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The Strange Career of the Civil Rights Division's Commitment to *Brown*

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As we approach the thirtieth anniversary of the Supreme Court's decision in *Brown v. Board of Education*,[1] I find myself reflecting upon the United States Department of Justice's response over the years, and the impact of the Department's actions upon the school desegregation process. Hindsight helps us to see the shifting nature of that role, and the less predictable consequences which flow from it. My comments will focus primarily upon enforcement by the Justice Department during the Nixon Administration, for it was then that I served as Assistant Attorney General in charge of the Civil Rights Division.

I.

I entered the Department of Justice in 1956, directly from law school, as the most junior attorney in the Department. I began in civil rights. At that time, federal civil rights law enforcement, such as it was, was directed by the Criminal Division.[2] The Justice Department believed that its only authority to act lay in a few criminal statutes left over from the Recon-

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1. 347 U.S. 483 (1954).

2. The Civil Rights Division was not established until the passage of the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634. On December 9, 1957, Attorney General Rogers ordered the creation of a Civil Rights Division. *See* Dep't of Justice, Office of the Att'y Gen., Order No. 155-57.

struction Era, principally 18 U.S.C. § 242,[3] the "police brutality" statute.[4]

And so, in the early years following *Brown*, the Justice Department in general refrained from school desegregation litigation. No serious consideration was given to instituting prosecutions under section 242 against school officials who had deliberately segregated students. Some members of the Department thought that the requisite intent to deprive the students of their constitutional rights was absent, since the doctrine of "separate-but-equal" had but recently been abandoned and the doctrine of "all deliberate speed" had but recently been approved. Others took the more pragmatic view that, whether segregation violated section 242 or not, the chances of getting indictments, much less convictions, was zero.[5]

Whatever we may think about this inaction today, with the benefit of history and hindsight, the fact is that during the first ten years after *Brown*, the federal government had a very limited role in furthering school desegregation. Its role was pretty much restricted to seeking desegregation in so-called "federal impact" areas, that is, in school districts which served large numbers of military dependents,[6] and occasionally to recommending the use of federal marshals and troops to open schoolhouse doors or to curb the violence connected with school desegregation.[7] Even the Department's participation as an *amicus curiae* was fairly infrequent.

This is not intended as a criticism. It is simply a recognition of an historical and sociological fact—in the first decade following *Brown*, public school desegregation moved forward with all deliberate delay.[8] Even

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3. The statute reads:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, . . . by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242 (1982).

4. *See, e.g.*, Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945). There is only one reported case in which a public school official was prosecuted under Revised Statute § 5510, the precursor to § 242. *See* United States v. Buntin, 10 F. 730 (C.C.S.D. Ohio 1882).

5. Fresh in the Department's memory was the fact that, after a prolonged and vigorous grand jury investigation of voting discrimination in numerous parishes in Louisiana, the Justice Department had been unable to obtain any indictments.

6. *See, e.g.*, 1963 ATT'Y GEN. ANN. REP. 187; 1962 ATT'Y GEN. ANN. REP. 168-70.

7. For example, the Department participated as an amicus in *Brown* itself and in the Little Rock desegregation case, Cooper v. Aaron, 358 U.S. 1 (1958). In Bullock v. United States, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959), the Department prosecuted several men who sought to prevent the implementation of a federal court's desegregation order.

8. In 1964, the year in which the Supreme Court finally declared that "[t]he time for mere 'deliberate speed' has run out," Griffin v. County School Bd., 377 U.S. 218, 234 (1964), less than two percent of black students in the South were attending integrated schools. U.S. COMM'N ON CIVIL

private litigants were extremely cautious and selective in their choice of when and where to commence lawsuits—starting in the early post-*Brown* years in those school districts where the probability for some success with the least amount of violence was highest. Indeed, it would have been absurd to suggest filing suits to desegregate the elementary and secondary schools of rural Mississippi before James Meredith could successfully be enrolled at the University of Mississippi.

And so, with minor exceptions, it was not until after the passage of the Civil Rights Act of 1964[9] that the Justice Department became active in public school desegregation litigation. But even this enforcement effort had a slow beginning. Most of the Civil Rights Division's resources were already committed to the eradication of voting discrimination in the Deep South. In addition, the Act itself contained some built-in braking influences. Title IV contemplated a complaint procedure, involving certification by the Attorney General himself in every school desegregation case filed by the Department.[10] Further, it provided no guidelines to aid in determining when the Attorney General should intervene under Title IX[11] in privately initiated cases. For reasons like this, it was not until after the voting-rights crisis—the Selma March and the passage and implementation of the Voting Rights Act of 1965[12]—that the school desegregation enforcement effort really got moving.

II.

I see the history of federal implementation of the decision in *Brown* as consisting of two rather distinct periods. The 1960's were the era of the establishment of principles—for example, the rise and fall of freedom of choice[13] and the establishment and spread of *Green v. County School Board*'s "root-and-branch" approach[14] to the removal of racial segregation in the public schools. Near the end of this era, federal filings of and interventions in school desegregation suits surged.

The second period, which I call the remedial era, began at about the

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RIGHTS, FULFILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS 4 (1976).

9. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000a–2000h (1976 & Supp. V 1981)).

10. *Id.* § 407(a), 78 Stat. at 248 (codified as amended at 42 U.S.C. § 2000c-6(a) (1976)).

11. *Id.* § 902, 78 Stat. at 266–67 (codified as amended at 42 U.S.C. § 2000h-2 (1976)).

12. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973–1973dd (1976 & West Supp. 1983)).

13. *See, e.g.*, Wright v. Council of City of Emporia, 407 U.S. 451 (1972) (requiring modification of "freedom of choice" desegregation plan initiated in 1965 since it had failed to lead to any integration); Green v. County School Bd., 391 U.S. 430 (1968) (rejecting "freedom of choice" plan as inadequate to eliminate de jure segregation).

14. Green v. County School Bd., 391 U.S. at 437–38.

same time that Richard Nixon began his first term as President. I once heard it said that President Nixon was left holding the remedial *Brown* bag. Following the Supreme Court's decision in *Green v. County School Board* in 1968, the Justice Department filed a large number of "root-and-branch" motions throughout the South. In connection with these motions, the Office of Education (in what was then the Department of Health, Education, and Welfare) often developed total desegregation plans to serve as proposed court orders. As a result, in Mississippi, for example, some thirty school districts were scheduled to desegregate fully commencing in the fall term of 1969. What happened then is familiar history. At the eleventh hour, federal officials had a change of heart and requested the district court to delay implementing those desegregation plans. The court granted that request, but the Supreme Court, in *Alexander v. Holmes County*,[15] promptly reversed.

It was then that effective federal remedial enforcement of *Brown* really got under way. To that end, the Nixon Administration introduced several innovative procedures and programs. First, the Civil Rights Division was reorganized along subject-matter lines.[16] Since about 1964, it had been organized geographically. Lawyers working in geographic sections were expected to handle all types of civil rights enforcement problems, including employment discrimination, voting discrimination, police brutality, and school segregation. Under the reorganization, lawyers were assigned to work in sections organized according to areas of enforcement—education, employment, or voting. Under this structure, lawyers in the Education Section could devote their entire time and talents to school desegregation. I think history will support my conclusion that the reorganization contributed significantly to the effective enforcement of the *Brown* decision.

Second, teams made up of high-level officials, lawyers, and staff from the Departments of Justice and HEW traveled to various key localities to assist with desegregation. Their basic mission was to meet with state and local officials, primarily school officials, to discuss the implementation of desegregation plans. These travelling teams carried an important message: The Court has ruled; you must desegregate; we will try to help you with whatever problems you might run into; but we must enforce the law.

Third, there existed a highly structured and extremely effective coordination between the Departments of Justice and HEW in the development and implementation of school desegregation plans. A joint committee was

15. 396 U.S. 19 (1969) (per curiam).

16. *Compare* 1965 ATT'Y GEN. ANN. REP. 168-69 (reporting that Division had been reorganized on geographical lines) *with* 1970 ATT'Y GEN. ANN. REP. 82 (Division organized into sections on basis of subject matter).

formed to serve as a kind of federal desegregation coordinating committee and review board. Unlike many executive-branch committees, this one really worked—it was not a bureaucratic excuse for nonwork. The committee met regularly and frequently. Every federally developed desegregation plan had to be reviewed and approved by this committee. Staff members intimately familiar with the local school districts involved and equipped with charts, street maps, bus routes, and financial information, would make detailed presentations of alternative desegregation plans to the committee. After careful analysis and review, and sometimes with amendments and modifications, the committee would approve the desegregation plan before it.

In addition, the Justice Department initiated what was commonly called "statewide" school desegregation litigation. The approach was sparked by the determination to desegregate "at once," coupled with the need to conserve resources. In Georgia alone, for example, more than one hundred individual school districts remained out of compliance with *Brown*. The traditional approach would have required the preparation and filing of more than one hundred lawsuits in Georgia alone. Under a conventional Title IV approach, the Attorney General would have needed complaints from aggrieved persons in each school district. The breakthrough came with the simple yet creative recognition that, since the state board of education was an active participant in maintaining segregation in each district, an individual complaint from district *X* was also a complaint against the state board. Once the state board was properly before the court, it could be required to do a constitutional cleaning of its entire house.[17] In large part because of the statewide approach, more districts were desegregated during the early 1970's than during any other period following *Brown*.

What is so remarkable about this structure is that every federally developed desegregation plan had the support of the entire federal executive branch from top to bottom—from the White House on down. The review process ensured that the executive branch was satisfied that a plan met constitutional requirements and that its implementation was feasible. One might ask whether the federal government, either before or since, has similarly spoken with one voice in this area.

These positive programs may surprise those people who observed Mr. Nixon's public opposition to busing to achieve racial balance. But there was no real inconsistency. The approach might be characterized as follows: "We respect the courts. We may not always agree with them, but it

17. The statewide approach was eventually used in several states, including Texas, Georgia, Arkansas, Mississippi, and South Carolina.

is our job to implement their decisions. We will try to do so in the least disruptive way."

In his comprehensive statement on school desegregation, President Nixon stated:

> It will be the purpose of this administration to carry out the law fully and fairly . . . .
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> I have instructed the Attorney General, the Secretary of Health, Education, and Welfare, and other appropriate officials of the Government to be guided by these basic principles and policies:
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> . . . Deliberate racial segregation of pupils by official action is unlawful, wherever it exists. In the words of the Supreme Court, it must be eliminated "root and branch"—and it must be eliminated at once.[18]

In that same statement, the President promised to ask Congress for $1.5 billion to "give substance" to his commitment to desegregation: "Words often ring empty without deeds. In government, words can ring even emptier without dollars."[19]

In May 1970, about two months later, the head of the Civil Rights Division told the press: "I think everyone realizes the law is going to be enforced. This is it."[20] These were not empty words. The federal drive saw virtually total desegregation of the public schools in the eleven southern states by the fall term of 1970.

Mr. Nixon publicly opposed massive transportation of school children. Yet his statement reflected a realistic recognition that dual school systems could not be made unitary without busing students. His position on busing drew heavily upon the distinction between "de jure" and "de facto" segregation. The Constitution required "root and branch" remedies, including busing, for de jure segregation. The Constitution did not require such remedies for de facto segregation, surely not busing to achieve racial balance. As to the former, he would enforce the law vigorously; with the latter, he would urge restraint.

Although enforcing *Green* and *Alexander* was a difficult and complex task for enforcement officials, the courts, and school boards, the moral simplicities of the issue mobilized the nation to act. That action carried over into remedies for de facto segregation as well until the movement for desegregation slowed down in an atmosphere of doubt and rethinking.

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18. Desegregation of American Elementary and Secondary Schools: Statement by the President Setting Forth Administration Policies, 6 WEEKLY COMP. PRES. DOC. 424, 434 (Mar. 24, 1970).

19. *Id.* at 436.

20. Wash. Post, May 30, 1970, at A1, col. 4.

III.

History, perhaps with the help of political forces, has tended to dim recognition of the effects of de jure segregation. We thus find, for example, the current Justice Department urging in 1982 the abandonment of busing in Nashville[21]—a school system which has been in litigation for twenty-nine years and which, the courts have held, falls on the de jure side of the enforcement line.[22] Today, one senses in Washington the emergence of an unspoken doubt about *Brown*'s premise that separateness is inherently unequal. One might ask whether there is a growing subscription to an unwritten amendment to a familiar principle: "The amount of affirmative action, such as busing, required to overcome the effects of past discrimination is inversely related to the length of time which has elapsed since *Brown*."

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21. *See* Brief for the United States as Amicus Curiae in Support of Petitioners, Metropolitan County Bd. of Educ. v. Kelley, *cert. denied*, 103 S. Ct. 834 (1983).

22. For a history of the Nashville school desegregation litigation, see Kelley v. Metropolitan County Bd. of Educ., 492 F. Supp. 167, 167–78 (M.D. Tenn. 1980). The law of Tennessee had explicitly required the segregation of schools from 1901 until 1955, when, in response to the filing of *Kelley*, the state statute was declared void. *Id.* at 168 n.1.