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Closing the Classroom Door on Civil Rights

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Closing

The Classroom Door
On Civil Rights
In its zeal to stop school busing, the Reagan administration has effectively closed the classroom door on civil rights enforcement

by Neal Devins

William Bradford Reynolds, Assistant Attorney General for Civil Rights, is convinced that the civil rights community is out to get him. He prefaced a Justice Department report defending the Department's civil rights enforcement record with the comment: "All too often sensational charges of 'retreat' and 'roll back' purporting to be 'well-documented' attract instant media attention, while a responsible reply which exposes the falseness of the original charges receives no coverage. In this instance, we believe that the public has a 'right to know' the facts, rather than be left with false impressions created by press reliance on continued misstatement." (Correcting the Record of Civil Rights Enforcement, January 20, 1981 to September 30, 1982; A Response to the Report of the Washington Council of Lawyers, November, 1982 [hereinafter cited as Washington Council Response].)

Mr. Reynolds has claimed, that the Civil Rights Division is acting in a responsible manner. Yet, over the past three years, stern criticism has been levied against the division by many civil rights groups. Most noticeable, three "in-depth" reports have been
issued by the civil rights proponents criticizing almost every action taken by the CRD. [See Leadership Conference on Civil Rights, Without Justice: A Report on the Conduct of the Justice Department in Civil Rights in 1981-82, February 1982 [hereinafter referred to as Leadership Conference]; Washington Council on Lawyers, Reagan Civil Rights: The First Twenty Months, September 1982 [hereinafter referred to as Washington Council]; American Civil Liberties Union, Civil Liberties in Reagan's America, October 1982 [hereinafter referred to as ACLU].] Additionally, the U.S. Commission on Civil Rights, as well as the more specialized civil rights interest groups, have criticized nearly all CRD policy initiatives.

The overwhelmingly negative response by civil rights interests to Mr. Reynolds' CRD is not at all surprising. As Chester Finn noted, "Ronald Reagan assumed office after a decade and a half in which the presidency (particularly the Carter Administration) had vigorously sought to advance group interests through regulation, judicial interpretation, and government expenditure, and in which policy conflicts between group interests and individual rights, on the one hand, and between group interests even-handed national standards on the other, were almost always resolved in favor of the interested groups." (Finn, "Affirmative Action Under Reagan," p.20, Commentary, April 1982.) Thus, civil rights interests had come to expect that a sympathetic executive branch would assist them in achieving their policy objectives. President Reagan did not offer such sympathy. The 1980 GOP platform stated that: "[E]qual opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others, thereby rendering such regulations and decisions inherently discriminatory."

Since the policy objectives of the Reagan administration represented a reenactment from previous "victories" for the cause of civil rights, civil rights proponents felt compelled to criticize the new administration merely to stay its ground. Despite this, the criticisms levied against the Reagan Administration have been especially strong. The American Civil Liberties Union contended that "for this administration, the erosion of the Bill of Rights seems to be a primary goal, not
a side effect. This administration seeks to make structural changes in our system of government that, should they succeed, will not be easy to overcome once their time in office passes.” (ACLU, p.2.) Along the same lines, the Leadership Conference on Civil Rights noted in its report criticizing CRD: “[O]ne thing has become painfully clear. At the Justice Department in 1982, basic qualities of fair-mindedness and fidelity to the law are lacking. Instead, power and prejudice hold sway.” (Leadership Conference, p.75.) The National Urban League opened the 1982 edition of its annual report “The State of Black America” with a similar commentary: “At no point in recent memory had the distance between the national government and black America been greater than it was in 1981, nor had the relationship between the two been more strained.”

What is it about CRD policies that have caused such an extreme outcry? The Leadership Conference claimed that CRD had:

• repudiated the Supreme Court’s definitive interpretation of the Constitution and laws and announced that it would refuse to enforce the law of the land;
• abruptly switched sides in cases pending before the Supreme Court and announced that it would seek the overturning of Supreme Court decisions of very recent vintage, in disregard of the importance of certainty and continuity in the law;
• sought to undermine confidence in the judiciary by launching a sweeping attack on the federal courts for performing their constitutional role of protecting the rights of minorities from intrusions of majority will;
• established itself as the locus of anti-civil rights activity in the federal government, reaching into other agencies to try to curb policies deemed overly protective of civil rights;
• cooperated in the corruption of the legal process by allowing its decisions to be shaped by appeals from politicians not based on law.

Specifically, CRD critics allege: (1) In Fair Housing Law Enforcement, “The Division has abandoned entirely filing suits against discriminatory zoning ordinances. Its attorneys have not been permitted to review the ‘effects’ of housing policy as well as the motivation for it, although the effects test is the prevailing law of the land.” (Washington Council, p.2.) (2) On the voting rights issues, CRD is alleged to have refused to pursue new cases and reversed litigation positions established during previous administrations. (Washington Council, p.3.) (3) In the field of equal employment opportunity, “The Division has flatly repudiated the well-established require-
moment that affirmative action may be necessary to remedy certain types of employment discrimination, announcing that under no circumstances would it impose such relief regardless of the particular case." (Washington Council, p.6.) (4) In criminal court rights prosecutions, CRD critics note that “although the level of racially motivated violence appears to be on the increase, the Division's capacity for prosecuting these cases does not show a proportionate increase.” (Washington Council, p.5.)

CRD policies in equal education opportunity have been the most severely criticized. Great emphasis has been placed on CRD’s failure to initiate desegregation lawsuits. (Washington Council, p.2.) CRD also refuses to pursue busing remedies in desegregation lawsuits. (Leadership Conference, p.11.) CRD similarly refuses to make use of the presumption that proof of intentional segregation in a “significant” portion of a school district suggests that there was intentional segregation in other racially imbalanced portions of the district. (Washington Council, p. 29-30.) In higher education cases, CRD has entered into settlements which allegedly violate standards established by the Department of Education. (Leadership Conference, p.28.) CRD supposedly “has also assisted in a concerted effort to deprive the federal courts of their discretion to employ busing as a remedial device where appropriate (by contending that Congress can severely restrict the jurisdiction of federal courts to order busing).” (Washington Council, p.43-44.) Finally, CRD provided “the impetus for the Reagan Administration in its attempt to grant tax exemptions to racially discriminatory private schools.” (Leadership Conference, p.16.)

The sheer volume of criticism levied against CRD makes most difficult the chore of deciphering valid from invalid criticism. This essay consequently will pursue the more modest aim of providing a critical review of the CRD legal analyses affecting the “race and schooling” issue for elementary and secondary education. Three subjects will be examined: forced busing and scope of relief in desegregation lawsuits, Congress’ ability to limit court desegregation orders, and the tax-exempt status of racially discriminatory private schools. Although my analysis suggests that CRD policy is in grave error on the “race and schooling” issue, this conclusion does not necessarily suggest that all CRD policies are off base.

The question of “race and schooling” has traditionally been the centerpiece of America’s civil rights movement. As David Kirp noted, Brown v. Board of Education symbolized the universalistic vision that: “Once racial barriers were lifted, it was supposed, there would exist neither white schools nor black schools, but ‘just schools.’ When the dual system
was dismantled, the constitutional rights of blacks would be secured; so too would their opportunity for social and economic equality. Blacks, like whites, would then be free to succeed or fail on the basis of merit, not color. (D. Kirp, Just Schools, (1982)) This universalistic vision has not seen fruition, however. The Supreme Court consequently has rejected the use of "freedom-of-choice" plans which permit white and black students to choose, whether they would prefer to go to the previously all-black high school or the previously all-white high school. (See, e.g., Green v. County School Board of New Kent County, 391 U.S. 430 (1968)).

In place of such voluntary remedies, the Supreme Court has found permissible remedies which require the rearrangement of attendance zones and mandatory pupil transportation. (See, e.g., Swann v. Charlotte-Mecklenburg County Board of Education, 402 U.S. 1 (1971)). The Supreme Court, has also established an important presumption that proof of intentional segregation in a significant portion of a school district infers that there was intentional segregation in other racially imbalanced portions of the district. (See, Keyes v. (Denver) School District No. 1, 413 U.S. 189 (1973)). This presumption was based on the Court's recognition of the difficulty of proving intentional segregation in Northern and Western school systems where segregation had not been mandated by state laws.

The Department of Justice (DOJ) is the primary law enforcer in the field of school desegregation. DOJ may presently initiate or intervene in school desegregation lawsuits under federal statutes that prohibit racial discrimination by educational institutions at the state or local level. DOJ has advocated the civil rights position before the Supreme Court in those cases which rejected voluntary freedom of choice plans, recognized that mandatory busing can be an appropriate remedy, and established the common-sense presumption that intentional segregation in one portion of a school district infers intentional segregation in other racially imbalanced portions of that district.

The Reagan Justice Department has rejected both mandatory busing as an appropriate remedy and the use of the Keyes presumption to establish liability in desegregation lawsuits. Assistant Attorney General Reynolds expressed concern that mandatory pupil transportation remedies per se are threatening to dilute the essential (national) consensus that racial discrimination is wrong and should not be tolerated in any form. (Speech before the Delaware Bar Association, p.9, February 1982.) He added:

The flight from urban public schools has eroded the tax base of many cities, which has in turn contributed to the growing inability of many school systems to provide high-quality education to their students—whether black or white. Similarly, the loss of parental support and involvement has robbed many public school systems of a critical component of successful educational programs. When one adds to these realities the growing empirical evidence that racially balanced public schools have failed to improve the educational achievement of the students, the case for mandatory busing collapses.

Instead of mandatory pupil transportation, CRD now advances a remedial strategy program which includes "[t]he voluntary student assignment program, magnet schools, and enhanced curriculum requirements, faculty incentives, in-service training programs for teachers and administrators, school closings, if you have excess capacity, or new construction where that may be called for." (School Desegregation, Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, Nov. 1981, p.631.)

Assistant Attorney General Reynolds alleges that the CRD position is consistent with Supreme Court precedents. First, in regard to the Court's rejection of an ineffective "freedom-of-choice" plan, Mr. Reynolds contends that "the Court held simply that the Constitution requires racially non-discriminatory student assignments and eradication of the segregative effects of past intentional racial discrimination by school officials." (Testimony of William Bradford Reynolds, Subcommittee on Separation of Powers of the Committee on

The Civil Rights Division has been accused of being the focus of anti-civil rights activity in the federal government.
the Judiciary, United States Senate, October 1981, p.6.) Second, Mr. Reynolds argues that when the Supreme Court approved the use of busing "[it] spoke in measured terms, expressing reserved acceptance of busing but one of a number of remedial devices available for use when . . . it is 'practicable,' 'reasonable,' 'feasible,' 'workable,' and 'realistic.' The Court clearly did not contemplate indiscriminate use of busing without regard to other important, and often conflicting considerations." (Id at 7).

Third, CRD "concluded that involuntary busing has largely failed in two major respects: (1) it has failed to elicit public support and (2) it has failed to advance the overriding goal of equal education opportunity. Adherence to an experiment that has not withstood the test of experience obviously makes little sense." (Id at 11.)

Social science research and established constitutional doctrine generally refute the CRD position. First, academic gains appear to outweigh academic losses. (See, e.g., Hawley, "The New Mythology of School Desegregation," 42 Law and Contemporary Problems 214 (Spring 1978).) Second, and more significant, the constitutional infirmity which desegregation remedies address is racial isolation in the public schools, not disparities in academic achievement between blacks and whites. Thus, the focus of the initial remedy in a desegregation case should be to address the problem of racial imbalance in the public schools. Social science evidence clearly demonstrates that mandatory pupil transportation remedies are more effective than voluntary remedies in addressing the problem of racial isolation in the public schools. (See, e.g., M. Smylie, Reducing Racial Isolations in Large School Districts: The Comparative Efficiency of Mandatory and Voluntary Desegregation Strategies (1982).)

CRD's legal analysis is also faulty both because it ignores germane portions of the cases that it reviews and because it ignores recent Supreme Court decisions pertinent to the busing issue. The Supreme Court, in approving the use of mandatory pupil reassignments, recognized that in order to eliminate all vestiges of an unconstitutional dual school system desegregation remedies may be "administratively awkward, inconven-

nient, and even bizarre." (Swann v. Board of Education, 402 U.S. 1, 28 (1971)) Thus, even if Mr. Reynolds is correct that busing "has failed to elicit public support," the constitutional question is whether busing effectively addresses the problem of racial isolation in the public schools.

CRD also ignores recent Supreme Court decisions speaking to the continued efficacy of mandatory busing. University of Chicago law professor Edmund Kitch summarizes these decisions as follows: "The Court endorses an approach to the 'factual' question that makes proof of a neighborhood school policy into proof of racial discrimination. It then approves a remedy which, by implication, assumes that a neighborhood school policy, when combined with any significant residential segregation, is unconstitutional." (Kitch, "The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus," 1979 Sup. Ct. Rev. 1,6 (1980).)

This view, that the Court views busing as a constitutionally mandated remedy, has also surfaced in the Supreme Court's denial of certiorari in the Dallas (1980) and Nashville (1983) desegregation lawsuits. In Dallas, the Court refused to review the Fifth Circuit Court of Appeals overturning of a District Court order which substituted educational remedies and neighborhood schools for systemwide busing based on black-white student population ratios. (Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437 (1980).) Ironically, CRD has sought to buttress its argument that busing is improper by quoting Justice Powell's dissent to the Court's denial of certiorari in that case. (See, e.g., Reynolds, Oct. 1981 testimony, p.9; Reynolds, Nov. 1981 testimony, p. 9-10.) The Supreme Court, in the Nashville case, similarly refused to review an appellate court decision holding that a district court could not substitute educational remedies for mandatory busing, despite the District Court's finding that busing has proven ineffective in that school system. (Kelley v. Metropolitan County Board of Education, 103 S. Ct. 834 (1983)) The Justice Department intervened in Nashville claiming that "[Supreme Court decisions do not mandate the use of any particular remedial device [e.g., busing] but instead indicate in general terms which devices are permissible and what the limits on their use might be." (Kelley, Brief for the United States as Amicus Curiae in Support of Petitioners, p.10.) This contention, however, was inapposite to the legal issue raised in Nashville. Nashville did not call into question the propriety of judicially mandated busing orders. Instead, Nashville raised the issue of what legal significance ought to be attributed to the long-term efforts of school boards trying to implement mandatory pupil transportation orders. CRD thus tried to use this case as a political vehicle to further the Reagan administration's anti-busing policies. (See Devins, "New Dilemmas and Opportunities in Integrating Schools," Education Week, Mar. 9, 1983, p. 24.)

CRD, in addition to its refusal to pursue busing remedies, "will not make use of the Keyes presumption (that intentional segregation in one part of a school system suggests intentional segregation in other parts), but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of state officials." (Reynolds, Oct. 1981 testimony, p. 12.) The Supreme Court had devised this presumption because it felt that "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools in which racial imbalance is the subject of those actions." (Keyes, 413 U.S. 189, 202 (1973))

Assistant Attorney General Reynolds offered the following rationale for CRD's refusal to use Keyes in its decision to initiate litigation: "To avoid imposition of a system-wide desegregation plan, which often includes system-wide busing, a school board subject to the Keyes presumption must shoulder the difficult burden of proving that racial imbalance in schools elsewhere in the system is not attributable to school authorities. . . . [The Keyes presumption has been used] in some instances in imposition of system-wide transportation remedies encompassing not only de jure, or state imposed, racial segregation, but de facto racial segregation as well." (Reynolds, Nov. 1981 testimony, p.11-12 (emphasis supplied).)
The policy implications of the CRD approach were noted in the Washington Council Report:

This shift in policy has more than theoretical importance. By seeking relief in only part of a school system where segregation has occurred, the Division will encourage residential instability and "white flight" as parents seek to transfer their children to schools unaffected by desegregation. In addition, meaningful desegregation may often be impossible if only a fraction of a school district is involved. The Division's new policy, therefore, can only lead to the very unstable and ineffective attempts to desegregate which the Division's own leadership has decried. (Washington Council, p. 48.)

The CRD policy is also unsavory because it seeks to minimize the remedial duties of school districts already found guilty of significant acts of intentional segregation. The Keyes presumption is only triggered if there is intentional segregation in a significant portion of a school district. Thus in its effort to avoid "unfair application of the Keyes presumption," CRD is willing to err on the side of those school districts found guilty of intentional segregation.

CRD's policy is also inconsistent with the Supreme Court's view on this issue. Over the past five years, Court desegregation decisions evidence a view on the part of the Justices that, absent intentional government segregation, ours would be a naturally integrated world. Under this approach, it is proper to make a finding of a system-wide violation in a racially imbalanced school system guilty of intentional segregation in significant portions of the system. CRD's view of granting relief based solely on the incremental effects of proven discrimination suggests that ours might be a naturally segregated world. Justices Rehnquist and Powell support this interpretation of the law.

CRD has sought to limit criticism on the Keyes presumption issue, claiming that "the Assistant Attorney General was extremely careful to make clear that his use of the Keyes presumption would be limited... to the litigation stages of a school case, and would not be used as an investigatory tool to avoid ferreting out the real facts about alleged segregative practices, procedures and attitudes of school authorities." (Washington Council Response, p.13 n9.) This remark is a nonsequitur, however. If CRD is unwilling to make use of the Keyes presumption in its decision to initiate a lawsuit, because of possible "unfair" consequences, CRD clearly will not seek system-wide relief unless there is proven intentional segregation throughout the system. This is evidenced by CRD's failure to "initiate" any new desegregation lawsuits. Ultimately, CRD's rhetoric about the inequities of the Keyes presumption seem little more than a smokescreen for Department hostility towards expansive desegregation remedies, particularly busing.

CRD's hostility to the busing remedy and the Keyes presumption will impede the advancement of the goals of desegregation as established by the Supreme Court. Worse than this, CRD policies may spur on future school district inadventure. Witness the following colloquy between Assistant Attorney General Reynolds and the counsel for the House Subcommittee on Civil and Constitutional Rights:

Counsel: Are you suggesting that if a community intentionally chooses sites for its schools that create a segregated system, and those schools are built, there should be no remedy that actually desegregates these facilities other than on a voluntary basis?

Mr. Reynolds: I think using those [voluntary] desegregation techniques that I mentioned to you, I would say that would be the proper way to address the problem. I think that every kid in America has a right to an integrated education where he wants it, especially if you have a situation (of intentional segregation). (Testimony, Nov. 1981, p. 632) (emphasis supplied).

CRD's hostility towards the busing remedy is also reflected by the Division's response to congressional efforts to limit both federal court jurisdiction in desegregation suits and CRD authority to pursue the busing remedy. The Senate, in September
1981, passed the so-called Helms Amendment which (1) forbids "the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home," (Helms Amendment No. 69,127 Cong. Rec. 56274 (daily ed. 6/16/81).) and (2) forbids any federal court to "order or issue any writ ordering directly or indirectly any student to be assigned or to be transported to a public school [more than 10 miles or 15 minutes away from that school] ... which is nearest to the student's residence." (127 Cong. Rec. S 6644-45 (daily ed. 6/22/81).) On May 6, 1982, Attorney General William French Smith announced that the Department of Justice concluded that the court-curbing bill was constitutional. (Letter from William French Smith to Peter W. Rodino, Chairman of Committee on the Judiciary, House of Representatives.) On July 22, 1982, Theodore Olson, Assistant Attorney General for the Office of Legal Counsel, testified before a House Subcommittee in favor of the constitutionality of the prohibition of CRD efforts to pursue busing remedies. (Testimony of Theodore B. Olson.)

Attorney General Smith's conclusion that Congress was empowered to limit court desegregation remedies were premised on two dubious presumptions.

First, the Attorney General ruled that "[t]he substantial weight of the text and legislative history supports the proposition that the bill limits the remedial power of the federal courts, not the Supreme Court." (Letter, p. 5.) This conclusion is of great significance since "a Supreme Court with authority to review and revise lower and state court judgments may be constitutionally necessary to assure the national uniformity and supremacy of the Constitution and federal law." (Dale, Legal Analysis Regarding the Transportation of Students, p. 42; see also Radner, "Congressional Power Over the Appellate Jurisdiction of the Supreme Court," 109 U. Pa. L. Rev. 151, 160-67 (1960); Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Judicial Power," 79 Harv. L. Rev. 1362 (1956).) The Attorney General based this reading primarily on the fact that the bill recited Article III Section 1 of the Constitution as Congress' source of power for enacting the measure. Section 1 of Article III provides authority for limiting the jurisdiction and the powers of the inferior federal courts, not the Supreme Court. Yet, Justice Department officials later noted: "We have observed in the legislative history certain ambiguous statements upon which an argument might be based that a restriction on the powers of the Supreme Court may have been intended." Finally, Senator Johnson (a co-sponsor of the measure) has stated subsequent to the passage by the Senate of S. 951 that he fully intended its provisions to apply equally to the inferior federal courts and the Supreme Court. Considering this discrepancy between the Attorney General's reading of the bill and that of bill sponsor Johnson, it may well be that the Attorney General opted for his reading of the bill in order to duck the constitutional issue and thereby encourage congressional passage of such jurisdiction-limiting measures.

The Attorney General also argued "that the time and distance limitations contained in ... the bill would serve as legislative benchmarks for federal and state courts in the future in devising appropriate decrees. ... This limited effect on the court's remedial power does not convert the judicial power—to hear and decide particular cases without any power to issue relief affecting individual legal rights or obligations in specific courts." (Letter, p. 10, p. 12.) The accuracy of this statement, however, is contingent on the accuracy of the Attorney General's view that student transportation is never a necessary feature of a remedial desegregation decree. If a court views as necessary or incidental the transportation remedies extending beyond Congress' proposed time-distance limitations, congressional action might foreclose court remedial power. Considering that racial isolation is the wrong addressed in desegregation orders and that mandatory remedies are more effective than voluntary ones, it would seem that the Attorney General's conclusion is wrong when he speaks of "[t]his limited effect on the court's remedial powers." The Helms Amendment would have also prohibited the Department of Justice from bringing or maintaining any action which might require the busing of school children. Attorney General Smith concluded that this action "would be constitutional if read to preserve the government's ability to fulfill its Fifth Amendment obligations by initiating anti-discrimination suits, restricting only, and in a very limited fashion, the Department's participation, by seeking a busing order, in the remedial phase of such suits." (Letter, p. 14; emphasis supplied; see also Testimony of Theodore Olson p. 32-44.) This analysis, like the analysis of the jurisdiction limiting provision, assumes that busing is a non-essential remedy. Otherwise, DOJ authority would be restricted significantly, not "in a very limited fashion." Yet, as Charles Dale of the Congressional Research Service noted: "[T]he effect of [this restriction], when read together with restrictions placed ... [in the Department of Education through other appropriations measures], might be to place the federal government in the position of continuing to fund unconstitutional segregated school systems. This is because DOJ would be precluded from seeking judicial enforcement in cases referred to it by [the Department of Education] under Title VI [of the Civil Rights Act of 1964] where student transportation may be the last effective desegregation remedy." (Dale, Legal Analysis Regarding the Enforcement Authority of the Department of Justice, August 1981, p. 9; emphasis supplied.) Again, the legal conclusions of the Reagan Justice Department seem more in line with administration policies than legal realities.

One more area where CRD has antagonized civil rights proponents on the "race and education" issue of elementary and secondary school students is the controversy surrounding the tax-exempt status of racially discriminatory private schools. On January 8, 1982, the Treasury Department announced that "without further guidance from Congress, the Internal Revenue Service will no longer revoke or deny tax-exempt status to ... organizations on the ground that they don't conform with fundamental public policies [such as racial nondiscrimination]." (IRS News Release, Jan. 8, 1982.) Also, on that day, DOJ,
in light of the Treasury announcement, sought to vacate as moot two cases before the Supreme Court, Bob Jones University and Goldsboro Christian Schools (Memorandum for the United States; Jan. 8, 1982). Both cases involved federal appellate court rulings upholding as legally correct the IRS's denial of tax-exempt status to schools whose admitted racial discrimination was based on religious belief.

The IRS had established its policy of racial nondiscrimination in 1970 following a D.C. District Court decision, Green v. Kennedy, which temporarily enjoined the Service from granting tax-exempt status to racially discriminatory schools in Mississippi. (309 F. Supp. 1127 (D.D.C. 1970).) The IRS based this decision on a finding that it would be improper to grant tax exemptions to schools that violate important public policy objectives established in Brown v. Board of Education and in the Civil Rights Act of 1964. (IRS News Release; July 10, 1970.) The Supreme Court ultimately affirmed the Green decision. (404 U.S. 997 (1971).)

Yet, in a subsequent decision, the Court noted: "[t]he court's affirmance in Green lacks the precedential weight of a case involving a truly adversarial controversy." (Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974).)

CRD seized upon the inconclusiveness of the Green afforrmance in justifying the administration's policy reversal on this matter. CRD argued that it was improper for the IRS to read a public policy requirement into the plain language of the congressionally enacted tax-exemption provision of the Internal Revenue Code. Yet, after severe public criticism of the new position and congressional refusal to enact a racial nondiscrimination requirement, CRD returned to the Supreme Court where it requested that the case be decided. In order to provide some semblance of a case or controversy within the Court's jurisdiction, the government suggested that the Court appoint "counsel adversary" to the school on the underlying issue of whether the IRS is statutorily required to either grant or deny tax-exempt status to racially discriminatory private schools. The Court abided by this unorthodox administration request and appointed William J. Coleman, Jr., to argue the "government's side" in these cases (50 U.S.L.W. 3837 (Apr. 19, 1982).) On May 24, 1983, the Supreme Court upheld the pre-Reagan IRS position that racially discriminatory schools were not entitled to tax-exempt status. (Bob Jones University v. United States, 43 CCH S. Ct. Bull, 2669 (1983).)

Assistant Attorney General Reynolds explained that CRD felt compelled to reinstate the tax-exempt status of racially discriminatory private schools since "[t]he province and duty of the Justice Department, as the responsible advocate of the Executive Branch, is to advance in court its best view of what the law says and means. This we have done, and will continue to do." (The Civil Rights Policy of the Department of Justice: A Response to the Report of the Leadership Conference on Civil Rights, April 1982, p. 20.) Yet, without commenting on the accuracy or inaccuracy of CRD's legal position, CRD's actions on this matter were in grave error for at least three reasons. First, there was no need for CRD to act. The Supreme Court was already set to resolve the statutory interpretation issue raised by CRD in Bob Jones University. And even if CRD leadership did not agree with the government's position in these cases, those attorneys who had been responsible for this case (and prevailed before the Fourth Circuit) certainly would have zealously argued the government's position against vigorous opposition from Bob Jones University's counsel. Thus, if CRD had done nothing, the Court would have resolved the statutory issue in the form of a proper adversarial contest. Apparently, CRD wanted to avoid a Court decision upholding the racial nondiscrimination policy.

CRD was also in error because prior dissatisfaction with congressional action on this issue clearly suggested that Congress favored the racial nondiscrimination requirement. The clear federal policy against discriminatory institutions is firmly established in several Supreme Court decisions and many congressional enactments. Congress' reaction to the D.C. District Court decision McGlotten v. Connally illustrates its opposition to granting tax exemptions to racially discriminatory institutions. (338 F. Supp. 448 (DDC 1972).) In McGlotten, the court held that nonprofit private clubs that excluded non-whites from membership were entitled to tax-exempt status. Congress expressed its dissatisfaction with McGlotten by amending the tax-exemption provision of the Internal Revenue Code to prohibit the granting of tax exemptions to racially
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discriminatory private clubs. (26 U.S.C. sect. 501(c)(1976).) The Senate Committee Report on this legislation states that “it is believed that it is inappropriate for a social club... to be exempt from income taxation if its written policy is to discriminate on account of race, color, or religion.” (S. Rep. No. 1318, 94th Cong., 2d Sess. 8.) CRD can also be criticized for its decision to ask the Supreme Court to hear Bob Jones University subsequent to its efforts to have the case declared moot. Since government and the university agreed on the case's underlying issue, the Court’s hearing of the case thus abandoned the fundamental requirement of federal judicial proceedings that the parties who bring a case to court should be the ones whose interests will be represented before the court. The Supreme Court’s decision to resolve this case was a political one of the type, ironically, that the Reagan administration has rebuked courts for making. According to Attorney General Smith, “Responsibility for policy making in a democratic republic must reside in those who are directly accountable to the electorate... Courts are limited by Article III to deciding live disputes presented to them by parties with a concrete and particularized interest in the outcome.” (Smith, “Urging Judicial Restraint, 68 ABA J. 59, 60 (1982).) The administration’s handling of this matter thus suggests that its policy of judicial restraint is a smoke screen for the attainment of political ends. Reflective of this are CRD policies limiting certain aspects of school desegregation litigation and CRD recognition of congressional authority over both court jurisdiction in fashioning desegregation remedies and DOJ enforcement of court-approved desegregation remedies.

On the tax exemption issue, Chester Finn aptly noted:

This was no case of group entitlements, of government-mandated equality of result, or of requiring preferential treatment for those previously disadvantaged by their sex or color. It was purely and simply a matter of old-fashioned racism and of what the government’s policy ought to be toward those few schools that openly deny admission to black youngsters on account of their color. It signalled that perhaps the administration is not really color-blind. (Finn, “Affirmative Action Under Reagan,” Commentary, April 1982, p. 26.) Whether such bad motives can be attributed to other CRD policies on the “race and education” issue or the more general question of civil rights enforcement is more difficult to gauge. Clearly, CRD positions represent a retrenchment from past administrations’ support for the “civil rights” side of these issues. And in the matter of racial equality for elementary and secondary school children, CRD seems more concerned with advancing its anti-busing policies than with the law. In the “race and education” issue, CRD policies seem contrary to the principle of equality under the law.