The Culture of Bureaucracy:

Revolt at

When a lawyer is admitted to the bar, he takes an oath to support the Constitution of the United States. When a lawyer joins the Department of Justice, he takes another oath—the same one that is taken by the Attorney General and, in fact, by all federal employees.

That oath reads: "I solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, and without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

It was largely because of this oath—and the pressures we were under to violate it—that a majority of the attorneys from the Civil Rights Division of the Department of Justice gathered in a Washington apartment last August. We wanted to ascertain whether, under the Constitution, there was any legal argument which might conceivably support the Nixon Administration's request, in a Mississippi courtroom, for a delay in implementing desegregation in 33 of that state's school districts. The assembled lawyers concluded that there was not. Thus was born the reluctant movement which the press was to call "the revolt" in the Civil Rights Division.

Gary J. Greenberg is the former leader of the attorneys' "revolt" in the Civil Rights Division of the Department of Justice. Until forced to resign on October 1st, he had been a senior trial attorney in the Division's Appeals Unit.

Justice

by Gary J. Greenberg

August 19, 1969, was an historic date in the field of civil rights. It was on that day that Robert H. Finch, the Secretary of Health, Education and Welfare, in letters to the United States District Judges for the Southern District of Mississippi and to the Chief Judge of the United States Fifth Circuit Court of Appeals, sought to withdraw school desegregation plans that his department had filed in the district court a week earlier. It marked the first time—since the Supreme Court's 1954 decision in *Brown v. Board of Education*—that the United States had broken faith with the black children of Mississippi and aligned itself with the forces of delay on the issue of school desegregation.

Less than a week later—on August 25th—Attorney General John N. Mitchell placed the Department of Justice imprimatur on Finch's actions when Jerris Leonard, the Assistant Attorney General in charge of the Civil Rights Division, joined local officials in a Mississippi district court to argue for a delay.

The same day, in Washington, some of my colleagues in the Civil Rights Division and I prepared and distributed a memorandum inviting the Division's attorneys to a meeting the next evening to discuss these and other recent events which had, in the words of the memo, cast ominous shadows over "the future course of law enforcement in civil rights." The meeting's purpose was "to determine whether we have a common position and what action, if any, would be appropriate to take."

The 40 who attended the meeting

that next night first heard detailed factual accounts from those lawyers with first-hand knowledge of the government's actions in school desegregation cases in Mississippi, Louisiana, and South Carolina. We discussed the legal principles at length. We could find, as lawyers, no grounds for these actions that did not run cross-grain to the Constitution. We concluded that the request for delay in Mississippi was not only politically motivated but unsupportable under the law we were sworn to uphold. I then asked whether the attorneys in the Civil Rights Division should protest the actions of Messrs. Mitchell, Finch, and Leonard. Much to my astonishment, the answer was an unhesitating, unequivocal, and unanimous call for action.

But how? The group's immediate, though probably unattainable, goal was a reversal of the Justice Department's actions in Mississippi. Beyond that, however, we wanted to insure that future Mississippi-type decisions would not be made; we wanted guarantees that the Administration would, in the future, take the actions that were compelled by law, without reference to the political exigencies. We hoped that the protest could serve as a deterrent to future political accommodation. We agreed to write a dignified and reasonable statement of protest by which we could make our views known and demonstrate our unity and resolve. We chose a committee of six to draft the document.

Two evenings later, on August 28th, we held another meeting to review the draft submitted by the committee. The 50 attorneys in attendance discussed the draft, modified it somewhat, and then adopted it unanimously. (It was later signed by 65 of the 74 non-supervisory attorneys in the Civil Rights Division, some of whom had missed one or both of the meetings because they were out of town.)

The four-paragraph, 400-word document expressed, in painstaking language, the continuing concerns, motivations, and goals of the signatories. The last two paragraphs said:

> It is our fear that a policy which dictates that clear legal mandates are to be sacrificed to other considerations will seriously impair the ability of the Civil Rights Division, and ultimately the Judiciary, to attend to the faithful execution of the federal civil-rights statutes. Such an impairment, by eroding public faith in our constitutional institutions, is likely to damage the capacity of those institutions to accommodate conflicting interests and insure the full enjoyment of fundamental rights for all.
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> We recognize that, as members of the Department of Justice, we have an obligation to follow the directives of our departmental superiors. However, we are compelled, in conscience, to urge that henceforth the enforcement policies of this Division be predicated solely upon relevant legal principles. We further request that this Department vigorously enforce those laws protecting human dignity and equal rights for all persons and by its actions promptly assure concerned citizens that the objectives of those laws will be pursued.

Why did the consciences of 65 federal employees compel them to protest a government law-enforcement decision? Why did 65 members of a profession which generally attracts the conservative and circumspect to its ranks—and reinforces these characteristics in three years of academic training—launch the first "revolt" within the federal bureaucracy?

Part of the answer lies in the fact that the new Administration was elected largely by voters who expected—and, from the rhetoric of the campaign, had every reason to expect—a slowdown in federal civil-rights enforcement efforts.

Those political debts ran counter to the devotion and commitment of the attorneys in the Civil Rights Division. They had labored long and hard in civil-rights law enforcement, and had come to realize by experience that only unremitting pressure could bring about compliance with the civil-rights statutes and the Fourteenth Amendment. Yet this conflict of commitments did not of itself lead to the revolt. There was no inevitability in the situation.

Certain other irritants played a part in creating an attitude among the attorneys which made "revolt" possible. There was Mr. Leonard himself, a politician from Wisconsin with no background in civil rights, and, indeed, very little as a lawyer. He was insensitive to the problems of black citizens and other minority-group victims of discrimination. Almost from the beginning, he distrusted the attorneys he found in the Division. He demonstrated that distrust by isolating himself from the line attorneys. Still another element was the shock of his ineptitude as a lawyer. In marked contrast to the distinguished lawyers who preceded him in his job, Mr. Leonard lacks the intellectual equipment to deal with the legal problems that come across his desk.

His handling of the Mississippi case enlarged this mood of irritation and frustration. Secretary Finch's letter—drafted in part, and approved in full, by Mr. Leonard—said that the HEW plans were certain to produce "a catastrophic educational setback" for the school children involved. Yet the Office of Education personnel who prepared the plans, and Dr. Gregory Anrig, who supervised their work, and the Civil Rights Division attorneys who were preparing to defend them in court, had found no major flaws. Indeed, Dr. Anrig, in transmitting the plans to the district court on August 11th, wrote that in his judgment "each of the enclosed plans is educationally and administratively sound, both in terms of substance and in terms of timing." It was not until the afternoon of August 20th, only hours before the attorneys were to defend the plans in court, that Mr. Leonard called them in Mississippi to inform them of the Administration's decision. Finally, in justifying the government's actions to his own supervisory attorneys—and in arranging that they, and not he, would inform the line attorneys of the reasons for the requested delay—Mr. Leonard could be no more candid than to say that the chief educator in the country had made an educational decision and that the Department of Justice had to back him up.

But, again, these superficial signs of malaise were not what led to the lawyers' widespread revolt. Discontent only created the atmosphere for it.

The revolt occurred for one paramount reason: the 65 attorneys had obligations to their profession and to the public interest. As lawyers, we are bound by the Canons of Professional Ethics and by our oaths upon admission to the bar; as officers of the United States, we were bound by our oaths of office.

Membership in the bar entails much more than a license to practice law. One becomes an officer of the courts, duty-bound to support the judiciary and to aid in every way in the administration of justice. The scope of this duty was nicely summarized by United States District Judge George M. Bourquin in the case of *In re Kelly* in 1917, when he wrote:

> Counsel must remember that they, too, are officers of the courts, administrators of justice, oath-bound servants of society; that their first duty is not to their clients, as many suppose, but is to the administration of justice; that to this their clients' success is wholly subordinate; that their conduct ought

> to and must be scrupulously observant of law and ethics; and to the extent that they fail therein, they injure themselves, wrong their brothers at the bar, bring reproach upon an honorable profession, betray the courts, and defeat justice.

The Canons of Ethics command that an attorney "obey his own conscience" (Canon 15) and strive to improve the administration of justice (Canon 29). The Canons go on to echo Judge Bourquin's words:

> No...cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold....When rendering any such improper service...the lawyer invites and merits stern and just condemnation....Above all a lawyer will find his highest honor in a deserved reputation for fidelity to...public duty, as an honest man and as a patriotic and loyal citizen. (Canon 32)

Bearing these obligations in mind, examine for a moment the situation which confronted the attorneys as a result of the decision to seek delay in Mississippi.

In May, 1954, the Supreme Court declared that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." One year later, the Court decreed that school officials would be required to make a "prompt and reasonable start" toward achieving the constitutional goal with "all deliberate speed." Tragically, a decade went by and little was accomplished; that was the era of "massive resistance." In 1964, the Supreme Court ruled that "the time for mere 'deliberate speed' has run out." In 1968, the Court held that school officials were under a constitutional obligation to come forward with desegregation plans that worked, and to do so "now." The Fifth Circuit Court of Appeals interpreted that edict, in the summer of 1968, to mean that the dual school system, with its racially identifiable schools, had to be eliminated in all of the states within its jurisdiction by September, 1969. (Mississippi is one of those states.)

Secretary Finch's letter, besides suggesting the possibility of a catastrophic educational setback if desegregation were effected at once, spoke of the certainty of chaos and confusion in the school districts if delay were not allowed. That allegation was based upon the uncontestable existence of hostility to desegregation within the local communities. While there was, and continues to be, a danger that chaos and confusion will accompany the desegregation of public schools in Mississippi, the Supreme Court had ruled again and again that neither opposition to constitutional rights nor the likelihood of a confrontation with those opposed to the constitutional imperative may legally stand as a bar to the immediate vindication of those rights.*

Thus, while pledged by our oaths to support and defend the Constitution and bound by duty to follow our conscience and adhere to the law, we faced a situation in which the Administration had proposed to act in violation of the law. We knew that we could not remain silent, for silence, particularly in this Administration, is interpreted as support or acquiescence. Only through some form of protest could we live up to our obligations as lawyers and as officers of the United States. The form that this protest should take emerged so clearly that it

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*On October 29th, of course, the Supreme Court unanimously rejected the Administration's efforts at delay by enunciating the rule that the Constitution requires desegregation "at once." That ruling is not a part of this narrative except as it demonstrated anew that the position we had taken on the law was unassailable.

then became a matter of inevitability, rather than a "choice" made from among several alternatives.

For the duty to serve the law, to promote the administration of justice, to support and defend the Constitution is more than a negative command; it is more than a "thou shalt not." It is an affirmative duty to act in a manner which would best serve and promote those interests. Thus, at the first group meeting, we immediately and unanimously rejected the notion of mass resignation because it would have served no positive purpose. It would only have removed us from association with the supporters of delay; it would not have fulfilled our obligation to act affirmatively to insure that constitutional rights would be protected and that the civil-rights laws would be vigorously enforced.

Many of the attorneys thought that our obligation could not be met by merely drafting, signing, and delivering a protest statement. If delay for the purpose of mollifying a hostile community did not comport with the Constitution—thus impelling us to raise our voices in protest—then we were likewise duty-bound not to support the Mitchell-Finch-Leonard position through any of our official actions. The bureaucratic concept of "loyalty" notwithstanding, some of us concluded that we could not, for example, defend the government's position in court.

The question arises as to whether the action taken by the group met the burden imposed upon us by our obligations to the law and the public interest. Did our fidelity to these obligations demand more than the soft and lofty importunings of the protest statement? Should all of the attorneys have explicitly refused to defend in court the action taken in the Mississippi case? Should the attorneys have embarked on a more direct course of action to block the government's efforts to win a year's delay for school desegregation in Mississippi?

To begin with, we were hard pressed to come up with some appropriate alternative to the protest statement as a vehicle to make the views of 65 people known. But beyond that, it was vitally important to preserve the appearance of dignity and professionalism if our protest were not to be dismissed as the puerile rantings of a group of unresurrected idealists who, except for their attire, bore a close resemblance to the Weathermen and the Crazies. To generate the public support we thought vital to the success of the protest, we had to act in a responsible and statesmanlike manner. Furthermore, it seemed to us that the presentation of any statement signed by nearly all of the attorneys in the Division would be a remarkable feat and that that demonstration of commitment was more important than the words actually used. In our view, the soft language implied everything that a blunter statement might have said. It also had the virtue of not putting the Administration up against a wall, thus forcing them to respond with a hard-line position of their own.

Though duty and conscience compelled a protest, reason dictated the nature of the protest. We did not merely seek an opportunity for catharsis; we sought to devise a course of action which had a chance to reap a harvest of practical results. That being the overriding consideration, the attorneys chose the course of a mildly-worded group statement. Other overt manifestations of disagreement were left open for individuals to pursue as they saw fit.

The group action we took—that is, the drafting and signing of the statement—was a "protest," if by that we mean a dissent from the actions of one's administrative superiors. The language of the statement did not move into the area of "revolt," if by that we mean an explicit refusal to obey the orders of one's superiors—although the state-

ment was intended to imply that "revolt" was in the air.

Compelled by what they felt to be their obligations to the law, individual attorneys took a number of actions on their own, most of them in that murky area where there is a confluence between "protest" and "revolt."

Even before the first group meeting, the Division lawyers in Mississippi expressed their disinclination to present the government's case for delay in the district court. As a consequence, Mr. Leonard made his first appearance in a federal district court as Assistant Attorney General and argued the motion for delay himself. In mid-September, two Divison attorneys (the author being one) appeared in federal courts in other school desegregation cases. When pressed by those courts to reconcile the government's "desegregate-now" position in those cases with Mr. Leonard's position in Mississippi, both attorneys said they could not defend the government's action in Mississippi.* Some of the Division's attorneys went a step further: they passed information along to lawyers for the NAACP Legal Defense Fund in order to aid their Mississippi court battle against the delay requested by the Administration. Others spoke with the press to insure that the public was fully aware of the role that political pressures had played in the decision to seek delay.

These actions, while neither authorized nor approved by the group as a whole, were individual responses to the same crisis of conscience that led to the protest statement itself. One may have reservations as to the propriety of some or all of these acts of defiance. (Indeed, I have doubts as to whether it was proper for a Division attorney to furnish information to the NAACP after the government's action transformed it into an opposing party.) But it is important to recognize that the demands of conscience compelled more than just the signing of a piece of paper, and, in this sense, the protest was, realistically, a "revolt."

When the storm clouds first began to gather within the Civil Rights Division, the hierarchy of the Department of Justice, including the Attorney General and Mr. Leonard, reacted with a professed sense of surprise, and even shock. Despite this, however, the Administration's actions were, at the outset, nothing short of accommodating.

The supervisory attorneys in the Division took the position that we had a perfect right, under the First Amendment, to meet and discuss matters of mutual concern. Prior to our second meeting, Leonard Garment, President Nixon's special consultant for youth and minority problems, let it be known through an intermediary that the Administration was likely to respond favorably to a reasonable and responsible protest. Indeed, Mr. Garment and the Deputy Attorney General, Richard G.

*In my situation, I was in St. Louis before the Eighth Circuit Court of Appeals, sitting *en banc* (i.e., the full seven judges of the court were present), arguing that a delay granted by the district court to an Arkansas school district for the desegregation of its high schools should be reversed. One of the judges asked whether I could assure the court that the Attorney General would not "come along and pull the rug out from under" them if they ordered instant integration. I was pressed to reconcile my request for immediate integration in Arkansas with the position taken in the Mississippi case. After the court listened to my attempts to distinguish between the two cases, one judge said it appeared to the court that the practical effect of the government's posture was that Mississippi was being given special treatment. At this point, a number of judges called upon me to state my personal views on the contradictory positions taken by the government. I responded by saying I assumed that the court knew from the press accounts of the "revolt" what the feelings were in the Division. I indicated that, as a signatory of the protest statement, I could not be expected to defend the government's action in Mississippi.

Kleindienst, facilitated the protest by allowing us to hold our second meeting behind closed doors in the Department of Justice.

But later, when the Administration came to a fuller appreciation of the depth and unanimity of the protest, this attitude began to change.

On September 18th, Mr. Leonard responded to the attorneys' statement for the Administration. We were informed that the reply was a final articulation of policy and that if we did not like what we read we should resign. The reply was curiously unresponsive. Whereas the attorneys' statement was carefully limited to questions concerning the intrusion of political influences into areas of law enforcement where only considerations of law belong, Mr. Leonard's reply outlined how the Administration would go about desegregating public schools. To this extent the reply completely missed, or avoided, the point of the protest. We had never challenged the discretionary authority of the Attorney General and the President to determine by what method the constitutional objective would be achieved. In matters where discretion was vested in the Attorney General to choose between policy alternatives, the attorneys did not challenge his right to make the choice. But in the matter of enforcing constitutionally required school desegregation in Mississippi, the Attorney General had no discretion. He was bound to uphold the dictates of the law, an obligation that could not be squared with the decision to seek delay.

Aside from its non-responsiveness to the questions we had raised, Mr. Leonard's reply was disturbing on two other counts. First, it conceded, with delayed candor, that political pressures had played a role in the Mississippi decision. Second, it announced a new touchstone for civil-rights law-enforcement policies: future actions would be taken not on the basis of the law but, rather, on the basis of "soundness." Thus, when ABM and other defense appropriations are thrown into the balance, a decision to seek delay of school desegregation in Mississippi in return for the continued support of Senator John Stennis (D-Miss.) in defense matters can presumably be certified as a "sound" decision, notwithstanding its inconsistency with clear legal mandates.

The attorneys decided that we would neither accept the response nor resign. But the situation demanded further action, and we chose to reiterate our commitment to the law. On September 25th, we delivered to the Attorney General and Mr. Leonard a new statement. It expressed our view that Mr. Leonard's reply "indicates an intention to continue with the policy of civil-rights law enforcement toward which our August 29th statement was directed, a policy which, in our view, is inconsistent with clearly defined legal mandates."

The Attorney General's patience was wearing thin. The next day he told the press that "policy is going to be made by the Justice Department, not by a group of lawyers in the Civil Rights Division." At a news conference three days later, Mr. Leonard said that he thought the position taken by the attorneys was wrong. He warned that the revolt would have to end as of that date.

On October 1st, Mr. Leonard called me to his office. He told me that he considered it to be the obligation of all of his attorneys to defend the government's Mississippi action in court. He asked whether I would be able to do so in the future. I said that I could not and would not. Our obligation was to represent the Attorney General, he said, and John Mitchell had decided that delay was the appropriate course to follow in Mississippi. I countered by explaining that my position dictated that I represent the public interest in court, and my re-

sponsibility was to enforce the law. Mr. Leonard then made his attitude on the meaning of law enforcement very clear. "Around here the Attorney General is the law," he said. The difference of opinion was irreconcilable, and I was told to resign or be fired. I said I would forthwith submit a letter of resignation, and did—effective immediately. Mr. Leonard concluded the meeting by heaping effusive praise upon my abilities as a lawyer and offering to write a glowing letter of recommendation if I requested one. I did not.

Later that day, Mr. Leonard issued a memorandum which banned any "further unauthorized statement...regarding our work and our policies." He directed the attorneys to keep all "discussions of our work and policies within this Department."

Thus, the Administration's official attitude boils down to an absolute ban on any further protest activity. The public is to be kept in the dark. Law-enforcement decisions are to be made by John Mitchell, and the test for those decisions is soundness, including the relevant political considerations. The attorney's job is to articulate and defend the Attorney General's decisions in court, and that obligation applies without reference to one's individual oath of office and the dictates of conscience.

As attorneys, I and my former colleagues who remain in the Civil Rights Division cannot accept this point of view. The Justice Department lawyer's primary obligation must be to the Constitution. That should hold true whether the attorney is John Mitchell, Jerris Leonard, or Gary Greenberg. In his role as an officer of the United States, the Justice Department lawyer represents the public interest. While Jerris Leonard equates that obligation with obedience to the President and the Attorney General, I and my former colleagues could not. The Justice Department lawyer is not hired to represent John Mitchell in court. He is hired to represent the United States.

The ban on future protest by attorneys is unreal. Indeed, it would be self-deception for John Mitchell or Jerris Leonard to assume that the "massive resistance" in the Civil Rights Divison is over. The revolt may have been driven underground, but the attorneys remain within the system. They retain their voice and their ability to influence policy from within. They continue to adhere to their view of the law, and they see their obligation to the public, and under their oath of office, as paramount. The attorneys remain a potent and organized deterrent ready to act should there be another Mississippi.

Whether or not the revolt achieved its long-range objectives one cannot yet judge. There are indications that in the area of civil rights, as in other matters, the Attorney General is either unaware or contemptuous of the forces which conflict with the politics of the Southern Strategy. The attorneys in the Civil Rights Division continue to take a hard line in individual cases. They assume this posture every day in the pleadings and briefs they present to the Attorney General and Mr. Leonard for approval. So long as the Administration is kept in the position of having to say no—an attitude adopted so far in only those few cases in which the political pressures were intense—it is not likely that they can effect the wholesale retreat on enforcement of the civil rights laws which the Administration seems ready to permit in return for political support. But while it is vital that the revolutionaries remain within the Division, and while their presence within the system may deter future Mississippi-type decisions, there is some question whether their determination will sustain them for the next three and a half years. If not, the prospects for even the grudging enforcement of civil-rights laws are bleak indeed.

The Culture of Bureaucracy: Rebuke at HEW

by Morton Mintz

Twice in 10 days, Robert H. Finch, Secretary of Health, Education and Welfare, publicly criticized Dr. Jacqueline Verrett, a Food and Drug Administration research scientist who discovered that artificial sweeteners called cyclamates cause severe deformities in chicken embryos. The first criticism came on October 8 in an interview with Gilbert C. Thelen Jr. of the Associated Press. The second came on October 18 at a press conference at which Finch announced a surprise order halting production of cyclamate-sweetened foods for general consumption.

On the latter occasion, Finch, in response to questions, explained his "unhappiness" about Dr. Verrett. She had, he said, chosen "to go directly to the media without having consulted" with her superior or with the Secretary's office. Thus she had not acted "in a very ethical way," he said.

A condemnation such as this would have been almost inconceivable in the reign of the last Republican Secretary of HEW before Finch, John W. Gardner. Shortly before President Johnson asked him to take over at HEW, Gardner, while president of the Carnegie Corporation, wrote a piece for the October, 1965, *Harper's* entitled "How To Prevent Organizational Dry Rot." Organizations of all kinds—"U.S. Steel, Yale University, the U.S. Navy, a government agency, or your local bank"—need not stagnate, Gardner said. If they do, it is "because the arts of organizational renewal are not yet widely understood." Saying that some of the rules for such renewal are known, he listed nine. Although some of these are irrelevant to Finch's handling of the Verrett case, Finch followed none and violated others. In chastizing Dr. Verrett, for example, he was hardly implementing "an effective program for the recruitment and development of able and highly motivated individuals." He was not providing "a hospitable en-

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