

Fellow Commissioners:

My proposed Frederick County Racial Equality Act (the "Act") is attached for your review and comment. If enacted, the Act would eventually require County Divisions and Departments to refrain from the practice of categorizing, classifying, distinguishing, or otherwise identifying citizens on the basis of race unless the BOCC expressly determines that the practice is narrowly tailored to serve a compelling governmental interest.

The Act allows County Divisions and Departments a certain period of time to present what I call a "Nuremberg defense" (i.e., a claim that the practice is required by higher ups). The BOCC would evaluate a Department's claim that a federal or state statute, regulation, rule, grant condition or other authority purportedly requires the practice. If the BOCC expressly determines that a particular practice was narrowly tailored to serve a compelling governmental interest, then the practice could continue. Otherwise, the practice must cease.

The moral authority and legitimacy of governmental race-based distinctions are at their zenith when expressly required by an act of the United States Congress passed in accordance with its powers under the Civil War Amendments to eliminate the badges and incidents of slavery. On the other hand, the authority and legitimacy of race-based distinctions are at their nadir when performed on the basis of some bureaucratic grant writer's perverse obsession that all of society's benefits and burdens be allocated on the basis of a strict racial quota system. I believe we will find far more examples of the latter than of the former.

Over the years at least three members of the present U.S. Supreme Court have expressed concern about the specter of a government bureaucrat, clipboard and pencil in hand, attempting to pigeonhole consumers of government services into pre-determined racial categories:

"[T]he very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals. . . . If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as The First Regulation to the Reich's Citizenship Law of November 14, 1935, translated in 4 *Nazi Conspiracy and Aggression*, Document No. 1417-PS. pp. 8-9 (1946)." *Fullilove v. Klutznick*, 448 U.S. 448, 534, footnote 5 (1980) (Stevens, J., dissenting); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 633, footnote 1 (1990) (Kennedy, J. and Scalia, J., dissenting).

My interest in this topic came about in March, 2002 when the prior BOCC learned that the County's Department of Aging was engaging in the practice of categorizing, classifying, distinguishing or otherwise identifying consumers of the Department's services on the basis of race. I proposed a resolution that would have directed the Department of Aging to cease and desist from the practice. On September 24, 2002

Commissioner Rhoderick moved to reject the proposed resolution, seconded by Commissioner Gardner. Commissioners Gardner, Rhoderick & Weldon voted in favor of the motion to reject the resolution, with Commissioners Gray & Thompson opposed to the motion.

The recent revelation that officials at Walkersville High School called students to an assembly on the basis of race has brought the topic to the fore once again. The practice represents a departure from the holding in *Brown v. Board of Education*, 347 U.S. 483 (1954): "[I]n the field of public education the doctrine of 'separate but equal' has no place." 347 U.S. at 495. See <http://www.gazette.net/200339/walkersville/news/179904-1.html>.

If there is to be a movement away from the cavalier use of governmental race-based classifications and toward racial equality, it is quite appropriate (and ironic) that it begin here in Frederick County. We tread over the same ground as did Roger Brooke Taney, Chief Justice of the United States Supreme Court and author of *Dred Scott v. Sandford*, 60 U.S. 393 (1857), perhaps the most irresponsible and racist decision ever rendered by the Supreme Court.

Your opinions and commentary are welcome.

Lennie

RESOLUTION #03- _____

A RESOLUTION BY THE BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY, MARYLAND ("BOCC") DIRECTING ALL DIVISIONS AND DEPARTMENTS WITHIN THE JURISDICTION OF THE BOCC TO CEASE, DESIST AND REFRAIN FROM THE PRACTICE OF CATEGORIZING, CLASSIFYING, DISTINGUISHING OR IDENTIFYING CITIZENS ON THE BASIS OF RACE UNLESS THE BOCC EXPRESSLY DETERMINES THAT THE PRACTICE IS NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST

RECITALS

WHEREAS, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character;"¹ and

WHEREAS, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality;"² and

WHEREAS, "Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category;"³ and

WHEREAS, "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class;"⁴ and

¹ Martin Luther King, Jr., August 28, 1963.

² *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Oyama v. California*, 332 U.S. 633, 646 (1948); *Hernandez v. Texas*, 347 U.S. 475, 478 n. 4 (1954); *University of California Regents v. Bakke*, 438 U.S. 265, 290-291 (1978); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223-224 (1995); *Rice v. Cayetano, Governor of Hawaii*, 528 U.S. 495, 517 (2000).

³ *Palmore v. Sidote*, 466 U.S. 429, 432 (1984); *Miller v. Johnson*, 515 U.S. 900, 912 (1995).

⁴ *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

WHEREAS, "Of all the criteria by which men and women can be judged, the most pernicious is that of race;"⁵ and

WHEREAS, "an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bear no relationship to an individual's worth or needs...;"⁶ and

WHEREAS, "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities;"⁷ and

WHEREAS, racial classifications "...threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility;"⁸ and

WHEREAS, "...race is an impermissible arbiter of human fortunes...;"⁹ and

WHEREAS, "Racial and ethnic distinctions of any sort are inherently suspect...;"¹⁰ and

WHEREAS, "Racial classifications of any sort pose the risk of lasting harm to our society...;"¹¹ and

⁵ *Maryland Troopers Association v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993); *Podberskey v. Kirwan*, 38 F.3rd 147, 152 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

⁶ *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

⁷ *Rice v. Cayetano, Governor of Hawaii*, 528 U.S. 495, 517 (2000).

⁸ *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *United States v. Hays*, 515 U.S. 737, 744 (1995).

⁹ *Maryland Troopers Association v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993); *Podberskey v. Kirwan*, 38 F.3rd 147, 152 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995); *Eisenberg v. Montgomery County Public Schools*, 197 F.3rd 123, 128 (1999), *cert. denied*, 529 U.S. 1019 (2000).

¹⁰ *University of California Regents v. Bakke*, 438 U.S. 265, 291 (1978); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218 (1995); *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

¹¹ *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

WHEREAS, “[T]he individual is important, not his race, his creed, or his color”;¹² and

WHEREAS, Racial classifications “. . . reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin;”¹³ and

WHEREAS, “Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution;”¹⁴ and

WHEREAS, “A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification;”¹⁵ and

WHEREAS, “[R]acial classifications. . . must serve a compelling governmental interest, and must be narrowly tailored to further that interest”;¹⁶ and

WHEREAS, “[R]acial classifications are simply too pernicious to permit any but the most exacting connection between justification and classification”;¹⁷ and

WHEREAS, “It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority group assigned proportional representation in every desirable walk of life”,¹⁸

¹² *Shaw v. Reno*, 509 U.S. 630, 648 (1993).

¹³ *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

¹⁴ *Miller v. Johnson*, 515 U.S. 900, 912 (1995).

¹⁵ *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979); *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 536-537 (1982); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 485 (1982); *Shaw v. Reno*, 509 U.S. 630, 643-644 (1993).

¹⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

¹⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995); *Gratz v. Bollinger*, ___ U.S. ___, (2003).

¹⁸ *Grutter v. Bollinger*, ___ U.S. ___, (2003).

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS FOR FREDERICK COUNTY, MARYLAND

§1. Identification of Authorities that Purportedly Require Racial Classifications. - Each Division and Department within the jurisdiction of the BOCC shall, not later than January 15, 2004, provide the County Manager with specific citations to any federal or state statute, regulation, rule, policy, grant condition, or other authority that purports to require the Division or Department to categorize, classify, distinguish or identify citizens on the basis of race.

§2. Cease and Desist. – Beginning May 17, 2004 each Division and Department within the jurisdiction of the BOCC shall cease, desist and refrain from the practice of categorizing, classifying, distinguishing, or identifying citizens on the basis of race, unless the BOCC expressly determines that the practice is required by a federal or state statute, regulation, rule, policy, grant condition, or other authority that is narrowly tailored to serve a compelling governmental interest.

§3. Delivery of Resolution to Directors of County Divisions and Departments.
– The County Manager and the County Attorney are authorized and directed to send a copy of this Resolution to the Directors of all Divisions and Departments within the jurisdiction of the BOCC.

§4. Short Title. – This Resolution may be cited as the “Frederick County Racial Equality Act.”

The undersigned hereby certify that the Board of County Commissioners of Frederick County, Maryland approved and adopted the foregoing Resolution on the _____ day of _____, 2003.

ATTEST:

BOARD OF COUNTY COMMISSIONERS
OF FREDERICK COUNTY, MARYLAND

By:

Douglas D. Browning,
County Manager

John L. Thompson, Jr., President

Michael L. Cady, Vice President

John R. Lovell, Jr.

Jan H. Gardner

Bruce L. Reeder