

INTRODUCTION

A STEP TOWARD EQUALITY: AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT OPPORTUNITY

Remarks by
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For the second time in this nation's history it has come face to face with its avowed espousal of equality, freedom and opportunity on the one hand, while on the other, its actual practices still fall far short of these high principles. Consequently, we are witnessing most of the institutions engage in a sort of schizophrenia in matters relating to equal treatment of men and women, and more particularly, of persons belonging to different ethnic and racial groups.

Almost two hundred years ago, the Declaration of Independence promised—and the Constitution, after it was amended, demanded—that various groups in this country receive fair and just treatment. That promise has never been kept. That demand has never been obeyed.

A short excursion through history should place the present level of the country's dilemma in perspective. During the internal conflict known as the Civil War, most Americans recognized that the root of the country's difficulty was racism. For example, when suggestions were made that those persons then held in legal bondage be freed to join the Union Army, the reality of a national hatred and anti-Black enmity became manifest. One author says, "Responding to the demand for Black troops, congressional leaders asserted that it was a 'white man's war.' They maintained that the presence of Black (men) would increase desertions, discourage enlistments and degrade the white soldier."¹ The author goes on to say, "Underlying these 'practical' considerations, however, was the fear that the presence of (Black) troops would engender racial equality within the military structure. It was claimed that if (Black men) were given equality with white soldiers, the situation would lead to demands for the same treatment in civilian life."² To this day, we face many lingering manifestations of this early attitude. It was all right to segregate Black men and have them fight and die for the country, but thoughts about equality for these same men were un-American and, obviously, unpatriotic.

The great fear then, as it seems to be now, was ". . . inspired by the mere implication of a society based on equality . . ."³

1. *The Poisoned Tongue: A Documentary of American Racism and Prejudice* 137 (S. Feldstein ed. 1972).

2. *Id.*

3. *Id.*

The labor bosses, the union organizers, the new immigrants and the poor whites were manipulated into a national scare by bigots. They could see thousands of ex-slaves competing with them for jobs, moving into Northern and Western cities, demanding entry into educational institutions, engaging in political activity, moving into *protected* neighborhoods, and acting like people, like citizens, as if they belonged. With more than three hundred years of declarations, spurious studies and racist theories (many of which we see being revived today), it was fairly easy for the immigrants and laboring groups—once the victims of hatred and intolerance themselves—to be galvanized against the upward mobility of Black people, and any other people who did not have the right ethnicity, heritage or origin.

But, the economic and military necessities ushered in by the Civil War were more powerful than the racial hatreds. Resultantly, we saw a vacillating Abraham Lincoln sign the first affirmative action initiative, an executive order known throughout history as the Emancipation Proclamation.⁴ Following Lincoln's Act, we saw the Congress and the country amend the Constitution to declare that a Black person is a whole person; not 3/5 of a person as that document had originally declared.⁵ History records that Congress then enacted several Civil Rights Acts,⁶ all of which were designed to affirmatively include all persons into what has been called "the main-stream" of national life.

Then, as now, we witnessed an assault against these measures; even against the very principles upon which they were grounded. It was on April 9, 1866 that the Congress passed the first Civil Rights Act.⁷ It was "An Act to protect all persons in the United States in their Civil Rights, and furnish the means of their vindication",⁸ it was intended to place members of all races on an equal footing in the exercise of their rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property."⁹ The Federal courts were empowered to hear and decide cases arising under the Act, and the President was mandated to use the land and naval forces to compel its enforcement. Severe penalties were proscribed for its violation. Other Acts were passed in 1867,¹⁰ 1870,¹¹ 1871¹² and 1875.¹³ We know the ensuing story. United States history admits that the courts emasculated these Acts,¹⁴ frustrated the Congressional intent, and relegated all, except white males, to a posture of peasantry. That was more than 100 years ago that the Congress called for the elimination of segregation and discrimination. Moreover, it called on the nation to take affirmative and positive steps

4. Emancipation Proclamation, Proc. No. 17, January 1, 1863, 12 Stat. 1268.

5. U.S. Const. art. 1, § 2, cl. 3.

6. Civil Rights Act of 1861, 12 Stat. 284 (1861); Civil Rights Act of 1870, 42 U.S.C. § 1981, 16 Stat. 140 (1870); Civil Rights Acts of 1871, 42 U.S.C. § 1983, 16 Stat. 433 and 17 Stat. 13 (1871); Civil Rights Act of 1875, 18 Stat. 335.

7. Civil Rights Act of 1866, 14 Stat. 27 (1866).

8. *Id.*

9. *Id.*

10. *Id.*

11. Civil Rights Act of 1870, 16 Stat. 140 (1870).

12. Civil Rights Acts of 1871, 42 U.S.C. § 1981, 16 Stat. 433 and 17 Stat. 13 (1871).

13. Civil Rights Act of 1875, 18 Stat. 335 (1875).

14. Higginbotham, Book Review, 122 U. PENN. L. REV. 1044, 1056-65 (1974).

toward building bridges of opportunity for every American citizen.

For the sake of brevity, let's come to 1941 and Executive Order No. 8802,¹⁵ issued by President Franklin D. Roosevelt, designed to bar discrimination in employment by anyone, any institution or any company receiving funds under a Federal contract. You will recall that Mr. Roosevelt would not issue the order until labor leader A. Philip Randolph and the NAACP's Walter White threatened a massive march on Washington.¹⁶

A. Philip Randolph spoke to this issue in 1940. He said in part:

Thus our feet are set in the path toward equality—economic, political and social and racial. Equality is the heart and essence of democracy, freedom and justice. Without equality of opportunity in industry, in labor unions, schools and colleges, government, politics and before the law, without equality in social relations and in all phases of human endeavor, the Negro is certain to be consigned to an inferior status. There must be no dual standards of justice, no dual rights, privileges, duties or responsibilities of citizenship. No dual forms of freedom. . . .¹⁷

He could have been speaking yesterday, or this evening, and his words would have been just as timely.

But again, in the 1940's and the 1950's, very much like the 1870's and 1880's, the federal mandates were practically ignored,¹⁸ and one wonders even now where were those who cry equality, meritocracy, qualifications, and fairness when the nation was facing a crucial test of will and honesty.

At an earlier time, on February 1, 1903, William E. B. DuBois had observed that ". . . the problem of the Twentieth Century is the problem of the color line."¹⁹ As in most of his speeches and writings, DuBois proved his prophetic and unquestionable genius in his analysis of the social structure and projected movement of American society.

DuBois' notice still prevails as the world's most critical issue. I believe, however, that today he would accept as a coincidental question, and as closely akin to the problem of color, those involving the universal struggle to survive; the common quest for equality; the striving to enter upon pathways of promise; the fight against ethnic isolation; the endeavor to end economic and sex exploitation; and the task we face of helping American institutions, and those who control them, to develop the capability and the strength of will to accept people—other than white males—as equals.

Now, one may ask: What does this have to do with affirmative action now—today?

All of what I have said, and even more, is precisely what affirmative action is all about. It is a mandate, a request, a requirement, a nudging by the racially abused, the economically deprived, the politically outraged and the federal government. Universities and other recipients of the public dollar are being told to take positive steps toward searching out and including members of the population whom they have discouraged, excluded and overlooked, particularly where such denials were due to one's race, religion, national

15. Exec. Order No. 8,802, 3 C.F.R. 1129 (Supp. 1968) and Exec. Order 9,664, 3 C.F.R. 480 (Supp. 1957).

16. J. ANDERSON, A. PHILIP RANDOLPH: A BIOGRAPHICAL PORTRAIT 257 (1973).

17. L. FERMAN, ET AL, NEGROES AND JOBS (1968).

18. See generally D. BELL, RACE, RACISM AND AMERICAN LAW (1973).

19. W.E.B. DuBois, THE SOULS OF BLACK FOLK 13 (1902).

origin and/or sex.²⁰

Today, we are concerned with affirmative action as an instrumentality through which institutions may strip themselves of past negative behavior and, in good faith and positive movement, proceed to expand their doors of opportunity to every person who possesses the requisite skills and talents to perform at all levels in these, formerly nearly exclusive, institutions and occupations. In other words, affirmative action is a means by which institutions, organizations, and the government itself, may institutionalize the principle and practice of fairness, and move from preachment to performance.

To accomplish these over-due goals, there are several legal mandates regarding the provision of equal employment opportunities. The government has learned like minorities and non-minority women, that the practice of equality is far too important to leave its effectuation and implementation on those who have been guilty of discrimination. Consequently, it is pressing institutions to comply with the following laws and regulations:

*Executive Order # 11246 as amended by # 11375.*²¹ These Executive Orders are applicable to all institutions with federal contracts of over \$10,000. The Orders prohibit discrimination in employment (including hiring, upgrading, salaries, fringe benefits, training and other conditions of employment) on the basis of race, color, religion, national origin, or sex. It covers all employees. These Orders are enforced by the Division of Higher Education, Office for Civil Rights, Department of Health, Education and Welfare.

*Equal Pay Act of 1963.*²² The Equal Pay Act is applicable to all institutions. It prohibits discrimination in salaries (including all fringe benefits) on the basis of sex. It covers all employees. It is enforced by the Wage and Hour Division, Employment Standards Administration, Department of Labor.

*Title IX of the Education Amendments of 1972.*²³ Title IX is applicable to all institutions receiving federal monies by way of a grant, loan or contract (other than a contract of insurance guaranty). It prohibits discrimination against students or others on the basis of sex. It is enforced by the Division of Higher Education, Office for Civil Rights, Department of Health, Education and Welfare.

*Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972.*²⁴ This is the basic Federal law mandating employment on a non-discriminatory basis. Title VII has been the central anti-bias vehicle since 1964. Through it the Equal Employment Opportunity Commission looks at every aspect of the employer's conduct. The EEOC has been successful in uncovering and correcting several cases of discrimination; and the penalties have been harsh. They have ranged, in back pay, from a few

20. Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., 86 Stat. 103 (1964) as amended by the Equal Opportunity Act of 1972, 42 U.S.C. § 2000 et seq., 86 Stat. 375 (1972).

21. Exec. Order 11,246, 3 C.F.R. 406 (Supp. 1969), 42 U.S.C. § 2000e (Supp. IV, 1969), as amended by Exec. Order 11,375, 3 C.F.R. 406 (Supp. 1969), 42 U.S.C. § 2000e (Supp. IV, 1969).

22. Equal Pay Act of 1963, 29 U.S.C. § 206 (1970 ed.), 77 Stat. 56 (1963).

23. Education Amendments of 1972, 20 U.S.C. § 1681 et seq., 86 Stat. 373 (1972).

24. Title VII of the Civil Rights Act of 1964, 78 Stat. § 241 (1964).

25. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000 et seq., 86 Stat. 103 (1964).

dollars to several hundreds of thousands. Usually, after compelling the discriminating employer to pay up, the EEOC requires an almost instant affirmative action program. Congress made two important amendments to Title VII in the Equal Employment Opportunity Act of 1972: (1) The law was expanded to cover public employers of 15 or more persons and educational institutions; and (2) Congress authorized the federal government to sue on behalf of charging parties when conciliation failed. More precisely, EEOC may sue private employers and the Department of Justice can file against public employers.

*Title VI of the 1964 Civil Rights Act*²⁶ bans discrimination in any program which receives federal financial assistance. Under the recent amendments, Title VI requires institutions receiving federal assistance to examine their boards, committees and other instruments of policy-making to determine whether discrimination obtains in their makeup.

*Title VII (Section 799A and Section 845) of the Public Health Service Act.*²⁷ Title VII is applicable to all institutions receiving or benefiting from a grant, loan guarantee, or interest subsidy to health personnel training programs or receiving a contract under Title VII or VIII of the Public Service Health Act. It prohibits discrimination in admission of students on the basis of sex; and prohibits discrimination against some employees. It is enforced by the Division of Higher Education, Officer for Civil Rights, Department of Health, Education and Welfare. The law covers full and part-time employees (its coverage includes graduate and undergraduate students who are employed).

Again, although the concept of affirmative action is relatively simple, and although the phrase 'equal employment opportunity' is quite familiar to most of us, a good deal of recent rhetoric about these two issues has served both to complicate each of them and attempted to confuse and encumber their execution. Those of us who have been working for several years to implement equal employment opportunity, by taking affirmative action, are constantly forced to return to the basics of the matter. We are constantly forced to remind dissenters, and proponents alike, of the circumstances that so urgently called for affirmative action. And we are constantly forced to remind ourselves and our associates that the major point of the regulations is to *assure all persons of equal access to the same channels for jobs*. In short, to implement the proclaimed right of every man and woman to procure a livelihood, without crippling obstacles, invidious discrimination and nonsensical distinctions.

This confusion that I mentioned lies in several quarters and, in my opinion, demonstrates some clear and present dangers to any effective programming. First among these points of confusion is the malignant retreat by the national government.²⁸ Then there is continuing weak commitment of

26. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 75 Stat. 252 (1964).

27. Title VII of Public Health Service Act, 42 U.S.C. § 295h-9, 84 Stat. 19 (1970), as amended by 85 Stat. 461 (1971) and 88 Stat. 347 (1974), and Title VIII of the Public Health Service Act, 42 U.S.C. § 298b-2, 85 Stat. 355 (1973).

28. The Federal Civil Rights Enforcement Effort—1974, Volume III, "To Ensure Equal Educational Opportunity" (A Report of the U.S. Commission on Civil Rights, January 1975); MAKING CIVIL RIGHTS SENSE OUT OF REVENUE SHARING DOLLARS (U.S. Commission on Civil Rights Clearinghouse Report 50, February, 1975).

colleges and universities.²⁹ Next is the seeming conflict between minorities and non-minority women.³⁰ There appears to be a concerted effort by a few members of other ethnic groups to derail or impede some of the small progress which has been made by minority groups.³¹

There seems to be an attempt to declare that *all* white women represent a new, instantly found or recently discovered, underclass in American society. This suggests that this group should have major efforts and initiatives under affirmative action programs directed, specifically, toward them. In other words, there are those who have deliberately lumped minorities and women into the same category for affirmative action purposes.

Such action is hypocritical. It disserves the needs and status of both white women and members of minority groups. It suggests that white America has selected out a small piece of action for minorities and by declaring white women a minority, it satisfies its conscience by shifting some of its power to the other side of the same table. It should be clear that when power and influence are granted to white women on a selected basis, it does little toward seriously altering the social order's economic status quo or the relative historic position of minorities.

It is a cruel hoax to declare that white women and minorities are on the same footing and thereby cast and force them into competition with each other. I made the following observation before the Harvard Law School's Visiting Committee in 1970:

There is a temptation, or an attempt, by many people concerned with and about the status of women to compare or equate their position to and with the position of Black people. This is both unjust and unfair to both groups. For this would, in my judgment, operate to obfuscate the position of both. The two groups come toward the problem from different legacies of deprivation. The women, unlike the Black people, for the most part, live in constant contact and presumably in an influential position with members of the discriminating group. It has been pointed out that ' . . . some of the most important relationships in her personal life—those with her husband, son, father, and brothers—are with members of the decision making power. This fact makes the status of women a unique one.'³²

I would hope that women's groups, in their rightful push for rewards that they have been denied, and for positions from which they have been excluded, will guard against becoming pliant tools, and a part of a strategy which maintains entrenched racist practices. The progressive advances of women's groups have meant much for human rights in America. The potential is there for accelerated social change, or for conflict. Let's guard against the women's movement and minority groups engaging in conflicts and let's promote the common cause by working together.

The next danger is the apparent conflict and/or misunderstanding between members of minority groups, women's groups and some leading

29. See note 34 *infra* and accompanying text, as well as the following: "Faculty Backlash", *Newsweek*, Dec. 1972 at 27; W. Leonard, *Affirmative Action versus Affirmative Results* (Annual Report to the President, Governing Boards, Deans of Faculties and Vice Presidents of Harvard University, 1975).

30. See note 32 *infra* and accompanying text.

31. See note 33 *infra* and accompanying text at (10): Leonard, *DeFunis v. Odegaard: An Invitation To Look Backward*, 3 *BLACK L.J.* 224 n.7 (1973).

32. Leonard, 21 *Harvard Law School Bulletin* 17 (1970).

organizations in the Jewish Community. This danger signal prompted me to write my good friend, Rabbi Arthur Hertzberg of the American Jewish Congress, a letter.³³

Then, there is the attempt to pit Black people, Chicanos, Puerto Ricans, Asian Americans and Native American Indians against each other, with further efforts to spice the whole quibble up by declaring that poor white people should be included in whatever meager programs there are for the historically oppressed.

Unfortunately, these groups seem to find it easier to attack Black people and the insignificant gains that we have made, than to spend their energies directing their darts of righteous indignation at the white majority who got us *all* in the mess that we are in.³⁴

When other people who wear the economic, political and social badge—"minority"—join white women and demand an equal portion of the small amount of action which Black people have forced the white establishment to concede, then the vehicle can quickly become over-loaded and fail to work for anyone. Consequently, the white majority still holds fast to its privilege and power, while leaving the others, except white women, to fight over the crumbs.

I recently wrote the President and the Deans at Harvard about another one of the clear and present dangers to equal employment opportunity and affirmative action: the growing use of the *negative quota* against minorities and against women, but particularly against minorities.

The first principle of equal opportunity is equal access. It is the basic right of each person to compete for resources and rewards without negative distinctions being made because of race, sex, color, creed, religion or national origin. This is what equal opportunity and affirmative action are all about. Affirmative action means that positive action must be taken to include and help to increase the numbers of people who have, until recently, been virtually excluded from almost every level of university appointments, i.e., minorities and women.³⁵

It is amazing, and instructive, to note that many people, institutions and organizations who argue vehemently against the employment of goals, timetables (and certainly not quotas) are in the front ranks of the practice and defense of the negative quota against minorities. One could conclude that this borders on bad faith. I do not find that to be the case. Instead, I think that it is one of those conditions born of inadvertence, insensitivity and a lack of appreciation for the vast skills and talents possessed by members of minority groups. Further, these flames of negativism are constantly fed by specious studies and questionable conclusions flowing from the pens of many persons who are well-placed in the academic structure of this nation.

The Ford Foundation funded a study in 1968 which surveyed about 70% of the Ph.D.'s and reported that approximately 1% (which is now inaccurate) of the Ph.D.'s were Black.³⁶ Unfortunately, this study has been

33. See Appendix A.

34. See Appendices B, C, and D.

35. See note 28 *supra*.

36. "Doctoral Fellowships for Black Students", *School and Society*, Feb., 1969, Vol. 97, p. 87.

used as justification for not searching out and appointing additional Black faculty members by almost every institution of higher learning in the country.

The great danger in the use of this negative quota is, if carried to its logical extreme, that one could conclude that any group with representation in the student body or in the faculty greater than its representation in the population as a whole is therefore over-represented and should have its number decreased by ceasing to hire persons who belong to that group, regardless of their qualifications to do a particular job.

Can one imagine what this would do to Asian Americans in some disciplines? Would one dare imagine what this would do to American Jews? How would such action affect white Anglo-Saxon Protestants? What would happen to other groups who would seem to have more than their share of university appointments?

I call this to your attention because of the growing and bold use of the negative quota argument by too many people. I sincerely fear that if such an argument continues to be used effectively, as it is being used today, against minorities, it may well be directed towards other groups tomorrow.

In the First Session of the 86th Congress (1965) the House Committee on Education and Labor found, among other things, that "job discrimination is extant in almost every area of employment and in every area of the country. It ranges in degrees from patent rejection to more subtle forms of invidious distinctions. Most frequently it manifests itself through relegation to 'traditional' positions and through discriminatory practices. . . ."³⁷

Given that history of inaction and the fragility of our governmental structure, the government says, 'we will help you understand that you are a part of the nation and the nation's goal is to use the skills and talents of every individual at the level of his or her highest potential.' To help institutions realize this mission, the government has said that it will require the development of a plan—an affirmative action plan.

An affirmative action plan is a specific and result-oriented procedure. It is a deliberate attempt to provide equitable treatment for all employees regardless of race, color, religion, national origin or sex. It includes consideration in hiring, upgrading, salaries, fringe benefits, training, professional development and all other conditions of employment.³⁸

The history of employment practices, in most of the nation as reflected in the composition of the present work force, often indicates that minorities and women have been affirmatively under-utilized. Likewise, if the city or the university is to experience continuous and needed renewal, they must develop to the fullest their human resources; they must remove obstacles to individual fulfillment; they must respect individual dignity, aspiration and worth; and thereby develop the most efficient and productive faculty and staff.

It simply means that if the nation and its several institutions are to maximize the use of all of human resources that any scheme preventive of this achievement robs the nation of much of its true value and is a denial of the basic rights of the people.

37. Title VII of the Civil Rights Act of 1964, 78 Stat. § 241 (1964).

38. See note 21; Higher Education Guidelines, Exec. Order No. 11,246, 3 C.F.R. (Supp. 1969).

These are some of the things we must keep forever in mind. There are those who cite the progress inherent in the actual laws to urge that affirmative action is an unnecessary frill. They would wish to return to the old pattern of static behavior, of "say it and forget it." Many people recognize the fallacy of this attitude. Martin Luther King saw it, and warned us that "Laws are passed in a crisis mood . . . but no substantial fervor survives the formal signing of legislation. The recording of the law itself is treated as the reality of the reform."³⁹ That is why we are reminded now of some of the laws that have both hindered and helped us. That is why I am asking us to take a periodic review of what our past has produced so that we may have a better understanding of what our present activities are all about.

Affirmative action is in large part the cautious combination and comparison of facts. The data, the numbers, the goals and timetables are essential guideposts by which we must judge our progress, our methods, our steps. It is a sort of drudgery to gather all this information. But without it, we are working in the dark. We must remind ourselves, and those who may object to so much information, that the data themselves are *not* affirmative action. Numbers do not in themselves create equality, but they *do* force institutions to take a frank look at reality, and therefore represent the first prong of providing equal employment opportunity.

Armed with statistics, we must push, provoke and pursue a course that will equalize the racial, sexual and ethnic proportions of our personnel make-up. If we discover that few minorities or women apply for jobs, we must work to increase applications. If we discover that some people do not know of job openings, we must find ways to advertise employment news in the proper places. If we discover that women do not possess certain credentials or experience to move into management positions, we must allow them to take courses, or enroll in on-the-job training courses. If we discover that Spanish-speaking citizens cannot get jobs because of communication barriers, we must arrange for language instruction courses. If we find that qualified applicants are turned down for jobs because of the whim or preference on the part of the employer, we may have to get rid of the employer—at the very least remind him or her of the laws against discrimination on the basis of color, race, creed or sex. These are the ingredients of affirmative actions.

The banners of fear and concern strike me as false issues. Why do the opponents of equality and affirmative action hide behind such emotional red flags and the fragile shibboleths "preferential treatment" and "reverse discrimination"? If the suggestion is that only white males, or white people, need apply—then say so. Stop being hypocrites.

If there is insecurity and fear of the expanded pool, and the added competition of members of minority groups and women—then that fact should be admitted.

The painful and plain fact is that present hiring and promoting do not proceed along the line of equality and merit. Even if one could find a miniscule of substance in the charge of preferential treatment and reverse discrimination, the choice would *not* be between that and equality of treatment, but between reverse discrimination and what we *have* now. I

39. M. KING, JR., WHERE DO WE GO FROM HERE? CHAOS OR COMMUNITY 5 (1967).

submit that anyone who cannot see that white males, of all ethnic and religious backgrounds, have received preferential treatment for the past many years—is either insensitive to reality or ignorant of history's pages.

Moreover, if we can work intelligently with the principles of equal opportunity and affirmative action, I submit that we would not have to worry about red herrings like quotas, preferential treatment or reverse discrimination. Fairness and honesty will serve as their own defense. Faculty and administrators are being asked to say, promise and take steps which assure that they will not engage in the old, and present, variety of denial and discrimination; and that they will reverse the age old practice of affirmative preference for white males.

The closing paragraph in a letter to J. Stanley Pottinger from the Executive Committee of the American Economic Association gives adequate refutation to some of the present quibble.

Many who cry 'reverse discrimination' are those who owe their present rank or position to having got there first—to have succeeded in earlier days when the competition was not open to all. Their claim to intellectual superiority, as also to moral authority, must accordingly be viewed with considerable reserve.⁴⁰

As I said to my friend Rabbi Arthur Hertzberg, "I would like to emphasize the enormous benefits that may be derived from the accurate application of affirmative action principles. It is in the best interest of all Americans to include and rejoice in the inclusion of those who have not yet been allowed full participation in American society. A continuation of the status quo is not only a self-perpetuating fallacy, but an indication of an irredeemable disintegration of the fragile institution we call America."⁴¹

40. Letter from Galbraith to J. Stanley Pottinger.

41. See Appendix A.

APPENDIX A
HARVARD UNIVERSITY

OFFICE OF THE PRESIDENT

MASSACHUSETTS HALL
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December 28, 1972

Mr. Arthur Hertzberg
The American Jewish Congress
Stephen Wise Congress House
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New York, New York 10028

Dear President Hertzberg:

Thank you for your letter of December 22. I, too, enjoyed and found the New York meeting both helpful and informative.

I would like to share some of my thoughts and concerns regarding the current controversy over affirmative action policies and principles. The very term, affirmative action, has been over and misused to such an extent that it appears to have lost its meaning in a sea of discussion, fear and misunderstanding.

The misunderstanding I refer to is painfully evident in so many of the statements and letters that have come recently to my attention. Notable among these is a letter of last August (1972) from Mr. Phillip E. Hoffman, President of the American Jewish Committee, to President Nixon and Senator McGovern. Mr. Hoffman cites the Committee's support of "broadscale and intensive compensatory educational programs for the deprived and disadvantaged," as a basis for his complaint that preferential treatment of such deprived minority groups has become a violation of the "constitutional system" of the United States that holds the right of the individual citizen to be above the rights of any one group. One must ask, where is the preferential treatment?

The allegations that follow this kind of reasoning assert that affirmative action is "reverse discrimination", and that equal employment opportunity principles are contrary to the concept that merit is (or should be) the one and only basis for employment, education, political power, etc.

Before the debate continues with any more alacrity, it is imperative that the misunderstandings outlined above be cleared up.

First, in response to the charge that the individual, as the basic political unit of a democracy, has been superseded by ethnic, religious or other groups, it must be said that discrimination on the basis of race, sex or religious and ethnic affiliation is the most blatant violation of what Mr. Hoffman claims to be the root of Constitutional principle. For a good part of American history, the individual black person, for instance, has been discriminated against precisely because of his membership in a certain race. The same may be said for women—that individual women have been discriminated against on the basis of their membership to a certain sex. The same has been true for Jewish people—individual Jews have been discriminated against on the basis of their national and religious background.

The group memberships mentioned above, which so long served as grounds for discrimination, must be taken into consideration in order to rectify the discriminato-

ry policies that emerged to surround them. However, as unqualified criteria for employment, acceptance, etc., such membership is not and never has been inherent in affirmative action plans. Those who claim the contrary are sadly mistaken. They may be said to be victims of several false and very damaging assumptions.

Let me examine some of these assumptions. By doing so, I hope to answer the charge, mentioned above, that reverse discrimination is the result of affirmative action programs and policies.

There is an erroneous premise holding that if a member of a minority group or a woman is hired, he or she is *ipso facto* "unqualified", that his or her position represents a denial to a white male.

Another facet of this premise is the idea that college and university administrators have caved in to certain pressures to recruit, admit and hire people who do not have requisite skills and talents to perform at levels to which they have been appointed (and, might I add, which have not been traditionally held by women or minority groups). In other words, progress in affirmative action goals is equated with regression in the principle of merit as a criterion for hiring.

This association of progress in one area with regression in another is only a result of innocence and ignorance. Groups within the non-minority community fail to recognize that the pool of competition has broadened significantly. For a number of years, white males of various religious and political persuasions had to be concerned only with competing among their own kind. Consequently, it was easy to grasp and then maintain the narrow gates of opportunity. The traditional maintenance of circumscribed opportunity allowed for continuation of such circumscription when minority groups and women, in significant numbers, began to seek entrance to a large variety of jobs and careers.

The purpose of affirmative action is to abolish whatever hindrances are currently prohibiting minority groups and women from entering the mainstream of the American economy and political flow. Affirmative action does not seek to set quotas, but to establish goals. Affirmative action plans and timetables do not seek to further circumscribe opportunity, but to implement the principles of equal opportunity; principles so dear to the hearts of Americans. Affirmative action principles, however, are not designed to inhibit personnel officers and admissions committees, but to broaden the scope of their choices.

It is possible that in some cases and in some institutions, these programs may have been misdirected and misused. Surely, though, we must not allow mistakes to serve as bases for judging intentions. And surely, we must not allow certain uninformed programs to overshadow our principles.

I thought it unfortunate that neither Senator McGovern nor former President Nixon seized the opportunity presented by the Hoffman letter to rise to a statesman-like stature and call for an end to the domestic quibble over whether goals or quotas are the best way to deliver and ensure overdue Constitutional obligations. Both men could, and in my judgment should, have pointed to the mandates flowing from the 13th, 14th and 15th Amendments, the Civil Rights Acts from 1866 to 1972 and the several Executive Orders—all of which were designed to eliminate all disabilities and burdens placed upon this Country's oppressed people; and concomitantly to impose formal requirements on the legal institutions of this nation to guarantee *full* participation in its economic and political life. It is clear that the hindrances and grievances of the people, for whom these acts were promulgated, have never been remedied. Immunities, privileges and rights exist; but they have never been fully protected or equally extended.

It will be a great tragedy, in my judgment, if members of the American Jewish community, who for years on their own motion have identified to a great extent with the aspirations and struggles of other minority groups, should now assume the role of gatekeepers—should now stand in the shoes of those who once oppressed them. It

would be a sad commentary on "the American way" that the once oppressed would seek to oppress others, and would refrain from helping those who seek to smash the resistance that once obtained to hinder and impede their own legitimate and rightful progress.

Furthermore, I applaud your present efforts and I would urge you and other interested persons to help create an inter-group and national dialogue around this and related issues. Benign or sectionalized debate could only serve to exacerbate and further the present confusion.

Finally, I would like to emphasize the enormous benefits that may be derived from the *accurate* application of affirmative action principles. It is in the best interest of all Americans to include and rejoice in the inclusion of those who have not yet been allowed full participation in American society. A continuation of the status quo is not only a self-perpetuating fallacy, but an indication of an irredeemable disintegration of the fragile institution we call America.

Sincerely,

Walter J. Leonard
Special Assistant
to the President

WJL/maj

cc: Phillip Hoffman
Selected individuals

APPENDIX B

August 4, 1972

Hon. Richard M. Nixon
President
The White House
Washington, D.C.

Dear President Nixon:

The purpose of this letter is to express the American Jewish Committee's grave concern over a trend which is in sharp conflict with our longstanding commitment to the principle of equal opportunity for all Americans. We refer to the current widespread efforts and promises to achieve "proportional representation" in our society by providing opportunities in employment, in education, in governmental appointments and civil service and in other areas of American life on the basis of race, sex or ethnic affiliation.

The American Jewish Committee has actively supported and participated in a variety of "affirmative action" programs designed to rectify historical injustices suffered by Blacks and the members of other disadvantaged minority groups. We have, for example, urged broadscale and intensive compensatory educational programs for the deprived and disadvantaged—i.e., special training, extended apprenticeships and counselling programs and other forms of remedial assistance, to help them to qualify for entry into higher education, into better jobs and in general to realize their potential for full participation in the mainstream of American life. We maintain however that such special assistance must be extended to all the disadvantaged regardless of their racial and ethnic backgrounds.

We have also supported the policy of "open enrollment" as it is practiced in many universities throughout the nation so that some form of free higher education or vocational training might be available to all who seek it and all who can benefit from it. We also recognize the need for intensive and extraordinary efforts in the areas of vocational counselling and job recruitment geared to the disadvantaged minority communities, utilizing the media, the agencies and the community organizations best suited to reach the members of these communities. Such affirmative action programs designed to seek out, encourage, assist and accept those previously excluded, must not however be permitted to lead to the acceptance by government or the private sector of the concept of "proportional representation" which we believe is but a euphemism for quotas. For this concept substitutes new forms of discrimination for old, creates new breeding grounds for intergroup anger and hostility and greatly downgrades the importance of merit.

How "merit" is to be measured or determined is, of course, a difficult question and the American Jewish Committee strongly urges fundamental and continuing review of qualifying criteria and examinations currently in use, to make certain that they are in fact dependable measures of present and potential capacity.

As a practical matter the imposition of quotas or "numerical goals" to accelerate the progress of specifically designated groups are clearly against the law. As the U.S. Supreme Court said in an unanimous decision in the case of *Griggs v. Duke Power Company* in 1971, "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed." Furthermore, the concept of group rights is totally alien to our constitutional system, for in a democracy it is to the individual that rights are accorded, *not* to the group. While we recognize that special measures are indeed necessary to overcome dramatic and longstanding injustices, and to enable those long deprived to compete on the basis of merit, we maintain that such measures must be addressed to the individual and not to the group.

Accordingly, the American Jewish Committee strongly urges you, Mr. President to continue to lend your efforts to the furthering of national policies that would greatly expand employment and educational opportunities for individuals of all groups and thus diminish the intense competition for scarce existing opportunities. We therefore urge you to reject categorically the use of quotas and proportional representation in implementing vitally essential affirmative action programs.

Sincerely,

Phillip E. Hoffman
President

PEH:vs

APPENDIX C

THE WHITE HOUSE
WASHINGTON

August 11, 1972

Dear Mr. Hoffman:

I share the views of the American Jewish Committee in opposing the concepts of quotas and proportional representation. I do not believe these are appropriate means of achieving equal employment opportunity.

I have sought and will continue to seek to enlarge opportunities for men and women of all religious, ethnic and racial backgrounds to serve in responsible positions, but the criteria for selection that I have employed and will continue to employ will be based on merit. I share your support of affirmative efforts to ensure that all Americans have an equal chance to compete for employment opportunities, and to do so on the basis of individual ability.

With respect to these affirmative action programs, I agree that numerical goals, although an important and useful tool to measure progress which remedies the effect of past discrimination, must not be allowed to be applied in such a fashion as to, in fact, result in the imposition of quotas, nor should they be predicated upon or directed towards a concept of proportional representation.

I have asked the appropriate department heads to review their policies to ensure conformance with these views.

Sincerely,

S/RN

Mr. Phillip E. Hoffman, President
The American Jewish Committee
165 East 56 Street
New York, New York 10022

APPENDIX D

August 14, 1972

Dear Mr. Hoffman:

I have read with interest your thoughtful letter of August 4 on ways of expanding opportunities for members of disadvantaged minority groups who have been the victims of exclusion in our society. I have noted especially your rejection of the concept of proportional representation as a means of rectifying historical injustices suffered by Blacks and members of other minority groups.

As your letter makes clear, the issue of "affirmative action" is intertwined with other critical areas of social policy, including the principle of merit, the threat of new discrimination and the danger of new polarization. I intend soon to deal with these interrelated issues in a major statement.

I can assure you now, however, that I share the concern you have expressed and reject the quota system as detrimental to American society. I believe it is both necessary and possible to open the doors that have long been shut to minority-group members without violating the basic principles of non-discrimination and without abandoning the merit system. In this connection, I commend the American Jewish Committee for the positive approach taken in your letter and for the support you have given over the years in strengthening the principle of equal opportunity for all Americans.

I have pledged in my campaign for the Presidency to expand the opportunities for employment, for education, for housing and for personal growth and achievement for every citizen. I am confident that this goal can be reached in ways consonant and consistent with our basic commitment to a society based on the principle of full equality in a free society for all Americans.

Sincerely yours,

George McGovern

Mr. Phillip E. Hoffman, President
American Jewish Committee
165 East 56th Street
New York, New York