IN DEFENSE OF AFFIRMATIVE ACTION

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This year marks the twentieth anniversary of my judicial appointment to the United States Court of Appeals for the Eighth Circuit. I was one of a total of nine African-Americans appointed to the federal appeals courts by President Jimmy Carter. Many factors contributed to my appointment as a federal judge. I naturally like to emphasize merit and personal factors such as (and here I pause for my law clerks to applaud) intelligence, knowledge of the law, and fairness. Of course, relevant work experience was also a factor—I had been a prosecutor and a state court judge, two common career paths for aspiring federal judges. Politics was also a key factor—any judge should always be able to count at least one or two politicians among his or her friends. The timing of the vacancy was also right. I was also the beneficiary of affirmative action.

There are two separate aspects of affirmative action. Both are remedial, but the focus—the level of generality, the degree of specificity—is different. (We judges are very fond of analytical concepts like generality and specificity.) Affirmative action can be a remedy for specific past discrimination. This is the kind of affirmative action that is embodied in settlements or judgments. However, affirmative action can also be general. In this sense, it is used not as a remedy for specific past discrimination, but rather to promote diversity. I was the beneficiary of affirmative action in this broader, promotion-of-diversity sense. My appointment to the federal appeals court was not a remedy for specific past discrimination. I was, however, the first (and am so far the only) African-American

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who has been appointed to the Eighth Circuit.[1]

Today both aspects of affirmative action are under attack and have few defenders. This is a mistake and an injustice. It is also short-sighted and, ultimately, a potential threat to the civil order. Those who would abandon affirmative action ignore the history of this country and the reality of discrimination. As was recounted in a recent essay by the Honorable A. Leon Higginbotham, Jr.,[2] this year's law school enrollment figures illustrate the dramatic effect of what will happen without affirmative action.[3] Out of 268 first-year law students at the University of California at Berkeley, only 1 is African-American;[4] out of 468 at the University of Texas Law School, only 4 are African-American.[5] All of this has occurred less than fifty years after the court order desegregating the University of Texas Law School,[6] years during which, for the most part, Texas's system of higher education remained segregated in violation of the 1964 Civil Rights Act.[7] Without affirmative action, and unless admissions criteria are changed, this pattern will undoubtedly be repeated in admissions to other professional schools as well as undergraduate admissions. I fear that similar results will appear in public contracting and public employment in those jurisdictions that have eliminated affirmative action in those sectors.

I believe that the resolution of the affirmative action debate lies in part in education. Students need more exposure to the study of this nation's history, specifically, the history of the civil rights movement. Too many do not know our recent history, much less that of the nineteenth century and the Civil War. I would draw an analogy between the study of history and the development of the facts in an employment discrimination case. Knowledge of the basic facts

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1. The first—and so far the only—woman, my colleague the Honorable Diana E. Murphy, was not appointed to the Eighth Circuit until 1994 by President Clinton.

2. A. Leon Higginbotham, *Breaking Thurgood Marshall's Promise*, N.Y. TIMES, Jan. 18, 1998, § 6 (Magazine), at 28.

3. *See id.*

4. *See id.*

5. *See id.*

6. *See* Sweatt v. Painter, 339 U.S. 629 (1950); *see also* Hopwood v. Texas, 861 F. Supp. 551, 555 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

7. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994); *see also Hopwood*, 861 F. Supp. at 554-57 (discussing Texas's long history of discrimination in higher education).

provides the rationale for remedial legislation like the 1964 Civil Rights Act[8] and affirmative action. For example, the case for affirmative action, not only to end discrimination, but also to counteract discrimination's lingering effects, is compelling given facts like those noted by Justice Ginsburg in her dissenting opinion in *Adarand Constructors, Inc. v. Pena*:[9]

> Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending upon their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders [and insurance companies (I recently heard oral arguments in a redlining case)]. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.[10]

Of course, in my defense of the legitimacy of affirmative action to remedy past discrimination and to promote diversity, I am not encouraged by the fact that the above is taken from a dissenting opinion in a Supreme Court case in which the majority opinion struck down a federal affirmative action program for minority or disadvantaged subcontractors.[11] Nonetheless, I refuse to despair. In the not-so-distant past, this country confronted the reality of racial discrimination and acknowledged the need for affirmative action to end discrimination and its lingering effects,[12] and we can do so again.

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8. 42 U.S.C. §§ 2000e to 2000e-17.
9. 515 U.S. 200, 273-74 (1995) (Ginsburg, J., dissenting).
10. *Id.* (footnotes omitted).
11. *See id.*
12. *See, e.g.*, Benjamin L. Hooks, *Affirmative Action: A Needed Remedy*, 21 GA. L. REV. 1043 (1987) (arguing that affirmative action will continue to be necessary until we have a non-discriminatory society); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997) (detailing the events leading up to Proposition 209 and prospects for the future of affirmative action).

We must reacquaint ourselves with that history so that we can change the future. In the meantime, we would do well to remind affirmative action's detractors that the debate about affirmative action is ultimately not about preferences and quotas, but instead about justice and the constitutional guarantee of equal protection of the laws.