Department of Justice

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ADDRESS BY
ATTORNEY GENERAL NICHOLAS deB. KATZENBACH
at the
LAW DAY CELEBRATION AND BANQUET
UNIVERSITY OF SOUTH CAROLINA LAW SCHOOL
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It was three years ago that my predecessor as Attorney General came to this city. He spoke then to a convocation of professors and commended this state for its acceptance of the court order to admit a young architect, Harvey Gantt, to Clemson University without disorder, bitterness, or defiance.

It is my pleasure to come here today, at the invitation of your student bar, and give recognition to the progress made by this University and this professional school in seeking to provide every man membership -- and not merely existence -- in our society.

The future direction of this effort will be vitally influenced by our law schools -- and most of all by the students who are now being trained in them.

The responsibility was articulated fifty years ago by a young professor of law, named Felix Frankfurter, who told an audience:

"It is not enough that young men should come from our schools equipped to become skillful practitioners, armed with precedent and ready in argument. We fail in our important office if they do not feel that society has breathed into law the breath of life and made it a living soul...a vital agency for human betterment."

There have been, perhaps, few times when law could better serve as such a vital agency. For it is appropriate today to take note not only of one spring anniversary -- this eighth year that we celebrate a national law day. On May 17 will come another anniversary -- twelve years since a unanimous Supreme Court handed down the Brown school decision.

Indeed, we meet at a time when both law and education stand at the forefront of our attention. And no institution is better equipped to fulfill the dual mission of educational excellence and a just legal order than a school of law like this one.

The national focus on education is manifest. In recent years, particularly under the leadership of President Johnson, the Congress has passed by clear majorities a comprehensive series of measures to enrich and vitalize our educational system from the elementary to the university level.

The President has described himself as a teacher "still on leave of absence from the Houston public schools." His determination coupled with the determination of Congress have provided us with an unprecedented range of statutory tools and new approaches on which state and local governments can draw in acting on our fundamental belief in the right of a free public education.

Throughout our society there is a growing awareness of the social and economic costs we pay for failing to achieve the full release of the energies and abilities of all our citizens.

Some of these costs can be measured. It now costs us, on a national average, about $450 a year to keep a child in public school. But it costs $1,800 a year to keep a young delinquent in a detention home. It costs $2,500 to keep a family on relief. It costs $3,500 to keep a criminal in a penitentiary.

Whatever these measurable costs, how much greater are the costs of neglect, of dropouts, of human failure, which flow from inadequate education. And in this society, characterized by its belief in excellence, in the virtues of human incentive, and in equal opportunity, the education we should provide cannot be merely perfunctory or just adequate.

As the President has observed, "we have always believed that our people can stand on no higher ground than the school ground -- or can enter any more hopeful room than the classroom. We blend time and faith and knowledge in our schools -- not only to create educated citizens, but also to shape the destiny of this great Republic."

In this Age of Space, the task of providing education of quality to all our children is one of unparalleled need and one of equally great complexity. Quality education requires unwavering commitment of resources and of attention. And yet, as we enter the last third of the 20th century, we find ourselves still distracted, still obstructed, by a problem yet with us from the 19th and even the 18th century, the problem of race.

Twelve years ago, there were many who doubted the Supreme Court's view that racially separate schools are inherently unequal. But ensuing experience in the North and the South has further validated the Court's assertion.

I cannot help but think back to the perhaps unconscious confirmation given in the argument before the Supreme Court last January concerning the Voting Rights Act of 1965. The State of South Carolina sought to prove the soundness of her literacy requirement. The state felt that the new law would seriously dilute her literate electorate -- because it has the second highest illiteracy rate in the nation.

When we look at this illiteracy figure, we find that it consists of three times as many Negroes as whites.

Not only has it been confirmed that education for Negroes, when compared with that for whites, remains "less available, less accessible, and especially less adequate." In some areas and noticeably in some of the rural South the gap has even widened, when measured by the drop-out rates, years of formal education completed, and college attendance.

In but few instances, North or South, is there even rough equality between "Negro education" and "white education." The migration of the Negro to the city and of the white to the suburb creates further breaches -- in expenditure per child, in the competence and training of teachers, and in career skills which are provided to the pupils. Proportionate Negro college attendance and completion throughout the country is considerably less than half the whites; the high school rate is about a half that of the whites.

These are not any longer -- if ever they were -- mere hypotheses. They are stubborn fact.

The last year has seen some measurable progress in school desegregation. It increased to slightly more than 6 percent of Negro children -- about 180,000 out of 2-1/2 million -- in the eleven Southern states.

This progress exceeds that made in all preceding years, but even it has come in large measure only because of the introduction of administrative guidelines as an assisting factor.

There are, nevertheless, those who contend, in the best of faith, that equal education is not possible -- that poor Negro children are held back by deprivations in their homes and by general handicaps of environment.

But even the supposed iron laws of "cultural lag" have begun to yield to the findings of experience, research and experimentation in our schools. We have found that we can overcome it -- if we want to overcome it.

More decisive than the elusive concept of "cultural lag" are simply poor schools and poor teaching. Where a sustained attack is mounted through teaching, curriculum, guidance, and common facilities, the effect on Negro students is quickly evident.

In 1963, Baltimore -- to cite one example -- offered a pre-school year for four-year-olds from two of the city's most depressed, and largely Negro, neighborhoods. When the children went on to regular kindergarten, they did as well as children from middle and upper class families.

In the first grade, they did substantially better than other children from the same depressed neighborhoods. By the end of the year, two-thirds of the original sixty were in the top half of their class. Ten of the sixty were in the top quarter.

In one demonstration program in a school at the edges of Harlem, after two years, drop-out rates fell by one-half, I.Q. scores were brought up for more than 80% of the students, and the average pupil in two years was able to gain more than four years in reading ability.

Again, there is here a natural merger between good teaching and good learning. There are revealed also enormous resources of dignity for the individual and talent for the nation.

Yet despite this experimental ferment and vigorous activity at all levels of government there remain persistent obstacles to the achievement of our aims. Unmistakable barriers remain in the sluggish rate of progress we have made in dealing with the segregated local school in the South and the resegregated ghetto school in the North.

The almost total separateness of schools in many parts of the South and the widening quality gap between slum and suburb schools in the North remain formidable obstructions whose removal is essential to the national welfare.

No number of Headstart and pre-school programs, no variety of aids to elementary and secondary schools, no innovations in manpower development and teacher training can be effective unless we solve the larger inequality of segregation.

Twelve years: in our world twelve-years is not a short stretch of time. It represents the full span of a child's public education. Yet in many communities the record of accomplishment is almost barren.

In too many instances we have seen not a true confrontation of the issue but evasion, marginal acquiescence, and the rethreshing of litigious controversies. In too many instances, we are still working very largely as if the problem were a completely new one.

What progress there has been often has reflected the exacting devotion and skill of the federal judiciary, most of whose members have carried heavy burdens of responsibility with unusual dignity and fidelity to the law of the land.

It would be unfair to raise a charge of collective indolence as regards education against the local agencies of government and the citizenry. A number of communities have worked with diligence to deal with school desegregation effectively.

But the federal judiciary has only sporadically been matched in the quality of its performance by those vital forces in our democracy. It is the job primarily of the people and their elected representatives to grapple with large social issues, but too often this task has not been met in school desegregation.

The road leading away from Brown has been marked by an unending series of "detour," "falling rocks," and "limited access" signs. The guideposts of the Court have been read too often as loose metaphors rather than imperatives for action. "All deliberate speed" and "gradualism" have been invoked in ways suggesting the slow erosions of the ocean tides or the natural movement of a glacier.

All of these considerations lead me tonight to talk to you directly as members of the legal profession about a special obligation which it seems to me thrusts itself upon us.

It is the purpose of our profession to offer our clients the promise of protection from arbitrary acts of government and the denial of basic human rights. Everyone -- the public, those directly affected, the Department of Justice and other public officials -- wishes to have fair and searching tests of new departures in law and administrative action.

I think for example of the great skill and gentlemanliness displayed on behalf of South Carolina in the Supreme Court argument of the Brown case -- by Dean Figg. A friend has told me that after the decision was handed down, one of the Justices called him aside to observe that Mr. Figg made a superb argument.

To put the actions of government to hard tests, in other words, is altogether proper. To challenge ambiguities and misapplications of law is wholly within the spirit and traditions of our legal order.

But when vigorous challenges degenerate into dilatory tactics, they can be destructive and can endanger the public order. Law is not a synonym for litigation. Yet when the law of the land persistently is held to be no more than the law of the case; when members of the legal profession continue to contest the major holdings of the Brown decision on the suggestion that they may yet be reversed, then we court breakdown in our legal system.

This ought deeply concern you as students and future craftsmen of the law. The life-blood of the law is solving problems, not inventing problems. The courtroom -- however vital -- is only one forum of legal activity.

Much of the work of the lawyer is precisely intended to avoid litigation. Whatever field you enter -- tax, corporate, labor relations, estate planning, or administrative law -- your most important skills will derive from your sense of where society is moving, your capacity to sense the trend of events, and your ability to bring general as well as specific knowledge to bear on new and changing situations. The ability simply to find ingenious difficulties in every solution will not be of much help to you or the society in which you serve.

The good lawyer is an innovator, a person who devises working solutions and helps his neighborhood or state or country to overcome obstacles. That is one reason why there have been so many outstanding lawyers in public and political service. And that is why we so often look to the lawyer when great political and economic reforms need to be made.

When I look back on the profound changes that have taken place since my student days, I am impressed again and again by the role which the lawyer has played. If you look at the important domestic reforms of the 1930's such as agricultural price supports or social security, you find that the techniques were devised not by agricultural or insurance experts, but largely by lawyers.

If in the 1940's you examine the Lend-Lease program and the Marshall Plan, you again find that new methods of collaboration among allies owed much to the skill of lawyers.

In the 1950's we saw on our continent the creation of the St. Lawrence Seaway and in Europe a series of economic and functional communities, in all of which the lawyer played a critical and shaping role.

And in the 1960's, I think of some of the controversial issues resolved by lawyers during my experience in the Department of Justice -- such as the conflict between those who thought communications satellites should be governmentally controlled and those who thought they should be handled by a private corporation. You recall the outcome -- an entirely new public corporation jointly controlled by shareholders and the government.

Such achievements represent the true heart of legal action.

The lawyer has both a therapeutic and catalytic role in our democracy. That is why training in law is directed to objective appraisal, to the reconciliation of difficulties, to the encouragement to affirmative rather than passive support for its processes. And that is why I seek to describe a danger to our profession. It comes from the temptation to drive principles to their excess -- beyond the dangerous edge.

For example, what if there were a series of tests regarding taxpayers who withheld partial income tax payment because of strongly held objections to the war in Vietnam? Or suppose that many tax lawyers advised their clients to assert their "right" to reduce their tax bill because of objection to a large dam which flooded natural scenery, or opposition to the cost of veterans benefits, or scruples about the assistance that now goes to private colleges.

The litigation might, if pressed to its limits, cause blood clots throughout the circulatory system of our federal and our fiscal system.

When a decision has been repeatedly and mightily reaffirmed by courts and Congress and examined and re-examined in a long series of subsequent court actions, then good faith and public confidence also become proper -- even essential -- points of recognition by the lawyer.

To counsel breach of the law until a court actually orders compliance, to seek every possible postponement, to raise insistently frivolous and circular questions, to advise resistance of orders by all means short of contempt does not further justice. It invites chaos.

It is often suggested that it is federal initiative and interference which have inflamed controversies and choked progress. Any fair appraisal does not support this. The federal government has not intervened as a matter of first or hasty preference, but only after slowness or evasion threatened to deplete the clear meaning of the law.

The Department of Justice takes no pride in the fact that it has had to originate or to intervene in large numbers of school desegregation suits over the years. The 22 suits which the Department has brought this year derive from the unfortunate failure of the normal processes of political and community adjustment.

The same is true of the new guidelines promulgated by the Department of Health, Education and Welfare. These guidelines are moderate, perhaps even tardy benchmarks. They contain no sudden surprises nor do they in themselves break new ground. It would be tragic if the battles before the Supreme Court, before the district and appeals courts were all recycled again in long and futile legal actions. The guidelines, rather, furnish a rational framework and substantial uniformities by which communities and leaders can proceed with their tasks and plan for the future. Extraordinary circumstances can still be adjudicated.

The guidelines need not be taken as a vehicle for perpetuating the stale image of a South under siege, victimized by federal harassment. That federal action -- where it has had to be taken -- need not be debilitating was recently illustrated for us in a particularly difficult Black Belt county which had failed to file an acceptable school desegregation plan with the Department of HEW.

In this community, Negro children considerably outnumbered white children, but the 24 schools provided for them were vastly inferior. Many were shacks, propped on piles of bricks, without heat and running water, let alone sufficient books.

A Department of Justice attorney found that the local school superintendent was deeply troubled by the kind of education offered to the Negro children, but was not sure how to begin improving it, either in terms of resources or in terms of local racial hostility.

To assist the superintendent, we sought to make it plain to the community that the federal interest was not in vindictive desegregation but in helping generally to improve the level of education in the community.

Thus, community leaders, with the assistance of our attorney, began by introducing a step of minimum controversy, a federal school milk program. Meanwhile, they were learning the potential benefit to all children in the county of the 1965 Elementary and Secondary Education Act, under which the community was eligible for hundreds of thousands of dollars in assistance -- by next year 50% as much as the current school budget.

After much soul searching and effort, community leaders did more than simply decide to desegregate all schools. They determined to abandon the

ramshackle Negro schools; to provide true freedom of choice in attendance at a new school; to provide remedial education for all children, largely Negro, who were behind their grade level; and to desegregate faculties at all schools. In short, the need to desegregate became the occasion to provide quality education.

Even this does not exhaust the future possibilities for districts of this nature. Some may well consider creating special resource centers in subjects such as reading, languages, and science so as to overcome the deficiencies of the one and two-room school house and widen the horizon of opportunities for all. Others might participate in special programs of teacher training and retraining.

In the end, however, no guidelines, no medley of federal assistance acts, not even complete desegregation alone can finish the unceasing search for quality. How each state measures up to the responsibility is the special concern of our state universities and professional schools -- and, throughout, of the lawyer.

Whatever our own views, at the decisive level of our own consciousness there is little doubt as to our obligations. It was the poet Yeats who remarked, "Only the greatest obstacle that can be contemplated without despair rouses the will to full intensity."

That strength of will, that search for human understanding, and that confidence depend heavily on our public bodies of education. It is in a school such as this one that our ideals are nourished and our future shaped.

Justice Frankfurter, whom I quoted to you at the start of this talk spoke 45 years later to another audience of lawyers. "You belong," he said, "to a profession with a great tradition, a tradition which you must continue, not as an inert heritage, but through your own efforts an ever-continuing heritage of service. Yes, you belong to a profession that is indispensable to the well-being of our society which has its joys, its difficulties, its burdens, as do all human activities. But it also has satisfactions which you will find in your rendering of service and help to other men, satisfactions that can come only from enlarging the vision of society while maintaining its great past."