IN THE UNITED STATES DISTRICT COURT FOR THE

MIDDLE DISTRICT OF ALABAMA

EASTERN DIVISION

ANTHONY T. LEE, et al., Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, and Amicus Curiae, v. MACON COUNTY BOARD OF EDUCATION, et al., Defendants.	CIVIL ACTION NO. 604-E REPLY BRIEF OF UNITED STATES

Nowhere in their brief do the defendants deny the continued existence of a dual school system in Alabama. Nor do they deny that they have, in the words of this Court's order of July 13, 1964, failed

> in the exercise of [their] control and supervision over the public schools of the State, to use such control and supervision in such a manner as to promote and encourage the elimination of racial discrimination in the public schools, rather than to prevent and discourage the elimination of such discrimination.

The defendants instead deny that they "possess the statutory authority to control the actions of local school boards to the extend sought by plaintiffs in their proposed decree." (Def. Brief, p. 17, emphasis added). They contend that indispensable parties--the local school boards-- have not been joined. And they argue that the relief sought would lead to a multiplicity of litigation. This reply brief

deals with those contentions.

I. CONTROL

The defendants' disclaimer of sufficient authority misconstrues both the defendants' authority and the nature of the Government's proposed decree.[1/]

A. The defendants' authority

The defendants claim that the tradition of local control over public education excludes the State Department of Education from all but advisory and ministerial roles. In so claiming, they ignore the extent to which Alabama law, through the rule-making power and the power of the purse, provides for state monitoring of local activities in order to ensure that state policies are being followed. The Alabama law has already been fully discussed in our main brief

In addition, it is appropriate to call the Court's attention to the statewide desegregation case in Delaware, Evans v. Buchanan, 256 F.2d 688 (3rd Cir. 1958), affirming 152 F. Supp. 886 (D.C. Del. 1957), which we discussed at length in our 1964 brief at pages 79-82. The Court there found that Delaware law--which was strikingly similar to the Alabama law--gave the State Board there sufficient authority that it could be ordered to submit a statewide plan for desegregation. See also Hall v. St. Helena Parish School Board, 197 F. Supp. 649, 657-8 (E.D. La. 1961).

The defendants stress the purported lack of statutory authority by their almost total reliance on an Opinion of the Justices of the Alabama Supreme Court, 160 So. 2d 648

1/ We discuss here only our proposed decree, but much the same considerations would seem to apply to the plaintiffs' proposed decree.

(February 18, 1964). They cite no other case to support their contetnion. That opinion was before this Court in 1964, having been rendered only three days before the 1964 hearing in this case. This Court nonetheless found that the defendants had:

> . . . demonstrated that they have considerable authority and power over the actual operation of the local school systems. This is true irrespective of any supposed limitations on that power as set out in the Alabama law.

We must therefore look not only at the statutory authority of the defendants, but at their actual exercise of power. This we have done in our brief. The defendants are shown to have exercised extensive control over local school systems both before and after 1964. Again, the defendants do not dispute the evidence that establishes the control, but instead attempt to dismiss the importance of that evidence.

The Opinion of the Justices, at any rate, does not support the defendants' contention. That opinion was written in the context of actions taken under Alabama's pupil placement, school closing, and tuition grant laws,[2/] and the Supreme Court of Alabama correctly held that those laws conferred authority on the local school boards, not on the State Board of Education. The Supreme Court of Alabama did not, however, consider any of the statutes relied on in our brief, except the general statute, Ala. Code, Title 52, Sec. 14. The Opinion of the Justices expressly states "certainly we do not herein attempt to

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2/Ala. Code, Title 42, Chapters 4A, 4B and 4C. The actions included the closing of Tuskegee High School, the transfer of its students and teachers, and the transporting of white students who had been transferred.

define or delineate" the powers of the State Board of Education.

Out of the mass of depositions, testimony and exhibits in this case, the only evidence to which the defendants point to support their contention is the deposition of a Civil Rights Specialist for the Department of Health, Education and Welfare who was assigned to Alabama for nine months in 1966. From his testimony it is clear he was not qualified to testify about the question of state control. He testified:

> I make no claim to knowing the entire school law in the State of Alabama, and I would like to point that out. (Crowder Dep., p. 14)

And also:

> Q: But working in Alabama you, of necessity, had to become familiar with the operation of its system, didn't you?
>
> A: Not necessarily in the financial arrangements and how they receive their finances. (Crowder Dep., p. 7)[3/]

The defendants have thus attempted to controvert facts and law by using such answers as "I had no reason to question this, yes, sir" (Crowder Dep., p. 8; Def. Brief, p. 9).

B. The proposed decree

The proposed decree is based on the authority of the State Board of Education over the local boards, not on any authority to place students or teachers, to close schools, or to furnish transportation. The defendants'

3/ See also p. 12 (pupil assignment) and p. 13 (transportation) for other disclaimers of knowledge.

statement of "the basic framework of the actions attempted to be required by injunction" (Def. Brief, p. 17) ignores that fact. The proposed decree asks that the State Board be required to use its traditional powers and functions to help effectuate desegregation instead of using them as it has up to the present time to perpetuate segregation.[4/]

4/ Cf. Evans v. Buchanan, supra, approving a decree which "was designed to relieve the appellants [State Board of Education] of passivity and to compel them to go forward with the desegregation of the Delaware schools." 256 F. 2d at 695. See also Cooper v. Aaron, 358 U.S. 1, at p. 7: "State officials were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system."

II. The Parties

In Section VI of their brief, the defendants contend that the individual local school districts are necessary parties to this action if the relief requested by the plaintiffs or by the United States is to be granted. The defendants, however, concede that local school officials need not be joined as parties to an action in which the decree affects only the rights, duties and powers of the defendant state officials. We agree that "no Court can adjudicate directly upon a person's right without the party being either actually or constructively before the Court." (Def. Brief, p. 30). The relief requested by the United States in this case recognizes these principles of law and due process.[5]

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[5] The United States did not concede or imply, as the defendants contend on page 27 of their brief, that any of the individual local school systems are indispensable or necessary parties in this case. The suggestion by the United States on pages 124-126 of its brief, that the uncommitted school districts could be added as defendants, was merely one of three alternative procedures that it suggested to the Court. The adding of such districts as defendants in this case would be appropriate if the Court found it necessary to issue orders directly against such districts in order to obtain effective relief.

The relief requested by the United States would require action only to the extent of the defendant state officials' authority over the local boards of education, and does not involve any direct adjudication of the rights and duties of the local school districts except insofar as they are subordinate to the state officials. We are here litigating the duty of the defendant state officials to use the authority at their command to effect the constitutionally required desegregation of the schools of Alabama.

It is not necessary, in an action to determine the authority or duties of a government official or department, to join as parties all persons or inferior government agencies that may be affected by such a determination. Cherokee Nation v. Hitchcock, 187 U.S. 294, 300 (1902). In the Hitchcock case, the Cherokee Indians sought an injunction restraining the Secretary of Interior from leasing lands that were held for the Indians. The defendant objected to the failure to join, as an indispensable party, the proposed lessee of the land. The Court rejected this contention, stating

> Clearly, all the persons with whom the Secretary might contract, if he exercised the discretion vested in him by the statute, were not indispensable parties to the determination of the question whether the statute had lawfully conferred such discretionary power upon the official in question. 187 U.S at 300.

The issue involved in the request for relief by the United States in this case is what actions can and must be taken by the defendant state officials to carry out their duties under the United States Constitution. The fact that the manner in which they will ultimately carry out these duties will undoubtedly affect other government subdivisions and people, and does not convert those persons into indispensable parties for purposes of this case. With or without a Court order, the State Board of Education has the authority to take specific actions to promote desegregation of local school districts without the necessity of approval by the local boards of education. The local boards, therefore, have no legal claim that would require their presence as parties in an action to determine which specific actions the State Board must take. The requested relief is directed to the defendant state officials. Persons or agencies who are under the authority of a defendant are not indispensable parties to the litigation of the manner in which the defendant is required to use that authority. The relief requested here is analogous to that granted in Evans v. Buchanan, supra. There, not all local school boards were parties, but the court rejected this as a ground for denying the relief sought. 256 F. 2d, at 695.

While the United States agrees wholly with the definitions of an indispensable party found in the cases cited by the defendants, the principles enunciated in

those cases do not lead to a finding that the local school districts must be joined in this case. Furthermore, the cases cited by the defendants to support these general propositions are not applicable to this case on their facts. In Standard Oil Co. of Texas v. Marshall, 265 F. 2d 46 (C.A. 5, 1959), the Court held that the persons in question were not indispensable parties. The indispensable parties in Shields v. Barrow, 58 U.S. 139 (1854) were four out of six endorsers of a note given as consideration for the contract which the plaintiff was seeking to have set aside. Barney v. Baltimore, 73 U.S. 280 (1867), held that tenants in common are all indispensable parties in a suit to partition real estate. California v. Southern Pacific Co., 184 U.S. 199 (1895) involved a claim prosecuted by the State of California to lands in which other persons, including the City of Oakland, might have an adverse interest that could not be litigated in the Supreme Court; there was no issue of a positive obligation on the part of the State to carry out a specified duty, as in this case. Minority stockholders of Northern Securities Company were held to be indispensable parties in Minnesota v. Northern Securities Co., 184 U.S. 199 (1902) because their interest would not be represented by the Northern Securities Company. In Bogart v. Southern Pacific Co.,

228 U.S. 137 (1913) the Court did not reach the question whether the corporation in question was an indipensable party. In a suit by the United States to recover possession of leased premises and enjoin occupancy, the non-party State of Washington, as lessor, was held to be an indispensable party because of its adverse claim. Washington v. United States, 87 F. 2d 421 (C.A. 9, 1936). None of these cases involve the litigation of a superior government authority's duties in exercising its control and supervision over inferior agencies in accordance with its constitutional obligations, or a request that the defendant authorities be required to fulfill those obligations.

III. Multiplicity

Defendants assert that "litigation will be multiplied and the jurisdiction of all other district courts in Alabama will be preempted by any decree which results in the Actual or Potential withdrawal of all state funds from local school boards not parties to this suit." But the Government's proposed decree is designed to minimize not multiply litigation, and nothing in the proposed decree preempts the jurisdiction of other district courts. Indeed, the defendants, while stating this latter point do not seriously agrue it.

The Government's proposed decree, if conscientiously followed by the defendants, should go a long way toward bringing into compliance school systems that might otherwise end as defendants in federal court desegregation suits. We must assume that both this Court's order and the advice of the defendants will be treated with great respect by local school boards and that if the defendants were to report to the Court as required by the language of the proposed decree they will be able to report that the local systems are taking adequate steps toward compliance with the Fourteenth Amendment. Only those systems that do not take adequate steps would be brought before the Court under the third alternative suggested at pp. 125-126 of our brief. 6/

Defendants assert, citing Brown v. The Board of Education of Topeka, 349 U.S. 294, 99 L. Ed. 1083 (1954),

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6/ The additional parties may be added under Rule 21. See also Rule 20; U.S. v. Mississippi, 380 U.S. 128 (1965).

and Bradley v. School Board of the City of Richmond, 382 U.S. 103, 15 L. Ed. 2d 187 (1965), that a full evidentiary hearing is necessary whenever local, state and federal officials disagree on the sufficiency of a local desegregation plan, and that this hearing must be held in the local district court. It is, of course, possible that it will be necessary at some stage to hear evidence about the adequacy of desegregation measures in some particular school system. But the three major difficulties with the defendants' position are (1) that the local and peculiar nature of desegregation problems is substantially less than at the time of the Brown decision, which did not have the benefit of 13 years of judicial, administrative, and community experience and adjustment;[7/] (2) there is no reason to suppose that this Alabama federal district court of three judges is less familiar or capable of dealing with whatever peculiar problems may still exist than another district court in Alabama; and (3) that in this case the defendants have engaged in a state-wide program to standardize local conditions, particularly with respect to segregation. On this latter point, we point out that the ability of the local school districts to determine an individual course of action has been seriously impaired by the defendant state officials. Brown v. Board of Education dealt with cases arising "under different local conditions" (p. 298), and the Supreme Court ordered the local courts to fashion relief

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7/ Cf., the proposed decree in United States v. Jefferson County Board of Education and the Revised Guidelines.

in accordance with principles of equity, taking into consideration local problems, as an alternative to relief to be fashioned by the Supreme Court. The principles of equity which are cited in Brown do not rule out the competence of one federal district court to ensure state-wide compliance with the law.

To the contrary, considerations of good judicial husbandry and uniform standards of compliance would be better served by resolving school desegregation problems, to the extent possible, in a single unit. We have not urged, nor do we propose in our decree, that all school districts be brought before the Court. We urge instead that this Court provide its own means for carrying out a minimal but necessary supervisory function to the end that the defendants will this time perform their duties and school desegregation will go forward in Alabama.

The validity and wisdom of a state-wide desegregation plan has been upheld in Evans v. Buchanan, 152 F. Supp. 886 (D. Del., 1957), aff'd., 256 F. 2d 688 (3rd Cir., 1958). There the district court ruled that, although it is best, in the abstract, to permit local problems to be dealt with in the first instance by local boards, in accomplishing desegregation "there is a necessity for 'joint and not independent action...by all parties concerned,'" (p. 888). The Third Circuit affirmed in all respects the district court's order that the State Board of Education adopt a state-wide desegregation plan.

The basis for defendants' assertion that the relief sought "will multiply litigation" is unclear. Actually, a state-wide approach for school desegregation in Alabama not only recognizes the reality of state-wide control over the schools, but it reduces the likelihood that individual plaintiffs will in the future find it necessary to institute litigation. Assuming good faith compliance with the proposed decree, desegregation will advance in orderly fashion throughout Alabama and other suits will be unnecessary.

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