U.S. Department of Justice

Office of the Deputy Attorney General

John

Washington, D.C. 20530

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MEMORANDUM FOR: Hank Habicht
Special Assistant to the
Attorney General

FROM: Bruce E. Fein
Associate Deputy Attorney General

BEF

SUBJECT: Without Justice, a Report on the Conduct of the Justice Department on Civil Rights 1981-1982

The following is my appraisal of the report of the Leadership Conference on Civil Rights.

1. In the opening paragraph, the Report accuses the Administration of seeking to close doors of opportunity recently opened to people who have been victimized by discrimination. That statement betrays the ignorance of the Leadership Conference over the civil rights goals of the Administration. Brad Reynolds has reiterated without equivocation that the Admnistration will steadfastly redress injuries to persons who prove that they have been victims of illegal discrimination. The Leadership Conference, however, apparently desires to prefer persons on the basis of race or sex who have not been victimized by discrimination.

The last paragraph of the preface tacitly endorses the principle that judicial edicts are fixed in granite and that advocates who seek to influence the evolution of constitutional law are heretics to our Constitution. Abraham Lincoln, however, firmly disavowed the premise of the Leadership Conference. He proclaimed in his First Inaugural Address:

> "The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

2. On page 3, the Conference asserts that the Department has repudiated the Supreme Court's definitive interpretation of the Constitution and laws, and has announced that it would refuse to enforce the laws of the land. Again, this calumny is flawed by the misconception that the Supreme Court never overrules precedent and that those who seek to obtain a reversal are unfaithful to the Constitution. The Supreme Court has reversed itself on hundreds of occasions, and if the views of the Leadership Conference had been ascendent in 1954, the nefarious doctrine of separate but equal trumpeted in Plessy v. Ferguson, 163 U.S. 537 (1896) would still be the law today. When issues of great public moment are at stake, the Department of Justice should not be unthinkingly obedient to precedent, even those of recent vintage. In cases concerning legal tender and the flag salute, for example, the Supreme Court reversed itself on the heels of initially misguided rulings. See Minersville School District v. Gobitis, 310 U.S. 586 (1940), reversed in West Virginia Board of Education v. Barnett, 319 U.S. 624 (1943); Hepburn v. Griswold, 8 Wall. 603 (1870) reversed in Knox v. Lee, 12 Wall. 457 (1871). Challenging existent precedent acknowledges the wisdom of Justice Jackson who reminded all that the Supreme Court is not final because it is infallible, it is infallible because it is final, and that numerous Supreme Court decisions would be reversed if there were a superior judicial tribunal. See Brown v. Allen, 344 U.S. 443, 540 (1953).

3. The Leadership Conference accuses the Attorney General of attacking the federal courts for performing their constitutional role of protecting minority rights. To the contrary, the Attorney General has voiced criticism of judicial excesses that threaten to displace legislative policymaking by judicial edict. The Attorney General's remarks follow the hallowed tradition inaugurated by Thomas Jefferson of public criticism and questioning of an ascendent federal judiciary. Jefferson maintained:

> "A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the Nation is a solecism, at least in a republican government...."

The Attorney General's remarks, similarly, reprove a federal judiciary that has usurped legislative powers in a republican government.

Concededly, the federal judiciary was intended as a safeguard against tyrannical action undertaken by the elected branches of government. But Supreme Court doctrines regarding suspect classifications and fundamental rights have been repeatedly employed to frustrate legislative or executive actions that are oceans apart from tyranny. For example, is it tyrannical

to prefer a male to a female in the appointment of an administrator to an estate? See Reed v. Reed, 404 U.S. 71 (1971). Is it tyrannical to exclude aliens from special educational subsidies? See Nyquist v. Mauclet, 432 U.S. 1 (1977).

4. On pages 6 and 7, the Leadership Conference misleadingly suggests that the Green case requires compelling children to attend schools in order to achieve a racial balance. To the contrary, the Green case cited with approval Brown v. Board of Education (II), which held that the goal of desegregation was equal educational opportunity, and eschewed any mention of racial balance in the classroom. While the Civil Rights Division has disavowed the presumption of district-wide illegal segregation announced in Keyes, nothing suggests that such a presumption bears any reasonable nexus to the equal educational opportunity goal championed in Brown. Moreover, as previously stated, seeking alteration of Supreme Court doctrine follows a hallowed tradition set by Jefferson, Jackson, and Lincoln. The law with regard to desegregation remedies is far from settled, and if the Leadership Conference conception of Supreme Court rulings prevailed, the Nation would still live under the yoke of Plessy v. Ferguson.

On page 14, the Leadership Conference misrepresents the views of the Justice Department. The Conference asserts that the Department would tolerate purposeful segregation of students so long as the schools they attended had equal educational resources. To the contrary, the Department has repeatedly insisted that no child shall be denied the opportunity to attend the school of his choice on the basis of race.

5. The remainder of Chapter 1 is fundamentally flawed by treating constitutional law as pronounced by the Supreme Court or subordinate federal tribunals as a fixed and brooding omnipresence in the sky that cannot responsibly be questioned by the Executive Branch when it believes rulings are erroneous. As Abraham Lincoln explained with regard to the decisions of courts:

> "As rules of property they have two uses. First - they decide upon the question before the Court. They decide in this case that Dred Scott is a slave. Nobody resists that. Not only that, but they say to everybody else, that persons standing just as Dred Scott stands, is as he is. That is, they say that when a question comes up upon another person it will be so decided again, unless the Court decides in another way, unless the Court overrules its decision. Well, we mean to do what we can to have the Court decide the other way."

Lincoln also said regarding the Dred Scott decision that he would not adhere to the view of Stephen Douglas that he would have the citizen conform his vote to that decision; the member of Congress, his; the President, his use of the veto power. Whereas Douglas would make the decision a rule of political action for the people and all the Departments of government, Lincoln would not. Lincoln, if he were in Congress and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of the Dred Scott decision, would have voted that it should.

It might also be noted that many judicial scholars believe that President Lincoln's Emancipation Proclamation directly flouted the Dred Scott ruling. Does the Leadership Conference scold Lincoln for taking such bold action of questionable constitutionality?

6. On page 34, the Leadership Conference unfurls Justice Stone as a proponent of the view that the purpose of federal courts is to protect minorities. That observation is true insofar as the protection is limited to tyrannical acts of the legislature or the executive. But countless federal judicial rulings seem to embrace a much more grandiose concept of judicial power. It speaks volumes that Stone voted to uphold oppressive restrictions on citizens of Japanese descent during World War II, See Hirabayashi v. United States, 320 U.S. 1 (1943), Korematsu, v. United States, 323 U.S. 214 (1944), and purposeful segregation of citizens of Chinese ancestry in public schools, See Gong Lum v. Rice, 275 U.S. 78 (1927). Stone further admonished that:

> "Courts are not the only agency of government that must be assumed to have the capacity to govern."

See United States v. Butler, 297 U.S. 1, 87 (1936).

The Leadership Conference is at odds with the sage words of Justice Holmes that:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine. And it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

See Missouri, Kansas and Texas Railroad Company v. May, 194 U.S. 267, 270, (1904).

7. The Leadership Conference scolds the Department for pursuing a color-blind ideal of equal opportunity in its affirmative action advocacy. The Conference insists that the color-blind ideal is contrary to Supreme Court decisions and is thus an irresponsible legal position to espouse. As noted previously, if such a reverential view of the Supreme Court had prevailed in the past, the Emancipation Proclamation would never have been issued and the Nation would never have discarded the separate but equal doctrine of Plessy v. Ferguson. Justice Harlan and Chief Justice Salmon P. Chase (patriarch of the Free Soil Party) both championed a color-blind jurisprudence, See Plessy v. Ferguson, supra, at 559; J. Schuckers, The Life and Public Services of Salmon Portland Chase (1874), p. 531, and seeking to inscribe a color-blind ideal in the fabric of the Nation's laws is unswervingly faithful to the architects of the Fourteenth Amendment.