5-16-1992

Commencement Address - Judge Stephen Reinhardt

Stephen Reinhardt
U.S. Court of Appeals for the Ninth Circuit

COMMENCEMENT SPEECH
GOLDEN GATE UNIVERSITY
MAY 16, 1992
JUDGE STEPHEN REINHARDT
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RIOTS, RACISM, and the COURTS

I know that you are graduating at a time when the job market for lawyers is not what it should be -- not what it was a couple of years ago. Starting salaries seem to have reached their peak, at least for now, and in some cases have declined. Layoffs are no longer a term solely in the lexicon of blue collar workers. Still, the need for lawyers in this country is great, and that need will continue. Your professional training will always stand you in good stead. You are among the most fortunate, the most blessed in this society - and you should be extremely proud of what you have accomplished thus far. I congratulate each one of you.

You are graduating at a time of great challenge -- and great despair. The passing of the Cold War, so massively debilitating to our economy, should have allowed us to turn our attention voluntarily to the twin dangers that threaten to destroy America -- poverty and racism. Politically, given this nation's leadership in recent years, it is not surprising that we failed to do so. But now, perhaps too quickly, we have been handed another chance. We have been shown a glimpse of the future -- of events to come -- riots, racial hatred, armed warfare, and the military occupation of our cities. We have been given the opportunity to forestall that future -- to prevent the ugly dissolution of our society. If

we are to seize that opportunity we will have to act forcefully; we will have to rid ourselves of our pious self-righteousness, our self-defeating attitude of racial superiority, our thinly concealed enmity toward all those we consider different. We will have to deal swiftly with the massive needs of the poor, the disadvantaged, the disenfranchised -- those we have for so long denied a fair and equal opportunity.

Doing so would take significant personal sacrifices on all of our parts. Our alternative, however, is to await the inevitable -- the separation, by race, of our people into armed camps, the creation of permanent sub-groups held in a state of suppression by military might, and the institutionalization of criminal conduct as the primary form of commercial enterprise in large parts of our society.

If you think I am exaggerating, look again at the television and newspaper pictures of an armed Korean-American community in Los Angeles, its men lining the streets in front of their businesses carrying rifles or semi-automatic weapons, exchanging gunfire with members of other minority groups. Look again at the looters, at the roving groups of blacks and Hispanics. Look again at the recent report showing that 42% of African American male residents of our nation's capitol between the ages of 18 and 32 are presently incarcerated, on probation or parole, or awaiting trial -- are in one way or another involved with the criminal justice system as "perpetrators". Look again at the flight of White Americans to the suburbs, at the rapidly declining Caucasian population in our cities -- Washington, DC 27%, Detroit 20%,

Atlanta 20%, Newark 14%, and Los Angeles 36%. Despite all the advances we have made in the area of civil rights, the unthinkable -- open racial warfare -- is now possible. In fact it is rapidly becoming more probable. It could well happen here!

And if you think that I am overreacting to recent events in Los Angeles, that what occurred there is simply that gang members took advantage of a highly emotional racial occurrence and rioted and pilfered at will, think again. No-one should have been surprised when Los Angeles exploded. Over a year ago, at Stanford, I addressed a group of very conservative law students, members of the Federalist Society. I quoted a 1989 study by the National Research Council which said: "We cannot exclude the possibility of confrontation and violence . . . . The ingredients are there: large populations of jobless youths, an extensive sense of relative deprivation and injustice, distrust of the legal system, frequently abrasive police-community relations, highly visible inequalities, extreme concentrations of poverty, and great racial awareness." To this, I added, "the potential for a recurrence of the urban unrest and riots of the late 1960's is ever-present. A whole generation of young blacks is being lost. The divisions between different groups in our society are widening. Unless we continue to make substantial efforts toward swift and full integration, we are headed toward disaster."

There is nothing unique about Los Angeles, except that we prided ourselves on our diversity, trumpeted the success of our multi-cultural community. Without a doubt, today's Los Angeles

can be tomorrow's Boston, or Seattle, or Chicago, or Miami, or Dallas, or New York or San Francisco.

This land was to be a melting pot. Yet in recent years we have moved toward racial separation, racial isolation. Integration of the schools - one of our noblest ideals -- has not produced the results we hoped for. In fact, in some respects, it never occurred. De jure segregation is no more, but de facto segregation flourishes. In Los Angeles, the old minority schools are as heavily minority as they ever were; and so are the new ones; only 12.5% of the school population is now Caucasian. A dream of a nation in which race, religion, and national origin would be irrelevant is rapidly turning into a nightmare of divisiveness, of separatism, of hyphenates.

The economic prognosis for minorities is grim. Statistics regarding disparate treatment of blacks in our society are staggering. Forty-five percent of black children live in poverty, a figure computed after family assistance and other governmental benefits are added to household income. While white households have a median net worth of $39,000, that of black households is only $3,397 -- one-eleventh of the white median. Contrary to the mistaken perceptions of those in the present administration, blacks are not doing well. The economic status of blacks compared to whites has deteriorated since the 1970s -- and continues to deteriorate. The rich are getting richer; the poor are getting poorer. And let me note here, that although my remarks are principally addressed to the problems confronted by African Americans, we must be equally aware that Hispanics, native

Americans, Asians and others are all affected by problems of their own -- problems that cry out for our attention. You may be surprised to learn that, according to the latest available, but still partial, figures, substantially more Hispanics than blacks were arrested during the recent Los Angeles riots. What that means, no-one is certain. We do know, however, that thoughtful people will not attach simplistic labels to all the individuals involved in the disturbances, or ignore the wide differences in conduct, past behavior, and motivation that marked the participants. "Rioters" ranged from hardened professional criminals, who took advantage of a fortuitous opportunity to engage in violent criminal conduct and wholesale theft and burglary, to ordinary law abiding individuals, angered and frustrated by what they felt to be a grievous demonstration of the racial injustice that permeates their lives, who suddenly saw much-needed food and goods readily available and were overwhelmed by a combination of raw emotions and their conviction that the majority white society would never treat them fairly or afford them the opportunity to obtain those necessities by legitimate means.

As for those high office holders or candidates for high office who still refuse to understand the need to solve the underlying problems, and are interested only in trying to escape the blame for their own failures, or to shift that blame to others, they are simply ensuring a repetition and escalation of the violence, on a nationwide scale. Blaming the rioters is easy -- it's a no-brainer. On the other hand, accepting

responsibility for our own failures requires a different breed of person -- a breed we too infrequently find in high public office -- it requires leaders who possess both courage and compassion.

Well, so much for the general -- now for the particular. I address you today as fellow members of the legal profession. For better or for worse, law schools produce most of our nation's leaders. Some of you may one day serve in political or judicial office. But I want to speak to the larger group - to all of you will practice law, private or public, civil or criminal. Most of us cannot do much about the larger problems that confront our nation; including the problems of racism and poverty. But each of us can do something, and in our case, collectively, that can be a lot.

There is something crucial lawyers can do - something crucial lawyers must do. We can and we must restore to the minorities of this land the belief that they will receive justice in our courts. If we accomplish nothing else in our lives but to assist in restoring that faith, we will have helped ourselves, our children and our nation immeasurably.

Last week a nationwide poll showed that 84% of African-Americans believe that they do not receive fair or equal treatment in our courts. To me, that figure is shocking. It means that our judicial system is failing. We have lost the confidence of those who most need to believe in the fairness of the judiciary. And, interestingly, in Los Angeles, approximately half of the Caucasian population agrees that blacks are not treated fairly in the justice system.

Obedience to law is most likely to occur when there is respect for the legal system - for its fairness, for its sense of equality. Respect for the courts is essential to the survival of a peaceful and democratic society. Without that respect only brute force can command obedience. Practically, we cannot, in this nation, enforce law by might. There are simply not enough policemen, not enough National Guardsman, not enough regular troops to perform that job adequately. So we are compelled, like it or not, to maintain respect for law, for our courts, by our deeds. We must demonstrate that our courts stand for justice or we must face the consequences.

Why do 84% of African-Americans believe as they do - why do they lack confidence in our courts. Why do they think that the courts are not concerned with their needs, their aspirations? What is most disturbing about this distrust of the judicial system is that only a few years ago it was the federal courts - and particularly the Supreme Court of the United States - that offered the greatest hope to our minorities. It was the United States Supreme Court that acted to end segregation in this country when neither the executive nor legislative branch had the will or the courage to do what common sense and the Constitution demanded. It was the United States Supreme Court, dedicated to the expansion of individual rights and liberties, that said that this nation could no longer continue on a course of inequality, that all Americans must be treated fairly under the law, that governmentally sponsored racial separation must end. And in an unbroken series of far-reaching decisions the federal courts, led by Chief Justice

Earl Warren, expanded the rights of all citizens, helped transform this nation into a land in which African Americans for the first time were afforded the full rights of citizenship, a land in which our Constitution flourished. Until a few years ago, African Americans with problems knew they could look to the federal courts for help -- they knew they would find a sympathetic audience, that their interests would be protected -- that the civil rights laws of our nation would be vigorously enforced.

All that has changed. The message the new Supreme Court has delivered to the minority communities is clear. We no longer care. We have other concerns. Look elsewhere for help. In 1989, in a series of five major civil rights decisions, the Court let the minorities know of its attitude toward civil rights laws. The Rehnquist Court made it far more difficult for minorities to win discrimination cases, while making it much easier for white males to challenge the legality of consent decrees. In doing so, the Court clearly turned away from its historic role as the protector of the civil rights of minorities. The Rehnquist Court's decisions were so out of step with the will of the people and the understandings of the other branches of government, that Congress drafted a bill to reverse a number of its cases. That bill became the Civil Rights Restoration Act of 1991. Ultimately, President Bush was forced to sign it. The Supreme Court's Civil Rights decisions made one thing evident to all. A judicial revolution has occurred -- a revolution that will not easily be reversed. A Court that once served the poor, the oppressed, the

disadvantaged now has entirely different clients, entirely different interests, an entirely different agenda.

The Supreme Court continued on its anti-civil rights course this term. In Presley v. Etowah County, the Court overruled the Justice Department, the agency charged with administering the voting rights laws -- one of the very few times in recent years this pro-Government Court has refused to respect the interpretation of a statute made by the responsible governmental agency. African Americans in Etowah County had, for the first time in recent memory, accumulated enough political strength to elect a black to their county board of supervisors. Whites responded by removing all power to make decisions regarding their respective districts from individual supervisors and giving that power to the predominantly white board as a whole. The Supreme Court held that the Voting Rights Act had nothing to do with this matter. Is it any wonder blacks believe they are not treated fairly in our courts?

And civil rights decisions are not the only cases in which the Rehnquist Court has demonstrated its hostility to the pursuit of individual rights in federal courts. The Court has erected a series of procedural barriers - some in the name of federalism - that serve to limit the opportunity of minorities and poor people to have their grievances redressed. Concepts such as mootness, ripeness, abstention, standing have been employed to close off access to the federal courts and to deny federal remedies to people whose constitutional rights have been violated -- doctrines of exhaustion, procedural default and collateral estoppel are

regularly invoked against individuals with legitimate grievances. Illustrative of these procedural techniques is the Court's decision in Los Angeles v. Lyons. Lyons held that a black victim of an LAPD police chokehold could not sue to bar further use of that illegal technique because he could not prove that he would be choked again. Of course, Lyons was not the only one who could not meet that standard. No-one else could either. There are numerous other illustrations of the Court's use of procedural obstacles to bar meritorious claims. To name just two, class actions have been drastically limited, and attorneys fees, which often make it possible for civil rights actions to be brought, look like they may well be next.

After Lyons came McCleskey v. Kemp. In McCleskey, the Court said, openly and unashamedly, that institutional racism in our courts is of no consequence as far as individual black defendants are concerned. Unless a black man about to be executed can prove that racism was the specific cause of his conviction or sentence -- another standard that can rarely if ever be met -- the Court will not consider a challenge based on the fact that blacks are treated differently from whites, no matter how persuasive the evidence is. Sophisticated African Americans knew what this meant, and the word passed down to others quickly. The circle had closed. For as African Americans understood only too well, when race is a general element in the punishment of a black, the courts will ignore it; when it is a specific element in his victimization, juries all too often will refuse to acknowledge that fact. Many jurors, like the rest of us, prefer to pretend

that racial prejudice simply does not exist -- particularly their own.

To reiterate, what the African American community perceived from the Supreme Court's decisions was that the federal judiciary is no longer interested in protecting the rights of minorities, that federal judges are far more concerned with protecting the interests of white males. To the minorities and particularly to black Americans, this was a bitter blow. The age of Earl Warren, William Brennan, and Thurgood Marshall was the golden age of Civil Rights. Minorities were given the feeling that someone cared - that government cared - that the law was on their side. Understandably, with the Rehnquist Court in full sway, they no longer believe that. Their earlier belief gave them hope. Their current belief leads only to despair -- and to disrespect for the law.

It is not, of course, only the radical change in the Supreme Court that has contributed to the shocking poll figures. The survey was taken shortly after the Rodney King verdict. The reaction of African Americans to the verdict was overwhelming -- and was reflected in more than polls. As law-abiding citizens, we cannot condone the riot, but we can understand the feelings of all those who live in America's ghettos.

There are other aspects of our laws and sentencing procedures that have undermined the faith of minorities in the judicial system - the disparity between sentences involving crack, a substance used principally by minorities, and cocaine, a favorite of wealthy Caucasians - the harshness of some of our other

narcotics laws and their disparate impact on young, unemployed black males - the disparity in treatment of the types of offenses most frequently committed by minorities and those in which Caucasians are most often the perpetrators - between lenient sentences for white collar fraud or theft of millions, and harsh punishment for more traditional crimes involving far smaller amounts of money or property. And while the large majority of African Americans are strongly opposed to criminal conduct of any kind, they know that most of the minority youth who turn to crime have never had the opportunities or the advantages enjoyed by the average white American.

There is a final overriding reason why blacks lack confidence in the federal courts. By their appointments, Presidents Reagan and Bush have ensured that the federal courts will not be representative. Instead, they are a bastion of white America. They stand as a symbol of white power. I will report only on the courts I am most familiar with -- the federal appellate courts, the second highest courts in the land. Because blacks were rarely appointed to so rarified a position in the past -- only Presidents Truman, Kennedy, and Johnson had made any such appointments -- President Carter made a Herculean effort to redress the existing inequity when he took office. In 1976, there were only two black federal appellate judges on the bench. President Carter appointed a total of 56 judges to the federal appellate court -- 9 were blacks -- sixteen percent! Starting in 1980, however, Presidents Reagan and Bush dramatically reversed the course once more. In his eight years in office President

Reagan made a total of 83 appointments to the federal courts of appeal. During that time he succeeded in finding only one black he deemed worthy of appointment. George Bush, with 32 appointments thus far, has also been able to locate only one African-American he thought qualified to serve -- in his case, guess who - Clarence Thomas -- and now that Justice Thomas has been rewarded with an even higher office because of his outstanding legal abilities, there are no black Bush appointees on the Courts of Appeals. In President Bush's view, Clarence Thomas is apparently all there is out there. Clarence Thomas is black America to our President. In 12 years Bush and Reagan have appointed a total of 115 federal appellate court judges. Only two of them were African-Americans. And as the Carter judges age in years, we can expect the now extremely low percentage of African-American appellate judges to diminish even further -- a sorry indictment of the federal judiciary -- but more important, one more compelling explanation of why African Americans have so little confidence in our legal system. Incidentally, the figures for Hispanics, Asians, and Native-Americans are even worse. But you get the picture by now -- even if those who most need to understand do not -- and I don't want to depress you further on graduation day.

I do not mean to suggest that the courts are the principal cause of all of today's problems -- or even of the civil disturbance we have recently experienced. There is plenty of blame for all of us to share - Caucasians and African Americans, rioters and non-rioters alike. Certainly the political leaders

this nation must accept a large measure of responsibility for our failure. Their policy of "malignant neglect" is coming home to roost. Also, as I have said, I am not here to suggest that you as lawyers can, by yourselves, remedy the problems of poverty and racism-- problems which so often seem wholly intractable. I am here instead to suggest that there are things you can do to help alleviate these problems as you enter upon your professional life - as you begin the careers you have worked so hard to realize.

I suggest that you can do your part to ensure that all individuals are treated with dignity and with respect. You can insist that the laws be administered fairly and equally and that the judicial system function in a just manner. When you see an injustice, you can speak out, you can complain to the Bar Association, you can notify the Commission on Judicial Performance, you can file an action. You must remember at all times that you are a part of a profession with a particular responsibility, a responsibility to see that fairness and justice is done, that equal treatment under law prevails. You more than anyone can ensure that young African Americans have reason to regain confidence in our legal system, in our laws, our courts and our judges.

It will take time, but you can help change the underlying philosophy that presently guides our judiciary. You can help restore to both the federal and state courts a fundamental concern for individual liberties and individual rights. You can breathe fresh meaning into our Constitution. As our judicial philosophy changed once, so it can change again. History will long remember

the era of Chief Justice Earl Warren. History will record that time as a noble period. And history will also record the time when we return to that judicial philosophy - a philosophy of concern, of compassion, of understanding, of tolerance for all. History will record the efforts of those of you, who by your dedication to law and justice, help restore to us our true Constitutional values. That is your challenge and your opportunity. I hope for all our sakes that you succeed.