

HOLDING THE LINE*

DREW S. DAYS, III†

I want to talk to you tonight about the future of civil rights after six difficult years under the Reagan Administration. My message is fairly straight-forward. First, I am happy to report that civil rights advocates have generally been able to hold the line and protect hard-won gains for blacks, other minorities, and women against a furious assault by the current Administration. Second, we have won victories but not without casualties, some that it will take years, if not decades, to overcome. And third, those of us who believe in the cause of civil rights have to remember that, as Thomas Jefferson said, "eternal vigilance is the price of liberty." America will stay on the right course only if we make it happen.

Let me turn to the matter of holding the line. Ronald Reagan's rhetoric during the 1980 campaign seemed to bode ill for civil rights: all the talk about states' rights and about getting the federal government off of people's backs. I had no question that he was opting for states' rights over individual rights and for getting the federal government off the backs of those with their feet on our necks. Nevertheless, I thought that the new Administration would have to temper its rhetoric and give up on some of the policies it hoped to initiate when it actually took over the job of running the federal government. I was mistaken! I think that six years of Ronald Reagan have taught us that the Reagan we saw in 1980 is exactly what we got in 1981. The attack on civil rights has been unrelenting ever since he took office. Although he hasn't succeeded for the most part, it hasn't been for lack of trying.

Take, for example, the area of voting rights. What could be more at the core of democracy than the idea that no group should be excluded arbitrarily from the political process. Yet the Reagan Administration delayed for eighteen months legislation that was critical to providing meaningful voting opportunities to blacks and other racial minorities.¹ When it became clear that a sweeping bipartisan major-

* This article was prepared in connection with the School of Law's annual Civil Rights Lecture delivered on November 12, 1986. The Civil Rights Lecture is sponsored by the Black Law Student Association, the Hispanic Law Student Association, and the Creighton University School of Law.

† Professor of Law, Yale Law School. A.B., Hamilton College, 1963; LL.B., Yale Law School, 1966. Professor Days was the Assistant Attorney General for Civil Rights at the United States Department of Justice from 1977 to 1981.

1. See Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 330-39 (1984).

ity in the Congress was committed to enacting the Voting Rights Act Amendments of 1982,² President Reagan sought to claim credit for this great advance. More recently, the Reagan Justice Department tried to undermine this new law when it was challenged by North Carolina in the Supreme Court. But the Court, aided by a brief signed by both Democrats and Republicans in Congress taking the side of black voters, roundly rejected the Justice Department's arguments.³

On the question of school desegregation, the Administration has tried to characterize its position as one of opposition to busing, not to desegregation itself. But the record belies that claim. It has tried in every way possible to weaken the law and the practices of prior administrations directed toward finishing the job *Brown v. Board of Education*⁴ began in 1954. For example, switching sides in a case that arose when we [members of the Carter Administration] were in office, Reagan Administration lawyers argued unsuccessfully in the Supreme Court against efforts by Seattle and several other cities in the State of Washington to implement *voluntary* school desegregation plans. And you may remember the *Bob Jones University* case where the current Administration again switched sides to support tax exemptions for a school that for many years barred blacks entirely and then admitted them only on highly restrictive terms not applicable to whites. In both cases, the Supreme Court saw the Reaganites' claims for what they were -- attempts to turn back the clock -- and flatly rejected them.⁵

Employment discrimination, however, has been the area where this Administration has made its most sustained challenge to existing law and judicial precedent. In essence, what they claimed upon taking office was that goals, timetables or quotas could not be imposed upon employers to remedy even the most egregious and longstanding cases of discrimination against blacks, other minorities, and women in the workplace. Contrary to the position taken by every federal appellate court that had considered this issue, they contended that only "actual, identified victims" of discrimination could benefit from findings that an employer violated federal law. Under their theory, an employer could deny blacks jobs, promotions or other benefits for years. But once he got caught, all he would have to do was stop discriminating; he wouldn't have to hire or promote any specific number

2. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified in scattered sections of 42 U.S.C.).

3. *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986).

4. 347 U.S. 483 (1954).

5. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982).

of blacks unless they could show that they were courageous or crazy enough to have applied for positions years ago when there wasn't the slightest chance that they would get a favorable response. Of course, this approach represents a windfall for the employer. As long as blacks who applied have died, moved away or got other jobs, he is free to use merely "good faith efforts" to comply with the law. The Justice Department has pushed this argument everywhere: in the Supreme Court, as well as before federal trial and appellate courts. In one case, involving the Birmingham, Alabama police and fire departments, the Administration switched sides from working with blacks seeking redress for the history of employment discrimination there (the position of the Carter Administration) to joining whites trying to undermine an agreement that was providing blacks with jobs. The federal trial judge rejected the Justice Department's position.⁶ And the Supreme Court, in two cases decided last July, from New York and Cleveland, did likewise.⁷ In fact, seven of the nine justices acknowledged that remedies for employment discrimination did not have to be limited to "actual, identified victims" of the illegal practices.⁸ The only bright spot in the Administration on the question of goals and timetables is the Department of Labor, under Secretary Bill Brock. For some time now, he has resisted pressure from the Department of Justice to abandon such remedies as part of Labor's enforcement of its program prohibiting discrimination by government contractors.⁹ The recent Supreme Court decisions should strengthen Secretary Brock's hand in this regard.

The Administration's efforts to appoint or promote people with an antagonism toward civil rights have also run into trouble in Congress. My successor, William Bradford Reynolds, who, as Assistant Attorney General for Civil Rights, has been the Administration's "point man" on anti-civil rights initiatives, was rejected by the Senate for a higher post in the Department of Justice to which the President nominated him at the urging of Attorney General Meese. He was rejected, I believe, because Senators on both sides of the aisle found appalling his disrespect for legal precedent and lack of candor during his confirmation hearings. Jeffrey Zuckerman, President Reagan's nominee to be general counsel of the Equal Employment Opportu-

6. *In Re Birmingham Employment Litig.*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985).

7. *Local 28, of the Sheet Metal Workers, Int'l Assoc. v. EEOC*, 106 S. Ct. 3019 (1986) (New York); *Local 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986).

8. Only Chief Justice Burger and Justice Rehnquist rejected this position.

9. Exec. Order No. 11,246, 3 CFR 339 (1965).

nity Commission (EEOC) met a similar fate. Zuckerman raised Senate eyebrows when he admitted, among other things, that he had privately suggested that blacks and women could overcome discrimination by offering to work for lower wages than white male employees.¹⁰ He also acknowledged that he had once written a memorandum to the Chairman of the EEOC, saying that he thought it was reasonable for a company making layoffs to dismiss employees who would receive retirement benefits, a position in clear violation of federal law.¹¹ It is called age discrimination. Yet this same man was scheduled to become the head lawyer for an agency charged with enforcing laws *prohibiting* discrimination in employment based upon race, sex, or age!

However, as the foregoing discussion reflects, civil rights advocates have been engaged, with the exception of the Voting Rights Act Amendments, in a holding action. The climate has not been one in which civil rights initiatives stood much chance of succeeding. A case in point involves congressional efforts to overturn a Supreme Court decision in 1984 giving a very restrictive reading to a law prohibiting sex discrimination in education.¹² Under the Supreme Court's view, a college could receive federal funds for its physics department yet discriminate against female students in its athletics department without losing those funds so long as it didn't discriminate based upon sex in the physics department. Civil rights groups have been trying now for over two years without success to get the law amended to make clear that such sleight of hand by educational institutions is prohibited. Most of this delay can be laid at the feet of the Reagan Administration, which has taken the position that the restrictive Supreme Court decision applies not only to the law relating to sex discrimination but to other laws prohibiting discrimination based upon race, religion, age, and disability as well, and has opposed all proposals of meaningful reform. To give you some sense of how out of the mainstream the current Administration's view is, when I testified before the Senate supporting the reform, my statement was formally endorsed by not only other former Carter Administration officials but also by those from the Johnson, Nixon, and Ford Administrations. Exploiting this impasse, the Reagan Administration has taken the Supreme Court's ruling as an excuse to abandon scores of investigations into allegations of sex discrimination brought against educa-

10. Kurtz, *EEOC Nominee Faces Senate Critics*, Wash. Post, Mar. 5, 1986, at A4, col. 1.

11. Kurtz, *EEOC Nominee Running into Senate Opposition*, Wash. Post, Jan. 6, 1986, at All, col. 1.

12. *Grove City College v. Bell*, 465 U.S. 555, 557-62 (1984).

tional institutions. Meanwhile, your tax dollars continue to flow to recipients engaged in questionable practices.

Moreover, as I mentioned in my introduction, the victories (or "non-losses," perhaps) have not been cost free. In a sense, I think we may have been winning the battles but losing the war over civil rights policy in this country. What do I mean? The Reagan Administration lawyers, despite flat rejections by the Supreme Court and other federal courts, have continued to press legal arguments that have very little chance of prevailing. And, Attorney General Meese and William Bradford Reynolds, particularly, continue to give speeches that are an embarrassment to any lawyer or layperson familiar with the Constitution and with our judicial system.

The Attorney General, for example, spoke in July, 1985¹³ about the need for federal judges to respect the original intention of the framers of the Constitution without bothering to mention that we had a Civil War and that out of that war came several amendments, the thirteenth, fourteenth, and fifteenth to be exact, which were designed to protect blacks, among others, from violations of civil rights by state government. Of course, this omission should come as no surprise. The policies of his Department make clear that he is not interested in having courts be guided by the original intention of those who framed the Civil War Amendments. Of course, as a general proposition, who can quarrel with the idea that judges should be guided by the text of the Constitution and whatever other historical information is available to interpret that text? But that approach provides almost no assistance to judges faced with having to determine what phrases like "equal protection of the law" or "due process" mean in the context of concrete cases. The fifth amendment says that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Does the reference to "or limb" in the double jeopardy clause suggest that we can put someone, at least once, at risk of having an arm or leg cut off as punishment for a crime? Is that what the Attorney General has in mind? The process of judging is far less mechanical than Mr. Meese would have us believe.

More recently, the Attorney General has unburdened himself on the question of the Supreme Court's authority.¹⁴ Once again, some of the points he makes are unexceptionable. The Constitution *is* our supreme law; the Supreme Court *has* on occasion changed its mind

13. Address by Edwin Meese, III, Attorney General of the United States, Annual Meeting of the American Bar Association, in Washington, D.C. (July 9, 1985).

14. Address by Edwin Meese, III, Attorney General of the United States, Tulane University, in New Orleans, Louisiana (October 21, 1986).

about what the Constitution requires or permits; and the President and Congress *do* have the responsibility to conform their conduct to the Constitution. The rub comes, however, when Mr. Meese intimates that the President and Congress have the right to defy prevailing Supreme Court interpretations of the Constitution, or that Supreme Court decisions, since they technically bind only the parties before the Court, can be ignored by state and local officials even when their conduct is in blatant violation of a constitutional decision. In case anyone missed the radical nature of his thesis, the Attorney General used as his principal example the Supreme Court's decisions in 1958 ordering the Little Rock School Board to desegregate after President Eisenhower was forced to send in federal troops to ensure that nine black children could attend a previously all-white high school.¹⁵ What he seems to be suggesting is that irrespective of the nature of Supreme Court decisions interpreting the Constitution, those not directly before the Court need not obey until they are sued and told explicitly by the Justices that their conduct is forbidden. What a prescription for anarchy! The fact of the matter, in any event, is that Mr. Meese does not really believe in the doctrine he publicly embraces. In 1984, for example, the Supreme Court decided that an affirmative action lay-off plan in Memphis, Tennessee violated federal law.¹⁶ The Reagan Justice Department took that decision as the occasion to write over fifty municipalities and counties around the country to tell them that their programs were clearly illegal.

William Bradford Reynolds, for his part, has taken up the Attorney General's original intent argument and used it to criticize the one Supreme Court Justice who has been most effective in forging majorities prepared to reject the Reagan Administration's anti-civil rights positions.¹⁷ Justice William Brennan, according to Reynolds, espouses a "theory that seeks not limited government in order to secure individual liberty but unlimited judicial power to futher a personalized egalitarian vision of society."¹⁸ This is Orwellian speech at its finest. No one familiar with Justice Brennan's record on civil rights and civil liberties would associate him with the target of Reynolds's mindless attack.

Back to my point about losing the war. Meese and Reynolds are not stupid men. They both went to Yale and on to law school else-

15. *Cooper v. Aaron*, 358 U.S. 28, 28 (1958).

16. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 565 (1984).

17. Address by William Bradford Reynolds, Assistant Attorney General of the United States, Civil Rights Division, University of Missouri School of Law, Columbia, Missouri (September 12, 1986).

18. *Id.*

where. I am certain they learned to read cases there and took courses in constitutional law. So, the question remains: why are they both engaged in such outrageous and unprofessional conduct? The answer, I think, is that they do not expect to win in the law courts in the near future. Rather, they hope to win in the court of public opinion and to transform the national debate in a way that will have consequences inside and outside of the courts with respect to civil rights policy long after they have left office. What the Reaganites want to see is a movement away from civil rights enforcement by the federal government and fewer laws protecting individual rights against governmental and private discrimination, in essence a "deregulation" of the civil rights enforcement machinery that took forty years to establish. I believe that their strategy is having some success, at least among whites, if a recent public opinion poll conducted by the Gallup organization for the Joint Center for Political Studies in Washington is any indication. When asked about what they regarded as the principal issues facing the country, blacks listed civil rights sixth, whereas whites listed it nineteenth. But even blacks have shown some shift on this point. In a similar 1984 poll, blacks placed civil rights third on the list. Some other comparisons are also interesting. When asked whether the federal government should make every possible effort to improve the social and economic positions of blacks and other minority groups, eighty percent of blacks but only twenty-seven percent of whites thought government should help minorities. When asked whether government should spend more or less on social programs to aid the poor, eighty-six percent of blacks but only fifty-five percent of whites said government should spend more on social programs. Who knows what the figures will look like after two more years of the Administration's assaults?

I think we also have to take a hard look at what the Reagan Administration has done directly to civil rights enforcement agencies since it took office. The Civil Rights Division of the Justice Department, the Solicitor General's Office, and the Department in general, organizations once highly respected as first-rate *legal* institutions by judges and private lawyers alike, have lost significant credibility because of the numerous "about-faces" they have done on constitutional and federal statutory matters, several of which I mentioned earlier. In the *Bob Jones University* case, for example, the Supreme Court took the unprecedented step of appointing an outside lawyer to argue the position against the school that the Reagan Justice Department had abandoned. The Department has been wounded internally as well by the departure of a host of able career lawyers who had found it possible, until Reagan took office, to work under Democratic and Republican Administrations alike without violating their profes-

sional standards. The effective functioning of the Department has been severely compromised by these departures. And, in my estimation, the absence of senior staff makes the Department a far less attractive career path for young lawyers seeking first-class training.

Other institutions have been similarly damaged. The United States Commission on Civil Rights is another casualty. From its creation in 1958 to 1981, the Commission provided invaluable oversight with respect to the civil rights enforcement performance of the federal government. It was bipartisan by statute and, as one who himself was stung on at least one occasion by Commission criticisms, I can attest that it had only one loyalty — civil rights — whatever Administration was in power. The Reagan Administration tried in its first term to destroy the Commission outright. However, Congress refused to let this happen. Today, the Administration has had its way, nevertheless. By appointing as chairman a man prone more to rhetorical bombast than to reason and by allowing the Commission to function in a climate of mismanagement and inefficiency, the Administration has brought this once dignified and important institution to the point where even civil rights advocates and their supporters in Congress think that it is beyond saving. Its budget has been drastically reduced and its staff decimated.

The EEOC's future is also uncertain. The Commission was given principal responsibility under the Civil Rights Act of 1964 for enforcing the federal law against discrimination in private employment based upon race, color, national origin, sex, and religion. In the Carter Administration its role was expanded to include responsibility for other laws against sex discrimination and for the Age Discrimination in Employment Act. Yet, in this Administration, on several occasions, the EEOC has been forced publicly to change its position on employment discrimination issues by Justice Department and White House officials. In one case,¹⁹ the Commission was prohibited from filing a brief in court, even though it correctly stated the applicable law, because the position set out in the brief conflicted with Administration policy. These incidents, as well as the Zuckerman nomination, have severely damaged its credibility.

All of this is sad. However, I think that the greatest casualty of the Reagan years has been the spirit of voluntariness that must be present if this country is ever going to put behind its legacy of racism, sexism, and other "isms" that have for so long kept large segments of our society out of the mainstream. Congress understood when it enacted our civil rights laws that the federal government, even aided by private civil rights organizations, would not be able to coerce every

19. *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984).

discriminating institution in America into complying with those laws. Instead, it envisioned that vigorous enforcement against some offenders and open support by the government for self-initiated steps by institutions to address their own problems would foster an environment where voluntary solutions would become the principal response to discrimination. We worked toward this end in the Carter Administration. In contrast, Reagan officials have let it be known, particularly in education and employment, that they are prepared to sue institutions that establish voluntary plans designed to improve the conditions of blacks, other minorities, and women. It will take years to convince people, after what the current Administration has done, that the government is not a foe but rather a friend of voluntary solutions to discrimination.

I realize that I have painted a rather bleak picture for you tonight. But all is not lost. I think that the return to the Senate of a Democratic majority means that civil rights advocates will find clearly more sympathetic leadership on the Judiciary and Human Resources Committees, among others, where the Republicans have done major damage in recent years. However, we should not forget two important things. First, the civil rights holding action could not have succeeded without the courageous leadership of important moderate Republicans. Second, some Democrats who will now be in charge of other committees have not been friends of civil rights. They often voted to support Reagan programs or nominees that were anti-civil rights. The lesson is that we must remain vigilant irrespective of which party controls the Senate. For I can assure you that the Reagan Administration intends to continue its efforts to undermine the victories we have won on voting rights and in employment, among others.

We have to take seriously what I referred to earlier as the Reagan Administration's attempt to win the war for civil rights in the court of public opinion. What this means, among other things, is that we have to do our homework and make certain when we urge that race-conscious remedies, like set-asides, for example, be adopted that we can back up our claims and that we can show that what we are seeking is a responsible solution to the problem we have identified. When we fail to take such precautions, we become sitting targets for attacks by Reagan officials who claim that what we seek is a racial spoils system in America.

I think that we also have to tend to the business of politics. Civil rights leadership is important. But we must take seriously electoral politics and send to city halls, to state houses and legislatures, and to Congress people dependent upon our *vote* not just our voice for polit-

ical survival, people who are in a position to work for us in the councils of government. The election of 1986 shows what blacks, working with sympathetic whites and other racial minorities, are capable of. In four Senate races, the victors would not have won without the black vote. In Alabama, eighty-eight percent of black voters supported Shelby over Denton; in Louisiana, eighty-five percent of black voters went for Breaux over Moore; in North Carolina, the vote was eighty-eight percent black for Sanford over Broyhill; and in California, eighty-two percent of blacks voted for Cranston over Zshcau.²⁰ In each of these cases, I am convinced that we succeeded in sending someone to the Senate who will be responsive to civil rights concerns. Now is the time to begin planning for similar results in 1988.

Finally, as future lawyers and leaders of your communities, you must dedicate yourselves, whatever career course you pursue, to ensuring that efforts to finish the civil rights revolution do not falter. You don't have to become civil rights lawyers to do this. Thousands of lawyers in this country, members of the most prestigious firms in America, have for over twenty years been devoting their talents and the resources of their firms to civil rights representation.²¹ So, you don't have to take off your white hats the minute you enter private practice. That's a cop-out.

CONCLUSION

Of course, I am an irrepressible optimist, despite some of the things I have said tonight. Although the road has not been entirely smooth or straight, I believe that America set its face toward racial justice at least forty years ago during the last term of Franklin Roosevelt when the Fair Employment Practices Commission was created. Harry Truman understood that; Dwight Eisenhower did too. So did John Kennedy and Lyndon Johnson. Even Richard Nixon and Gerald Ford got the message. Jimmy Carter had no doubt. Only Ronald Reagan seems to have trouble catching the drift. He's still living in a Hollywood-like land of make believe where everyone is male, white, Protestant, wealthy, and happy. I would like to think that our children and grandchildren will be able, as they enjoy fully the benefits our society has to offer, to look back at the Reagan Administration as a period during which the Nation stumbled on the way to equality but quickly regained its footing.

20. Williams, *Blacks Cast Pivotal Ballots in Four Key Senate Races, Data Show*, N.Y. Times, Nov. 6, 1986 at A33, Col. 1.

21. The Lawyers Committee for Civil Rights Under Law, headquartered in Washington, D.C., is one such organization.