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# [Letter to Kenneth Starr, Solicitor General, on Ayers v. Allain]

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SCHOOL OF LAW

November 20, 1990

Read with FORWARD

Kenneth W. Starr  
Solicitor General  
U.S. Department of Justice  
Room 5143  
10th & Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear General Starr:

I understand that the Department of Justice is presently reviewing Ayers v. Allain to determine whether that case will be appealed to the United States Supreme Court by the Department of Justice. As a citizen concerned about the survival of the Historically Black Public Colleges, I believe that DOJ should give the Ayers decision a very hard look. Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990).

The neutral principle methodology used in Ayers, if allowed to stand, will eventually close all of the Historically Black Public Colleges. The reason is obvious: After Ayers, it may be determined by the political process that the Equal Protection Clause of The Fourteenth Amendment no longer commands that these schools be funded at adequate levels to draw white or Black students to their doors. The Ayers decision holds that the State of Mississippi no longer excludes Blacks from any of its public colleges on account of race, hence, Black students may voluntarily attend the Historically White Public Schools in Mississippi, reducing or eliminating the constitutional obligation of the state to adequately fund the Historically Black Public College.

The Ayers decision is wrongly decided on several grounds:

1. "At least since Green v. County School Board, 391 U.S. 430 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stand." Regents of the University of California v. Bakke, 438 U.S. 265, 362 (1978). The Ayers decision is a stunning demonstration of amnesia about one hundred years of rigid past discrimination in higher education in Mississippi which has only recently began to consider the deletion of provisions from its State Constitution which extol non-neutral race values. Mississippi Begins Analyzing Its Racist Constitution of 1890, N.Y. Times, Dec. 12, 1985, at B25, col. 1.

2. The Ayers decision is wrong by its creation of a presumption that Black public colleges are inferior, which comes as quite a surprise to thousands of their distinguished graduates. The application of the neutral methodology in the Ayers opinion declares this. The decision is written to "force" Black and white citizens of Mississippi, and beyond, to by-pass the Historically Black Public College for no other reason than that these colleges are Black; and, because they are Black is the reason that they are and have been substantially underfunded for years by the political process of the state. The Ayers decision concludes that Blacks today may "voluntarily" attend any Historically White Public College in Mississippi. However, in fact, the methodology applied in the Ayers decision "forces" Blacks to by-pass the Historically Black Public Colleges. Those colleges will cease to exist under the "forced by-pass theory" because common sense will tell disadvantaged Blacks and white students and their families that the Historically Black Public Colleges are doomed; that employers in and out of the State of Mississippi, Louisiana and Alabama will not employ students attending Black Colleges because of their now judicially declared inferior nature, accentuated by approved scaled-down funding by the state. The Ayers decision does not consider that if the state were required to provide proportionate funding of the Historically Black Public College that white citizens might "voluntarily" attend these schools. The failure of the court to consider this obvious and important alternative renders its application of neutral principles flawed and further demonstrates why the decision cannot stand.

3. The Ayers decision is wrong because it applies a stigmatic test of educational-worthiness of Black colleges. It presumes that relevant Historically Black Public Colleges are not worthy to continue to exist now that de jure segregation has been abolished. It says that Blacks are now seeking separation from whites, as if Blacks are now the pro-Plessy v. Ferguson forces. Such is not the case. The court's methodology wrongly and inappropriately shifts the responsibility of equality from the state which has denied it by positive law and impermissible constitutional conduct, to innocent Black victims.

4. The Ayers decision is wrong because it does not take into account the fact that racial discrimination, as wrong as it was and is, has and continues, out of necessity, to create protected speech. A University manufactures speech. Contrary to current and popular definitions of diversity as relates to Black colleges, its speech, and the broad diversity of such speech, pours out through the voices of its songs, poetry and dance, its focus on politics, both domestic and international, the views of its faculty and the student body, and yes, through its protests. The "forced by-pass theory" of Ayers will not help the Historically Black Public Colleges retain talented faculty who in time will be "forced" to

leave these Black colleges as the state maintains level or decrease funding for these schools. As these white and Black teachers leave-so does their unique speech. The Ayers decision trammels on the First Amendment freedoms of the Historically Black Public Colleges, and the exceptional diversity that intentional and defacto racism created. The result of the wrong and the speech derived therefrom is unquestionably and equitably protected under the First Amendment.

What is this protected diversity that finds shelter in the First Amendment? The states of Mississippi, Louisiana, Alabama and other great states of the South would not be able to boast of their rich cultural heritage without the exceptional diversity of voices and speech represented by the Historically Black Public Colleges. Is this speech, and are such voices that have risen against the invidious back hand of racism, and speech that now runs deep in the well of the state's history and which has vested in the state, and which is amplified beyond state borders through their many alumni, to be permanently blacked-out by the Ayers decision? These exceptional ideas, words, phrases, and particular conceptions that are represented by the expansive diversity of the Historically Black Public Colleges are threatened by Ayers, which sees diversity exclusively through the lens of a "forced by-pass" theory, which it attempts to justify under the shadow of neutral principle methodology.

5. Finally, the Ayers decision is flawed because the Historically Black Public College, many created one hundred years ago, play a direct role in the commerce of the Nation. They feed their graduates to education, agriculture, law, medicine, engineering, indeed, to all professional and graduate schools in the Nation. Many of these successful professionals, who for a variety of reasons, would never have been admitted to any other public college in Mississippi or Louisiana, or Alabama are now revenue producing and tax paying citizens of these states and the Nation. Indeed, the Historically Black Public Colleges draw students from outside the state, who pay airfares to get there, purchase millions of dollars of merchandise in interstate commerce, use telephones to stay in touch with their families out-of-state, purchase books, supplies, fraternal uniforms and a host of other items in the stream of commerce. How can the Ayers decision stand in the face of indisputably the most critical period when Black men and women are needed as agents of the state to supplement the new efforts of the state to increase the number of educated Blacks, and simultaneously threaten the closure of the very source from which the majority of such agents are being graduated? Indeed, with the drastic drop of thirty thousand Black males from college in the past decade, a decline which is expected to continue and to increase for Black women also, a national state of emergency will soon exist which could so enlarge the dependent state of Blacks so as to affect the economy and the domestic well-being of the Nation. Black colleges and the productive nature of their graduates have

enhanced unmeasurably the commerce of the Nation, and the domestic well being of our Democratic State. The Ayers decision affects the Commerce Clause of the Constitution in a most direct way.

I submit that the Ayers decision is blind to the operative confluent Constitution dimensions of the Equal Protection Clause, the First Amendment and the Commerce Clause, to say nothing of its ignorance of affirmative public statements and proclamations by Presidents, and the majoritarian initiatives of the United States Congress, whose collective purpose and intent have been to protect the Historically Black Public Colleges.

For the reasons stated above, the weight of the United States should be on the scales of justice with the Historically Black Public Colleges, not silent or against them.

Sincerely,



J. Clay Smith, Jr.  
Professor of Law

JSC:jah

cc:

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