

The Politics of Fair Housing

Keynote Address of Arthur S. Flemming*

I appreciate very much those introductory comments by Drew Days. I have had the opportunity of associating with a good many persons in the federal government, and I can say that, of those that it has been my privilege to associate with, Drew Days stands out as one of the persons who came to Washington and rendered outstanding and courageous service. I can't begin to tell you how much it meant to those of us who were working in the civil rights field to have someone like Drew Days in the Department of Justice. And certainly as Chairman of the old U.S. Commission on Civil Rights—as it is referred to these days—it meant a great deal to know that he was there, to have the opportunity to talk with him, confer with him, get advice from him, and to have his support for the kind of objectives that we were endeavoring to achieve. So when he called and invited me to come here to spend the evening with you, I was delighted to be in a position to accept that invitation.

Soon after I became Chairman of the U.S. Commission on Civil Rights (this was in the early-to-mid 1970s), I found myself being invited to go to various parts of the country and talk about the status of civil rights in our nation. As I tried to provide a bird's-eye view of where we were at that time, I often opened by saying that I thought we were in a period where we had the opportunity of operating under reasonably good laws and, in many instances, outstanding court decisions. But I said it seemed to me that the question that confronted us as a nation was whether or not we had the capacity and the commitment to implement those laws and court decisions in a manner that would really open up opportunities for those who had been and were still the victims of discrimination. And I used to say then that I felt that the jury was still out on that question.

But having made those generalized comments, I always felt that it was necessary to qualify them by saying that they did not apply to the field of housing, because I did not feel that we were operating

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under a good law with the Fair Housing Act.¹ I felt, as many people felt, that the law did not have the teeth it required if we were really going to deal with the issue of fair housing in a meaningful and effective way. We did have the benefit of some helpful court decisions. But the question remained whether we had the capacity and the commitment to take what we had in the way of a law (which was not very good) and of court decisions and to implement them so as to open up opportunities for those who were the victims of housing discrimination. The answer was clear. Up to that point we as a nation had not demonstrated that we had either the capacity or the commitment to really move forward in a significant manner in this area.

Just a year or two before some of us left involuntarily, the U.S. Commission on Civil Rights issued a report summarizing the situation and making recommendations that we felt would move us forward in this area. And as Drew has indicated, one of the areas tackled by the Citizen's Commission on Civil Rights was the area of housing. I think we picked a good title for our report, "A Decent Home: A Report on the Continuing Failures of the Federal Government to Provide Equal Housing Opportunities."²

The twelve of us who served on the Citizens' Commission felt that one of the areas we should tackle was housing. Our report (A Decent Home) addresses the political problems that confront us in this area. I feel that anyone who reads this report or any similar document cannot help but conclude that the political process in this country has produced minimal results in the area of fair housing. And I do not think it is too difficult to figure why that has been the case. After all, until 1962, the federal government (my emphasis throughout will be on the role of the federal government) promoted segregation in housing and was one of the principal actors establishing a solid foundation for segregated housing. In the 1960 presidential campaign, housing became an issue because then-Senator Kennedy said that, if elected President of the United States, he would sign an executive order which would set forth the policy of the executive branch of the federal government on fair housing. That idea came to him because the Civil Rights Commission, in its first report in 1959, urged the President of the United States to sign

1. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1982 & Supp. 1987).

2. Citizens' Comm'n on Civil Rights, *A Decent Home: A Report on the Continuing Failures of the Federal Government to Provide Equal Housing Opportunities* (1983) [hereinafter *A Decent Home*].

Fair Housing

an executive order which would try to raise the sights of the executive branch in this area of fair housing.³ In effect, then-Senator Kennedy said that he had taken note of that recommendation and that he would put it into effect.

As many of us know, although President Kennedy had said that he would sign it very quickly, he actually signed an executive order 22 months after he took the oath of office.⁴ And we know the reasons: he wanted to get some legislation through which would expand opportunities for housing in this country. But he was told very bluntly that he if signed this executive order, he wouldn't have the votes in the Senate to get that legislation through. He also wanted to appoint Bob Weaver head of the Housing Agency (at that time it was not a cabinet department), and he would have been the first member of the black community to hold that position. Kennedy was told that if he signed the executive order he would have difficulty getting Weaver confirmed. When the executive order was signed, it was not as sweeping as many of us had hoped it would be. But that is simply illustrative of the fact that the political process has not served us very well in the area of fair housing.

As we moved further into the 1960s, we thought the picture was changing for the better. The assassination of Martin Luther King provided the impetus for getting some additional action in the field of civil rights; President Johnson took advantage of that and proposed to Congress that they pass fair housing legislation. They did—they responded in a prompt way—but it was weak legislation from an enforcement point of view. At the same time the federal government was making commitments designed to expand the availability of housing for low-income persons, we were getting a number of court decisions that were very helpful. And yet, in the report that the Citizens' Commission on Civil Rights issued in 1983, we reported that the impact of the trumpet call of 1968, the Supreme Court's *Jones v. Mayer* decision,⁵ the landmark law of Title VIII, and the act designed to increase the supply of low-cost housing,⁶ had faded by 1980.⁷ The major elements of contemporary federal policy—decent housing and equal housing opportunities for

3. U.S. Comm'n on Civil Rights, Report 537 (Sept. 1959).

4. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (1962), as amended by Exec. Order No. 12,259, 46 Fed. Reg. 1253 (1980), reprinted in 42 U.S.C. § 1932 app. at 1217-1218 (1976).

5. *Jones v. Mayer*, 392 U.S. 409 (1968).

6. Housing and Urban Development Act of 1968, 12 U.S.C. § 1715z(a)(1) (1982 & Supp. 1987).

7. A Decent Home, *supra* note 2, at 50.

all—remained in place. But the steps taken to implement this policy did not come close to overcoming the work the federal government had previously done in constructing a segregated society in the housing field. That was a rather gloomy evaluation of what had happened up to 1980. What has happened from 1981 to the present certainly does not change the thrust of that evaluation.

I go back to my earlier statement—that the political process up to this particular point has produced minimal results in the area of fair housing. One of my close friends was Branch Rickey, who was a graduate of Ohio Wesleyan University, as I was. When I went back to Ohio Wesleyan in 1948 as president, Branch Rickey was on the board of trustees. He had just opened up the doors of opportunity for Jackie Robinson to enter organized baseball. By that time he was General Manager of the Brooklyn Dodgers. He was back on the campus talking to alumni, faculty, and students. He shared with us some of his experiences. He told us about some of the road blocks people had put in his way and about some of the dire prophecies made as to what would happen if he went through with his plans to include a black player on his team. Right in the middle of his talk, he stopped and said, “You know, this experience has taught me one thing—and that is, you should never accept the negative until you have thoroughly explored the positive.”

Well, if we stopped with the kind of gloomy evaluation that we included in the housing report that we issued in 1983, we really would not be motivated to go ahead and try to bring about a change, to try to bring our political system to the place where it would make a major contribution to dealing with fair housing.

I feel that in 1988 we are at a point where if we really explore the positive, we can lay the ground work for a promising future. We must think of fair housing as a part of the total civil rights movement. Unfortunately, as a nation we have suffered because we have not considered it as such. Just think how much further we would be toward equal employment if we had really zeroed in on the issue of fair housing! Just think where we would have been in desegregating our educational institutions if we had addressed fair housing with more vigor.

Housing is not now an integral part of the total civil rights movement. We are celebrating right now a victory in the larger area of civil rights: the passage of the Civil Rights Restoration Act.⁸ You can say that is not necessarily a forward movement because, in ef-

8. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

Fair Housing

fect, it is damage control—we are repairing the damage done by the Supreme Court's *Grove City* decision.⁹ Nevertheless, this has been a struggle; we all know the reasons for it. But I think it has given us all a lift—the fact that the Restoration Act passed finally by overwhelming majorities and that we were able to override a veto in both houses of Congress. Certainly this victory helps the civil rights worker to explore the positive.

Then too, we are making progress, it seems to me, as far as getting the Congress to put teeth into the Fair Housing Act is concerned. After all, as you probably know, the Fair Housing amendments have been reported out by the Senate Subcommittee on the Constitution. The amendments were reported out by that subcommittee in June of 1987, and the full committee has yet to act. But on the House side things look a little better. The House Subcommittee on Civil and Constitutional Rights reported the bill out on March 3, and on March 29, the full Committee of the Judiciary is going to mark it up. It looks as though we are going to get a vote in the House. I am confident that it will pass; if it does, maybe we can light a fire under the Senate and get action there.

In other words, we have a chance here to move forward—I like the thrust of the Fair Housing amendments. I like the fact that they would bring the process under the Administrative Procedures Act¹⁰ and would give administrative law judges authority to issue cease and desist orders. I happen to be one who is enthusiastic about the contribution that the Administrative Procedures Act has made to the life of our nation. I was a member of the U.S. Civil Service Commission when that act was passed. I worked with the late Justice Clark, who was then Attorney General, on the legislation that created the position of administrative law judge.¹¹ It has been changed since then, and I have followed it with a great deal of interest. In the last two or three years, as co-chair of "Save Our Security" I have been deeply concerned about the arbitrary and capricious actions that led to four to five hundred thousand people being taken off the disability rolls.¹² If the Administrative Procedures Act had not applied to

9. *Grove City College v. Bell*, 465 U.S. 555 (1984).

10. Administrative Procedures Act, 5 U.S.C. §§ 551-576, 701-706 (1982 & Supp. 1987).

11. 5 U.S.C. § 3105 (1982 & Supp. 1987).

12. For a general discussion of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 (1980) and judicial response to their enforcement, see Mashaw, *Disability Insurance in an Age of Retrenchment: The Politics of Implementing Rights*, forthcoming in *Social Security: Beyond the Rhetoric of Crisis* (T. Marmor & J. Mashaw eds. 1988).

that particular operation the nation would have lost complete confidence in the ability of the government to function in a fair, equitable manner. The administrative law judges—and there are more of them in the Social Security Administration than there are in any other place in the government—did a superb job, and the courts likewise did a great job in handling the appeals. I am very excited over the kind of contribution that was made. That is why I like the fact that the amendments to the Fair Housing Act will bring fair housing in under that frame of reference. I think we can get results if those amendments pass. The country will realize that we really mean business in the fair housing area.

The last report that the old Civil Rights Commission issued¹³ was a report based on the Budget Reconciliation Act of 1981.¹⁴ In that report we dealt with the issues of the right of access to education, employment, voting, housing, etc. We called attention to the fact that under the Budget Reconciliation Act of 1981, the agencies charged with implementing and enforcing laws defining those rights were having their resources reduced,¹⁵ and that this would have a negative impact on the ability to implement those laws.

We also said that we felt that another very important part of the civil rights movement was that part of it which gave people the opportunity for access.¹⁶ Martin Luther King was right when he said "It's fine to give me the right to sit at a lunch counter, but if I don't have the resources, what good does it do?" So it is in the field of education; it is fine to have the right of access, but if there is no genuine opportunity to exercise that right, it is meaningless. It is fine to have the right of access to jobs, but if the jobs are not there, that right of access is meaningless. Certainly in the field of housing it is great to have the right to access. But if the opportunity to exercise that right is not there, it becomes meaningless.

The Budget Reconciliation Act of 1981 called for sharp reduction in the resources available to add to the supply of low-cost housing in this country. We took sharp issue with that proposal on civil rights

13. U.S. Comm'n on Civil Rights, *Civil Rights: A National, Not a Special Interest* (June 25, 1981).

14. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981) (codified in scattered titles of U.S.C.).

15. *Id.*

16. Legislative provisions granting rights to minorities are frequently accompanied by provisions implementing those rights and thus providing access to formerly inaccessible facilities. One such provision applicable to housing is 42 U.S.C. § 3612, a provision of the Fair Housing Act enabling private individuals to bring direct court actions for violations of their rights under the Act.

Fair Housing

grounds. Over the last seven years, that trend has continued. A report was issued just the other day showing that if you take all of the programs where the federal government is charged with or has accepted the responsibility for helping low-income individuals and compare the appropriations for 1981 with the appropriations for 1987, after adjusting for inflation, you will find that there has been a reduction of 54% over this span of time. In the field of housing, it has been over 60%.¹⁷ We really have moved backward.

You may ask me "What is affirmative about that? You are exploring the affirmative; what do you think can happen in this area?" Personally, I feel that the mood on programs such as low-cost housing is changing on Capitol Hill. We find evidence of it in a number of areas. But it is at this point that I think we should identify the opportunity that is presented to us by the presidential and congressional campaigns of 1988. Housing has come into these campaigns, largely because of the concern that the nation has developed over the homeless. The discussion of the homeless issue has led to some discussions of the housing issues and to some very positive and emphatic statements on the part of some of the candidates for president.

If you put together what has happened on the Civil Rights Restoration Act with what is taking place on the Fair Housing amendments, and the commitments that are being made in the presidential and congressional campaigns, there are signs of hope. There are some windows of opportunity that are opening up.

But can we as a nation build on those signs of hope? Can we take advantage of those windows of opportunity? In the 1983 Citizens' Commission report on housing we had a recommendation for a citizen's group to make another study of this situation.¹⁸ But we have all the studies we need. We know what the problem is, what the needs are, what the solutions are. What we should have recommended is the development of political action task forces in this area, to translate into political action some of the convictions that many people have. I believe that there is a greater commitment to the basic values underlying our total civil rights movement today than there was at any time in the 1960s or the 1970s. But we are not giving the people who have those commitments the opportunities to demonstrate what their commitments are.

17. National Housing Task Force, *A Decent Place to Live* (Mar. 1988) [hereinafter *A Decent Place to Live*].

18. *A Decent Home*, *supra* note 2, at 96-101.

For example, here we are with the proposed amendments to the Fair Housing Act. I am not aware of any nationwide grass-roots movement to put the heat on the members of the House and the Senate. I am not aware of any political action groups in the field of housing anywhere in the country taking advantage of every opportunity they have to put candidates for Congress on the spot by asking them where they stand on putting teeth into the fair housing law. And I am not aware of political action groups anywhere in the country putting the question to presidential and congressional candidates as to where they stand on bringing us at least back to the place where each year we are financing several hundred thousand additional low-cost housing units. After all, it was not a standard really to be proud of, but for a number of years through the Nixon, Ford, and Carter Administrations we were at a 200,000-unit level¹⁹—now we are down to 25,000 this year.²⁰ We can get these issues on the political agenda. We can get action. But if we just sit around and bemoan the situation that confronts us, we will not change the status quo. My hope is that the signs of hope that are on the horizon will inspire us to try to get a network of political action task forces to work in the area of housing.

Now don't misunderstand me—I know there are some in this country who have been working on fair housing in season and out of season. But what I am trying to describe is a nationwide movement that will stir people up so that they do not let those who are now in public office or those who aspire to public office off the hook. I hope that as we evaluate the situation three years from now, or five years from now, we can see improvement because of the dedication and commitment of those who believe that lack of fair housing is wrong and that lack of housing opportunities for the low income is wrong. I hope that in that time the political system will have begun to serve us in such a way that fair housing becomes one of the areas in the field of civil rights where we are moving forward instead of backward. I believe that is an attainable goal under our form of government, because of what I believe is the commitment on the part of millions of our people to the values in life that underlie the civil rights movement.

19. *Cf.* A Decent Place to Live, *supra* note 17.

20. *Id.* at 6.