understanding that what you do is to act affirmatively in the interest of the particular enterprise that you serve. I believe that that is the future for affirmative action.

Equal Employment Opportunity is a different question, in that respect. Affirmative action serves the interest of equal employment opportunity, but equal employment opportunity is also a legal question. It is a question of guaranteeing opportunities in society, and reaffirming the faith that, where opportunities are assured, individuals will distinguish themselves and will find the opportunities that will employ their talents.

We still have work on the legal front to shore up equal employment opportunity, but one of the things that will help us to accelerate the process is to see personnel practices sufficiently redefined that there are fewer problems to be contemplated as equal opportunity problems. I do not believe, by the way—and I will go ahead and make this “radical” pronouncement—I do not believe the argument some people make, that, when everything is done exactly fairly, you are going to see a perfectly random distribution of persons by race, ethnicity, and gender throughout the society. That is simply not true. There are too many other things that affect people’s choices of livelihoods that will make the pattern not evenly distributed.

I am sometimes reminded of my service on the School Board, when we reviewed the question of enrollment statistics, and where our students were in the district. I happen to come from a small town, a university town that is predominantly white. People there insisted that we had to get minorities in every classroom, so that all of our children would have the benefit of a multicultural experience. It sounded so plausible, abstractly, until one began to ask, what does that mean we must do to the children who are going to bring the benefit to the others? There the craziness began, as we contemplated shipping these youngsters all over town, and making their parents lives next to impossible. In a moment of utter exasperation, in one of our meetings and as I listened to people insist again and again that we had to find more and more black children to go here and there so that others could benefit from their presence, I exclaimed, “Look folk! There ain’t enough of us to go around so that every white man can own one!”

I think the same thing is true respecting EEO. Fairness is what we wish to guarantee, and the more we guarantee fairness the less we should have to worry about counting noses. (end of tape)