UNITED STATES
COMMISSION ON
CIVIL A1GMTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

THE NEW RACISM

by

William B. Allen
Chairman, U. S. Commission on Civil Rights

"Racism," the epithet, loses the sting of a scourge in proportion as it is overused and debased through misapplication. Conservatives are frequently alleged to be racists, among other things. Little wonder if, by degrees, they become insensitive to protests of racism. The wolf syndrome (it is insensitive to say "the *boy* who cried wolf"!) has eroded the power of the warning. Still, it is of crucial importance for conservatives to recall what is truly fearful about racism. For the real racism is the greatest threat to freedom and limited government in our time, serving as the apt vehicle for a policy of *divide et impera*. The real racism both factionalizes our society and aggrandizes the power of the state in the process.

We speak of the "new racism" rather euphemistically, on account of its supposed difference from old fashioned "Jim Crow." In reality, however, there is no such difference. The racism of racial preference remains the same old fashioned racism, whether its preference scale seems to place American whites at the top of the scale or at the bottom of the scale. In each case, racism as social policy depends upon monopolizing political power in order to work its will. And even the supposedly benign racism (making up for the legacy of exclusion) concentrates political power in the hands of an elite which considers itself superior and invested with supranormal rights to determine the status and position of other members of the society.

Perhaps, however, we should think in terms of nonstereotypical analyses in order to understand how deeply and how perversely racism has been fashioned into the keystone of politicized social policy in our era. To show how the "new racism" factionalizes our society, perhaps a review of federal Indian policy would be more instructive than yet another rehash of affirmative action and the proliferation of "minorities" lining up to profit from the only game in town. And to show how the new racism aggrandizes the power of the state, we can mount a mere summary of some of the most egregious policies in recent years to show the character of the danger. In order to render both of these showings more persuasive, I shall open with an example of the kind of supportive atmosphere that makes racism politically viable.

Whether harmful or beneficial, social policies must always stake their roots in fundamental public opinions that not only nurture but sustain any policy of consequence in our free society. This was shown most clearly in the 19th century, as we will see in the case of the Indian. But there is a still more instructive example ready to hand. Accustomed as we are to struggling against Marxism's claim to scientific accuracy and moral necessity, it cannot help but dismay us each time we discover how far necessary tenets of Marxism have crept into the ordinary expectations of Americans—liberal and conservative—without their being aware of it. Unconscious Marxism provides the most fertile soil for the new racism.

The Kerner Commission Report of 1968 (riots in America's cities were caused by pervasive "white racism") expressed a rather conscious version of Marxist class analysis applied to the unique circumstances of American politics. Many people rejected the fairly sophomoric argument of the Report at the time, but few realized how deeply its premisses lodged in the minds of many Americans. We have since seen Supreme Court opinions entertain, albeit in passing, the theory that people sometimes are not responsible for their actions <u>because</u> of their social conditions. We find a still more dramatic resort of the Report's premises in the very notion of a "permanent underclass," which substitutes Marxist terms of analysis for the hopeful terms of the American founders, which expressed confidence that all human beings were capable of "self government." These general dispositions show up most decisively, however, in moments of crisis and decision making.

In Miami this winter, a return of violence precipitated by the deaths of young black men at the hands of police officers highlighted in a dramatic way how far Marxist terms of analysis had crept into our usages and thereby silently favored the agenda of the new racism and increased governmental power. In a public briefing in the aftermath of the riots last January, the Commission on Civil Rights State Advisory Committee received testimony from community officials and leaders, from the Mayor and Police Chief to pastors, teachers, and activists. In the course of their testimony, I was appalled to note their exclusive concentration on the question of whether the federal government had spent enough before! Witness after witness testified without so much as mentioning the names of the victims of the shooting as an explanation for the rioting and certainly without questioning whether any sane person could count upon the rule of law in Miami. The implication was clear: a deficit of federal spending in Miami's poor communities had resulted in lingering poverty which, in turn, sparked the riots. The rioters, in other words, risked life and limb in the streets of Miami not on account of perceived injustices in the administration of justice but because they were hungry!

It requires only a few moments reflection to discover in this posture a foundation in Marx's material determinism. The people who testified were by no means disciplined marxists; nevertheless, they depended utterly upon such an argument as they tried to advance the cause of the rioters in Miami. Two results follow: first, the "natural" response of increased federal spending and necessarily increased federal power; secondly, and more importantly, the witnesses tacitly dehumanized the rioters, denying not only their power of self-government but their very capacity to recognize and resent injustice. It is thought that rioters riot because their stomachs rumble rather than because their souls are troubled. This is the attitude that makes the resort to race and class so "natural" for many Americans today in speaking of social policy. They imagine that it would suffice to tinker with material conditions to determine people's opinions and attitudes, neglecting history's lesson that revolutions are not the resort of the poor exclusively and that all human beings, rich and poor alike, once persuaded that they cannot expect justice at the hands of their lords, will resort to rebellion.

It is this opinion, in its hostility to American principles, that fuels the new racism, as it did the old. In the 19th century we can find in the positive good school of slavery that foundation of opinion which ultimately led to attempts to enlist the power of the federal government in the protection of slavery. That story turned out in a manner that is well known. The parallel story of the American Indian turned out differently, however, and today constitutes the best single example of the "new racism's" power to pervert the institutions and principles of American government. Nowhere else has Congress so clearly and persistently succumbed to the despotic temptation as in Indian policy, and nowhere else has it done so with such harmful consequences for the liberty of all American citizens.

The fundamental opinion underlying Indian policy is the notion of irreconcilable difference between Indian and American, coupled with a presumed tutelary responsibility on the

part of Congress. We will see that this has led to policies dealing with the Indian in frankly racial terms and to powers exercised by Congress at the expense of the rights of all other citizens.

When Congress was in the full flush of excitement over the legislative initiatives of the 1960s in the field of civil rights, it occurred to some that it might be well to provide for Indians the same guarantees Americans were presumed to enjoy. Accordingly, Congress passed the Indian Civil Rights Act in 1968 (ICRA). More than the Civil Rights Act of 1964, the ICRA sought to guarantee the basic prerogatives of the Bill of Rights for Indians living on reservations. In the process, however, Congress discovered certain paradoxical necessities. Although the ICRA reads like a literal copy of the Bill of Rights, it does not include the Second Amendment to the Constitution, the right to bear arms. That omission reflected Congress's own ambiguous devotion to the Second Amendment. More revealingly, the ICRA did not include the First Amendment's guarantees of freedom of religious exercise and freedom from religious establishment. This omission reflected the ambiguous status with which Congress regarded the Indian, seeing him less as a citizen of the United States than the specimen of a precious and endangered culture, whose moral and religious practices often differ so markedly from anything the protections of the Bill of Rights can suffer, that it was thought rather preferable to exempt tribes from those strictures than to protect tribal members who were also, after all, American citizens.

At the time of the adoption of ICRA, therefore, it was clear that certain fundamental incompatibilities haunted that misty netherworld of American relations with Indian tribes. As tribes or nations the Indians are held to be sovereign—independent of the United States Constitution. At the same time, however, they have been regarded in our law as subject to the plenary power of Congress. Congress, accordingly, is indirectly responsible for whatever transpires on an Indian reservation—or at least has the power to change it, at the same time that Indian reservations are not properly (that is in terms of their membership) a part of the United States. Thus, tribal members are fully subject to the authority of tribal governments without recourse to the government of the United States, save that the government of the United States arbitrarily might choose to extend such protection.

Ten years after its passage the ICRA encountered a Supreme Court challenge on precisely this ground. The result: the Court decreed that, although Congress had the power to pass and enforce the Act, by passing it without specific enforcement provisions, the act could not be cited in the courts of the United States, even while tribes were obligated to extend to members the protections it promised! Thus, a mother at a New Mexico pueblo, whose property was stolen from her on the grounds that her children were insufficiently "of the blood," could not defend herself against the tribal government in an American court. Further, tribal custom and tradition rendered the expropriation of her property entirely appropriate!

In summary, then, while Congress has the power to alter Indian law and practice, it also has the power to abstain from doing so. In short, Congress may treat Indians just as it pleases, and without regard to the ordinary protections other Americans take for granted. Nor has Congress failed to follow up on this opportunity. In the very year the ICRA was ruled to be unenforceable in federal courts, Congress passed the Indian Child Welfare Act (ICWA), in which Congress made explicit the tacit premise of all our Indian policy. An Indian is as such not permitted to assert rights of American citizenship, even while Indians are almost universally admitted to citizenship whether on or off reservations. Indians vote in all of our elections; they pay our federal taxes; and they defend our liberties in the country's wars. Indeed, Indians are dramatically subjected to the obligations of citizenship even in one case in which certain other citizens are exempted: they must pay social security taxes. Congress specifically exempted the "self-sufficient" and "independent" Amish from the need to pay social security—a privilege Indians lack altogether.

In the ICWA the Indian individual, parent and child, is subordinated to the cultural identity of the tribe. By assigning jurisdiction in child custody cases to tribal courts, whether the child and/or parent is on or off the reservation and despite their dissent in most meaningful cases, the Congress has effectively ordered that Indian children be placed specifically with regard to their race and, more importantly, that state courts in particular close their doors to Indian suitors. Congress's express interest in preserving the integrity of Indian tribes has been executed in such a way as to destroy the integrity of individual Indians. Now is the time to repeat: Indians are almost universally American citizens. Accordingly, what this exercise of power by Congress means is that Congress is free to dispose of the persons and properties of citizens entirely on the basis of race, and without the customary safeguards of the Constitution.

How came Congress to exercise such power over the American Indian? In a word: treaty relations! One might rightly inquire how it can be possible for the government of a free society to deal with its own citizens (and only some of them at that) by means of treaty—thereby escaping the obligation to assure the equal protection of the laws. Congress has never attempted to answer that question, preferring to hide behind the fiction that treaties executed before Indians became citizens remain in effect after they are citizens. We will not be fooled by that device, however, for we recognize that if treaty obligations persist despite and indeed at the expense of citizenship, then there is no reason assignable why Congress may not enter into treaties with any of its citizens, suitably defined in terms of group affiliation (the most accessible of which is race). The power Congress exercises threatens not only the Indian, therefore, but every American; for it reveals a device whereby to elude the limitations of the Constitution. Given the rapid Lebanonization of American society that has been inspired by policies of racial preference, the prospect is frightening indeed.

It remains now but to answer whether this development is innocent—a by-blcw stumbled across by despotic souls ever ready to aggrandize themselves? Far from it, it is rather the natural fulfillment of that design which was originally aimed not only at the Indian but at all the United States. The architect of American Indian policy was the selfsame architect of the positive good school of slavery, and the theoretical argument that republican government was inefficacious and should be replaced by government on the model of rationally distinguished interests or cultures engaging in mutual bargaining for the sake of their respective members. The affirmative action regime is not new; it was invented in the 19th century. The Indian policy is only the most advanced stage of the affirmative action regime a glimpse of the future that awaits us. The 1824 Secretary of War who invented the Bureau of Indian Affairs by his own fiat, and laid out the guidelines of a government serving as a "great father," in fact bequeathed to us what today we falsely recognize as the "new racism." It is, in fact, the racism of yesteryear, rejecting in its principle, as it was designed to do, the central tenet of Americanism, the belief in self-government.

Behold the examples of even our most recent policy decisions. See how these decisions aggrandize the power of the state at our expense, and all in the purported service of the new regime. Then inquire anew whether we should not quickly learn to employ George Washington's language toward the Indian, "our brother," thence springing to his defense as the surest means to defend ourselves. What is the implication of those provisions of the Fair-housing Act Amendments of 1988, providing for the outfitting of new residential construction (and the retrofitting of some old construction) to accommodate the disabled, if not a claim by Congress that it can provide considerations for arbitrarily designated groups of citizens at the expense of other citizens? The point is not the general availability of "suitable" living arrangements for the disabled, for whom the market itself would make specifically adapted arrangements possible. The point is Congress power to assure that all relevant residences will be suitable!

What could be the point of the provision in the immigration Reform and Control Act of

1986 (IRCA), declaring it is "lawful," indeed mandatory for employers of five or more persons to discriminate in favor of citizens in hiring (as against legal immigrants), if not to demonstrate Congress's power to order folk to discriminate, as easily as it theretofore ordered them not to discriminate, on the basis of "foreign origin" (see Title VII of the 1964 Civil Rights Act)? The provisions are indeed contradictory; but the point is the irresistible will of Congress! Congress may divide the American citizen as it wills, and compel the citizen to take note of such divisions, constitutional guarantees to the contrary notwithstanding.

What otherwise could have been the point of the Supreme Court's *Richmond v. Croson* decision, in which it was determined that minority business set-asides and state/local racial preference schemes could not be imposed, willy-nilly, but only at the behest of Congress and under the "strict scrutiny" of the Court, except to concentrate the awesome power to discriminate in the hands of the government itself? What could the "Civil Rights Restoration Act's" picking and choosing among favored and disfavored rights and groups convey, apart from Congress' determined assertion of its power to legislate without limit and to rule without law? The Act accordingly subjects innumerable private enterprises and activities to the regime of racial and gender preference, while at the same time asserting that certain purported rights (such as the so-called right to an abortion) need not be extended, for the moment, under this regime.

This summary list of only some of our most recent accomplishments displays, I submit, nothing so clearly as it display the incredible power the government of the United States has amassed on the strength of the preposterous claim that it has the title to divide its citizens by race and other ascriptive identifications, to treat with them separately, and as groups rather than individuals, and to accord them the benefits of government, not as equal citizens enjoying equal rights, but as the designated beneficiaries of "appropriate" rights and privileges. The only remaining question is, what's so new about this? This sounds for all the world like the old-fashioned racism, the old-fashioned despotism. The more precise question, therefore, is how came we to be in such a state?