Trial File

JD:BKL:efw
DJ 169-1-11

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144-100-2-1
#1-087-2

Oral Argument, Lee v. Macon County Board of Education and NAACP v. Wallace, February 3, 1967

The panels in these cases consisted of Judges Rives, Johnson, and Pittman in NAACP v. Wallace and Judges Rives, Johnson, and Grooms in Lee v. Macon County Board of Education. Preliminary to the argument Judge Rives, who presided, said that the Court had denied the motions of state superintendent of education Stone to dismiss in each case as to him. Mr. Satterfield, representing Dr. Stone, then requested that the Court first consider a brief which the defendants had prepared on that point, and Judge Rives said that if the brief convinced them that the order should be changed the Court would do so.

The Court then considered the Government's motion to supplement the record by introducing in evidence an affidavit giving more nearly correct desegregation statistics. Mr. Satterfield objected to the introduction

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of the affidavit on the grounds that the sources for the affidavit were hearsay. The Court granted the motion with the understanding that the defendants can look at the source documents for the affidavit and may correct the affidavit by affidavit within a reasonable time.

Judge Rives then stated that the Court cannot decide these cases for a considerable while, but that the cases will be decided in time to be effective for the September 1967 school opening. Judge Rives said that it would be the disposition of the Court to hold the case awaiting the outcome of any en banc hearing that might be held in the Jefferson County case. He said that Counsel may file supplementary briefs in these cases within 15 days of the argument; on request of Mr. Satterfield the time was extended to 20 days.

Judge Rives said that although the Lee case was the older of the two the issues were clear in the NAACP case and that arguments in that case might help clarify the issues in the Lee case. The Court therefore held argument in NAACP v. Wallace first.

Joan Franklin argued for the NAACP. She began by saying that the Plaintiffs premise the unconstitutionality of the Anti-Guidelines Act on specific provisions in that Act. Section I calls the Guidelines unconstitutional.

Judge Rives:

There is also the issue of whether the Guidelines have to be signed by the President. I have done some research on this and have found that under some types of statute the President needn't personally approve every regulation but that in other statutes which vest discretion in the head of the department, the President must sign the regulations. Counsel should brief this point as well as the legislative history of the provisions requiring presidential approval. Can the President subdelegate authority to pass rules and regulations? I will provide Counsel with copies of my law clerk's memorandum on this point.

Miss Franklin:

The preamble to the Anti-Guideline Act shows the Alabama Legislature says that it is concerned with racial imbalance and with employment. But we aren't dealing with these concepts but instead with an attack

on the desegregation process itself. The Jefferson County case points out that in southern states "racial imbalance" has no meaning.

Judge Rives:

In your briefs develop whether the distinction between de facto and de jure desegregation is sound or whether this isn't really making one law for the North and another law for the South. I've looked at the Blocker case from the eastern district of New York in 226 F. Supp. which Judge Wisdom relies on in the Jefferson County case and I wonder whether it is really authority for the distinction.

Miss Franklin:

I argued the Barksdale case and contended there that State action was involved.

Judge Rives:

I'm referring to the Blocker case not to the Barksdale case. You should shephardize the Blocker case.

Miss Franklin:

State action is involved where racial lines are purposely drawn. This is similar to, but still different from, lines that have racial effect but were not racially drawn. The techniques in the Guidelines are designed

for the South and are appropriate for the situation there. HEW is entitled to treat the different situations in the different parts of the country in different manners. There is a contractual relationship between HEW and the local boards and no one has the right to arbitrarily interfere with that relationship. Lemon v. Bossier Parish is an authority for that proposition. So is Louisiana v. Counsel and Mayor of City of New Orleans, which holds that once a local authority has made a contract it must have the power to continue performing it.

The Alabama law strikes directly at the Negro pupils, who are third party beneficiaries of this contract. They therefore have standing. The NAACP also has standing. NAACP v. Alabama was a suit to vindicate the rights of the members of the NAACP and so is this. The Austin case in 112 F.2nd also supports our standing. So does Smith v. Morrilton, 356 F. 2nd 770 in which the Court upheld the standing of a teachers association to sue to desegregate not only the faculty but also the schools themselves. The Court held that the association could assert the rights of pupils.

Carter v. Johnston at 256 F. 2nd 962 is a suit in which the Court upheld the right of the Mississippi Freedom Democratic Party to challenge the apportionment of the Mississippi Legislature. Miss Franklin concluded her argument by saying that the provisions in H-446 referring to racial imbalance and employment had a clear meaning in light of the lack of desegregation in Alabama.

Mr. Barrett then argued on behalf of the United States.

Mr. Barrett:

The United States seeks a declaration that Alabama Act 252 (H-446) is unconstitutional. The defendants' cross claim asserts the validity of the Guidelines. The Government agrees that Lemon v. Bossier Parish supports the plaintiffs' standing. In addition, there can be no question of the interest of the United States in this case. The United States is a contracting party to the 441E; it is also the enforcer of Title VI.

Act 252 must fall. It is more than an expression of legal opinion or a nullification resolution. It is instead, a statute, passed by both houses of the

Legislature and signed by the governor of the state, declaring contract relationships under Title VI invalid. It directs citizens of Alabama to ignore obligations under Title VI and to ignore assurances executed pursuant thereto. Act 252 must fall under the supremacy clause as contrary to federal law and policy. We know of no other case exactly like this. The State is powerless to act in this fashion. The State cannot arrogate from the courts the right to rule on the validity of federal laws. The State having attempted to do so, there is a case or controversy.

The Guidelines are valid. Section 601 declares a national policy and Section 602 requires the administrators of the hundreds of federal programs to effectuate the purposes of Section 601 by adopting regulations of general applicability to be approved by the President. HEW adopted such regulations and the President approved them. These regulations apply to some 95 programs administered by the various parts of HEW.

Judge Rives:

Do you claim the Commissioner can adopt rules of general application without Presidential approval?

Mr. Barrett:

Yes. The Commissioner can adopt rules of general application for running his shop. Such rules do not have the force of law. The President, after signing the regulations, needn't deal with each specific school system or each specific problem.

Judge Rives:

The Commissioner has no greater power than the Secretary of HEW.

Mr. Barrett:

The regulations laid duties on the Commissioner. He must determine whether voluntary desegregation plans are adequate. The regulations cannot deal with the specifics of the mechanics of desegregation from year to year. Congress could not have intended the regulation to deal with every single detail of every single program and to have precluded the President from delegating this job.

Judge Rives:

What is the legislative history?

Mr. Barrett:

I'm not aware of any. We will check this. I believe there is nothing that precludes the Commissioner from having a statement of his policies.

Judge Rives:

The Commissioner can have rules for particular cases, not of general applicability, but I'm not so sure about whether he can have such general rules without Presidential approval.

Mr. Barrett:

It is important to look at the manner in which the Guidelines developed. Title VI was passed in July, 1964. In December, 1964, the regulations were adopted and approved by the President. The Guidelines came in April of 1965. Commissioner Howe testified on deposition that when HEW first advised school boards of the law and of the regulations a common response was the question by the school boards; "What do we have to do?" In order to meet these demands, the Commissioner issued the Guidelines. The Commissioner was dealing with some 6,000 school systems.

Judge Rives:

The statute does not refer to one rule, regulation, etc, but to rules, etc. At this point Judge Rives asked for copies of the regulations to give to the members of the Court to look at during the argument.

Mr. Barrett:

The language of Section 602 does not say that an administrator shall not adopt rules unless signed

by the President. It is not phased in negative language. Instead, it requires that the administrator adopt rules of general applicability, to be approved by the President. This does not forbid adoption of further rules without Presidential approval. These rules would not be regulations with the force of law but merely statements of intention.

Judge Rives:

There may be some validity to the distinction, but I'm not convinced yet.

Mr. Barrett:

Just as the courts, under stare decisis, follow past decisions, the Administrator may feel a need to introduce some consistency into his operation.

Judge Rives:

But doesn't that then become the law?

Mr. Barrett:

It is essential for the Commissioner and the school systems to have a guide to what the Commissioner will do.

Judge Rives:

The purpose of the regulations is to let the people know what the law is that governs them.

Mr. Barrett:

But administrative articulation of what the Commissioner is going to do is not final law. Such articulations leave open another level of questions of even more detail. What the Commissioner does is open to question in the administrative hearings. The fact that he puts down on paper what his practice is does not make it a regulation with the force of law.

Judge Rives:

The basic question in this case is how far Brown goes.

Mr. Barrett:

The question has been raised as to whether the content of the Guidelines conforms with federal law. As to faculty, Section 604 does not insulate boards from dealing with racial discrimination and the elimination of the dual system.

Judge Rives:

One problem with this case is defining our terms. Brown does not use the words "dual system." Dual system can mean two sets of schools intentionally designed for each race, or two sets of schools that accidently end up with different races in attendance.

Does Brown say that people of either race may be forced to attend a school they don't want to attend?

Mr. Barrett:

I don't use "dual system" in the sense of a system in which children of different races, for fortuitous circumstances, are in different schools. But I mean more than a lack of a choice of where to go to school. The cases that talk about freedom to choose or the right to stand equal before the law mean more than the right to choose between two schools, one of which the State has designed for Negroes and one of which it has designed for white students.

Judge Rives:

That's not true freedom of choice. But neither is it free choice to say you must choose to attend an integrated school. There is a considerable amount of integration required by free choice. But does free choice take a back seat to integration?

Mr. Barrett:

The Constitution and Brown do not require free choice.

Judge Rives:

The Supreme Court has ruled that faculty desegregation is a matter for a hearing. The

question in each case is whether the circumstances are such that faculty desegregation is required.

Mr. Barrett:

You don't eliminate discrimination by saying that you could go to either part of this racially oriented system. I will discuss this further in the Lee case with illustrative examples. The defendants argue that the Guidelines require racial balance and that racial balance is forbidden by the statute.

Judge Rives:

It might also be unconstitutional to require racial balance. Bolling v. Sharpe says that racial considerations violate due process unless there is a valid governmental purpose. Perhaps voluntary segregation may at times violate equal protection - this may be the meaning of the Supreme Court citation of the Kansas case [Apparently referring to Brown cite in Bolling]. But it may mean that only enforced segregation is bad. It might be better to integrate, but the question is what the Constitution requires. Some Negro and white children may prefer to go to non-mixed schools. The Court must look to the interests of all classes. My opinion has been in line with the Briggs doctrine.

Mr. Barrett:

We have been dealing with three concepts. One is what obligation does the Constitution place on the State in the operation of its schools. The State cannot compel segregation. The second is where, under no compulsion from federal authority, a state elects to provide for the achievement of racial balance. The weight of authority of the Federal Courts is that the states may do that if they choose to. Consistent with the Constitution, the states may consider race. This is probably the sort of thing Congress had in mind in the racial balance limitations in the Civil Rights Act. The third concept is where there has been enforced segregation and a concomitant dual system, what should the courts do to correct the situation. The Court, in granting relief, may take race into account. The voter discrimination cases illustrate this fact.

Judge Rives:

There is no question that you can keep statistics by race. But if you use the governmental process to require integration, aren't you encroaching on Brown?

Mr. Barrett:

The Court can order the school board to undo what it has done. This can be called "integrating."

Judge Rives:

There is a considerable amount of integration required to remove discrimination, but if you go further you deprive children of both races of their rights.

Mr. Barrett:

You don't have to go beyond that point. We propose relief within that doctrine.

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Mr. Satterfield argued on behalf of the defendant state officials.

Mr. Satterfield:

The questions posed by the Court this morning go to the vitals of these cases. The cardinal issue is one of individual freedom from restrictive federal action or state action pursuant to federal rules. The desegregation cases in the Supreme Court were concerned with the removal of governmental restrictions on the freedom of children and their parents. No case above

the district court level except the Jefferson County case, holds that the Government can destroy the freedom of children and parents in their choice of schools. The 8th Circuit decision of December 15, 1967 explains fully the Kemp case. It holds that even if the students of one race choose to attend one set of schools and students of the other race choose to attend the other set, that is permitted under the Constitution.

Judge Johnson:

Do you agree with Judge Rives' statement that the Constitution requires integration to the extent necessary to desegregate?

Mr. Satterfield:

I agree, to the extent that that means that desegregation may entail some "inter-mixing."

Judges Johnson and Rives:

Is some faculty desegregation required?

Mr. Satterfield:

In the Bradley case the question was remanded for a full evidentiary hearing.

Judge Rives:

In some instances faculty desegregation is required and in others it is not.

Mr. Satterfield:

If the hearing discloses that free choice cannot be carried out without faculty desegregation, Bradley requires faculty desegregation. If faculty desegregation is not necessary, Bradley does not require it. The Guidelines go a thousand times farther than Bradley. Neither the Constitution nor the Bradley case require a transfer of teachers to remove the identifiability of the school.

Judge Johnson:

Is there a duty to remove the affects of past discrimination?

Mr. Satterfield:

Not in the sense used by the Commissioner. There is a duty to establish a true free choice.

Judge Johnson:

Is there a duty to remove the identifiability of the schools by race?

Mr. Satterfield:

Not if that identifiability results from the choice of the students.

Judge Johnson:

Let me give you a specific example. Take George Washington Carver school in Montgomery where there are all Negro teachers and all Negro students?

Mr. Satterfield:

George Washington Carver is not identified as a Negro school. It is permissible to have school A preferred by white children, school B preferred by white and Negro children, and school C preferred by Negroes.

Judge Rives:

How far back must we go to undo our sins? Must we go back to Africa? Must we undo what was done before Brown? The principle of equality and of freedom conflict here. White children are entitled to the due process of the law. Should the sins of their parents be visited on them?

Mr. Satterfield:

The Court has put its finger on the problem that the Guidelines seek to hide. The Guidelines are based on the premise that two wrongs make a right.

Judge Johnson:

That begs the question of whether Section 604 forbids faculty desegregation and the question of whether the Guidelines require racial balance.

Mr. Satterfield:

As to the Guidelines they provide that the systems that want federal aid "must" do certain things.

Senator Pastore said that all procedures must follow the regulations; the President must approve them. Exhibit 1 to the Howe deposition and page 29 of the Howe deposition are statements by Secretary Gardner and Commissioner Howe that the Guidelines are of general applicability. See page 33 of the defendants' brief.

Judge Johnson:

Section 80.4(c)(2) of the regulations requires the school systems to subsit plans for desegregation which the Commissioner determines are adequate to meet the purposes of the Act. Doesn't this authorize the Commissioner to have standards to decide whether the plan is adequate?

Mr. Satterfield:

The Commissioner cannot do this where Congress provides that rules must be approved by the President. The regulation is contrary to law in that respect. The President cannot redelegate his authority.

Judge Johnson:

Was it illegal to authorize the Commissioner to decide whether a school system met the purposes of the Act?

Mr. Satterfield:

The regulation is not as full as Congress intended it to be. Congress did not intend the Commissioner to have so much discretion.

Judge Johnson:

I understand your position now.

Judge Rives:

Is it true that the 1966 Guidelines were not before the district courts in the Jefferson County case?

Mr. Satterfield:

That is correct. The Guidelines destroy the limitation in the Civil Rights Act of 1964. [At this point Mr. Satterfield read parts of his brief] Commissioner Howe's deposition, the letter about Walker County, and HEW practice shows that the Commissioner requires integration to whatever extent he, in his discretion wants. This is forbidden not only by the Civil Rights Act but also by the Elementary and Secondary Education Act, which forbids the Commissioner to control the assignment of students.

Judge Rives:

What is the connection of the Elementary and Secondary Education Act with the Civil Rights Act?

Mr. Satterfield:

Commissioner Howe testified that he applies the Guidelines to programs under the ESEA. The ESEA is the latest congressional expression of intent respecting schools and therefore helps us in interpreting the Civil Rights Act.

Judge Rives:

Does the Commissioner cut off funds under the ESEA?

Mr. Satterfield:

Yes.

Judge Johnson:

Does the Constitution permit Congress to prohibit the Commissioner from holding up funds for failure to comply with the Constitution?

Mr. Satterfield:

Yes. Commissioner Howe is an administrator with all of the vices of administrators, as pointed out by Judge Wisdom in the Jefferson County opinion. On November 3, 1966 Congress added to the Elementary and Secondary Education Act limitation, "or to require the assignment or transportation of students or teachers in order to achieve racial balance."

Judge Rives:

Congress may assume that state officers will follow the Constitution.

Judge Johnson:

Do you attach significance to "in order to achieve racial balance." Would the Commissioner have the right to require racial balance in order to eliminate discrimination?

Mr. Satterfield:

Note the definition of desegregation in the Civil Rights Act - it does not mean overcoming racial imbalance.

Judge Johnson:

We all agree that Congress did not and could not grant the Commissioner power to order the assignment against their will of children in order to achieve racial balance. But that does not answer my question. Could the Commissioner order the reassignment of teachers where he finds they have been assigned in order to discriminate? True freedom of choice conveys to me a school where there is a mixed school.

Mr. Satterfield:

No.

Judge Johnson:

What can the Commissioner do to require desegregation?

Mr. Satterfield:

He can require true free choice.

Judge Pittman:

Don't the courts have an affirmative obligation to disestablish segregation of pupils and faculty? Shouldn't they disestablish schools the continuation of which makes free choice impossible?

Mr. Satterfield:

The courts could not do so. This would deprive students and teachers of free choice.

Judge Pittman:

Can you conceive of any situation calling for the disestablishment of a segregated school in a free choice system?

Mr. Satterfield:

I cannot think of one.

Judge Pittman:

Isn't it mandatory action against the white school children to transfer one Negro child to the white school?

Mr. Satterfield:

No.

Judge Rives:

Isn't there a similarity between the jobs of the Commissioner and of the courts? Can't the Commissioner require what the courts can require?

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Mr. Satterfield:

At 110 Congressional Record, page 21246 Congressman Lindsey was discussing the Lindsey Amendment requiring Presidential approval of regulations. Mr. Lindsey said the Section was designed to require that all regulations under Section 602 be approved by the President. As to what steps are required to alleviate past discrimination, before Brown segregation was legal. A 1957 decision by Judge Rives says that the Constitution does not forbid voluntary segregation. In 1958 Cohen v. Public Housing Authority also supports voluntary segregation. Also see Evers I and the Bradley case in the Fourth Circuit. But the Guidelines reserved to the Commissioner the discretion to do whatever he wants, in twelve different sections. The Guidelines are designed to destroy freedom of choice plans. Section 181.1 of the Guidelines allowing the Commissioner to require another type plan is the most

significant provision designed to destroy free choice. The 8th Circuit said that yearly mandatory choice is not required by the Constitution.

State officials should be allowed to express their opinion. A Supreme Court decision of January 23, 1967 reaffirms the free speech of state officials [referring to New York loyalty oath case]. H-446 is very carefully drawn. It applies solely to the 1966 Guidelines and to assurances thereunder.

Judge Rives:

Do you agree with the Government that the first question is the validity of the Guidelines? If valid, the question is whether the supremacy clause invalidates H-446?

Mr. Satterfield:

Yes.

Judge Johnson:

What purpose did the anti-Guidelines bill have?

Mr. Satterfield:

To make up funds lost under the Guidelines.

Judge Johnson:

Then why declare the Guidelines invalid?

Mr. Satterfield:

Because that is the basis for making up funds.

Judge Rives:

Didn't the Act serve the political purpose of declaring the opinion of the Legislature?

Mr. Satterfield:

No.

Judge Johnson:

Wasn't the purpose of the Act to place the Legislature between the school board and the Guidelines?

Mr. Satterfield:

Yes, to the extent that the boards lose funds. The first act of the State of Alabama against the Guidelines was to file the Bessemer suit attempting to obtain an adjudication.

Judge Rives:

If we were to assume that the real purpose was to put the Legislature and the Governor on record against the Guidelines would an injunction be justified?

Mr. Satterfield:

No. That would violate their right of free speech.

Judge Rives:

Isn't pressure brought pursuant to H-446 a different matter?

Mr. Satterfield:

Yes.

The Jefferson County case is not binding for the reasons cited in the brief.

Judge Grooms:

Was there no evidence at all in the Jefferson County case respecting the 1966 Guidelines?

Mr. Satterfield:

None at all.

Judge Rives:

Under Rule 25-A of the Rules of Practice of the 5th Circuit an en banc court is necessary to overrule a 5th circuit decision.

Next Martin Ray argued on behalf of the Tuscaloosa City and County Boards of Education.

Mr. Ray:

There is no evidence at all in the record against the Tuscaloosa County or City Boards. Both systems receive federal funds. Neither system followed the Guidelines precisely. The boards followed their constitutional duty. The boards cannot operate without state funds. They are helped by federal funds. Mr. Ray cited the desegregation figures in the affidavit. H-446 had no effect on the school boards.

Rebuttal by Miss Franklin

Miss Franklin:

The record shows numerous contacts by state officials with the Tuscaloosa boards.

The crucial problem in this case is the attempt to use freedom of choice to defeat constitutional rights. No court has said free choice was a constitutional right. The compulsory education law itself infringes on free choice.

Judge Pittman:

Do you say that schools have to be mixed?

Miss Franklin:

No. Brown posits the right to equal education and then says segregation violates it. We shouldn't look at the Guidelines and ask whether they violate free choice. Instead we should ask whether the Guidelines promote equal opportunity.

Rebuttal by Mr. Barrett

Mr. Barrett:

Free speech is not involved here. The pressure in the record gives the Act its meaning. A year before the Act the defendants attempted to discourage 12-grade desegregation. This makes clear that what is sought

by H-446 is to prevent the carrying out of 441-B agreements that had already been signed.

Judge Rives:

If the Guidelines were invalid couldn't the Legislature have enacted H-446?

Mr. Barrett:

No. It is for the courts to decide whether the H-446 is invalid.

Contrary to the impression Mr. Satterfield may have given, the Commissioner does not review court orders to see that they meet the requirements of the Guidelines. He reviews them to see whether they are final orders for the desegregation of the school system.

With respect to the Walker County example, the Commissioner could conclude that the maintenance of the schools which he recommended to be discontinued was discriminatory. This shows that the real thrust of the defendant's argument is that the Commissioner is not free to eliminate discrimination where it will cause integration. The Guidelines are designed to make the choice free.

Lee v. Macon County Board of Education

Henry Aronson argued on behalf of the plaintiffs.

Mr. Aronson:

In its July 1964 Order, this Court made three findings of fact that are relevant today. One, it found the State Board of Education controls education in the State. Second, it found that the State Board of Education had an official policy of segregation. Third, the Court found that the State Board had implemented its policy of segregation through its powers of control. The record in this case shows the continuation of that policy to the present time. The legal conclusions this Court drew in 1964 were that the distribution of public funds to support segregation is illegal and that the defendants had the duty to use their power to disestablish the dual system.

Judge Rives:

Did we say "dual system"?

Mr. Aronson:

No. "Discrimination" is the word. With respect to free choice, in general there was no free choice in schools in the United States before 1954 with the

possible exceptions of Baltimore and Philadelphia. We were all assigned to the school nearest us.

Judge Rives:

I went to the school nearest me 60 years ago.

Mr. Aronson:

Every school in Alabama has been built under racial considerations.

Judge Rives:

There could be some Negro schools that were previously white schools in Alabama.

Mr. Aronson:

Even today every school is built for whites or for Negroes in Alabama. Free choice is not a constitutional right. There is no right to associate with students only of your own race.

Judge Rives:

The freedom of association point has bothered me considerably. [Judge Rives cited the Browder case in the Middle District of Alabama 142 F. Supp. 707,715 (the Montgomery bus decision). Judge Johnson said we may have been guilty of dictum in that case. Judge Rives also cited another Montgomery case at 277 F. 2nd 364,369.]

Mr. Aronson:

I disagree. Let me give you a hypothetical. All Negro children choose Negro schools and all the teachers at those schools are Negroes. All the white children choose white schools and all the teachers there are white. The school board followed all the procedures in the choice plan. We think this is nevertheless not a desegregated system. It is not free of discrimination. The free choice did not work. The Alabama Legislature expressed its opinion of free choice in §61 of Title 52 of the Alabama Code. The second Singleton opinion also shows that free choice is not an ultimate goal.

Judge Rives:

Was that dictum?

Mr. Aronson:

No. Free choice does not work.

Judge Rives:

What does "work" mean? Its meaning depends on what your goal is. If your goal is to mix, it doesn't work. But if the goal is to remove discrimination and to treat everyone alike the question is different.

Mr. Aronson:

When is discrimination removed? The schools in Alabama are unequal, they are racially located, they are subminimal, they offer unequal course offerings, they are located in poor facilities.

Judge Rives:

I agree. These are unconstitutional.

Judge Johnson:

You think there cannot be free choice without removal of past discrimination?

Mr. Aronson:

Yes. White children do not choose formerly Negro schools. Free choice will not destroy what the State has already done. It will not destroy the dual structure.

Judge Grooms:

You want racial balance? What is your plan?

Mr. Aronson:

Our proposed decree would order that the State could no longer further segregation. It would provide for the school systems to adopt the Jefferson County proposed plan.

Judge Johnson:

Didn't we basically enter the same sort of decree in Macon County in 1964?

Mr. Aronson:

Yes. In addition our decree would require the State to resurvey the schools, to abandon forthwith all those schools that are designated "to be abandoned," to assign the children to the remaining schools where such schools are available. No new building could be built without first having a non-racial survey. This would be done by the State and not by the court. There could be no State approval without deciding that the building would be non-racial, but that does not necessarily mean that the school would be integrated. The State should undo the past effects of racial decisions.

Judge Grooms:

You want forced integration?

Mr. Aronson:

Yes. That is the only way to end years of segregation; there is no middle ground.

Judge Rives:

In constructing schools, should you put them on the boundary lines between the racial groups?

Mr. Aronson:

If there are alternatives, that alternative should be chosen. But if it is not educationally feasible then it should not be done.

Judge Rives:

Do you agree with the repudiation in the Clark case of the "dejure-defacto" distinction?

Mr. Aronson:

There is a legitimate constitutional distinction but we need not reach it in this case.

Judge Rives:

Do you think race should be a factor where it causes more mixing but not a factor where it causes less mixing?

Mr. Aronson:

Race need always be considered in situations having repercussions in placing children in schools.

Judge Grooms:

Won't there be segregation if you use only geography?

Mr. Aronson:

We should take a second look at what we consider the neighborhood to be. A school located in the middle of a Negro area is not necessarily located in the middle of the neighborhood.

Judge Grooms:

No student should be deprived of attendance at a particular school because of his race.

Mr. Aronson:

In rural areas geography would result in mixed schools. Few urban areas are involved in this case. The location of a school influences the choice.

Judge Rives:

The use of racial dot maps in the school surveys was as wrong as it could be.

Mr. Aronson:

The remedy must reach that unconstitutional wrong. State action made a school Negro and it would take state action to undo it.

Judge Rives:

What do you propose that we do with George Washington Carver school?

Mr. Aronson:

Start with faculty desegregation. The Dowell case shows one way of doing that. You needn't follow the Guidelines, they are only tangentially connected with the Lee case.

Judge Rives:

Wasn't their connection just as tangential in the Jefferson County case?

Mr. Aronson:

In addition to faculty desegregation the State can equalize the facilities, desegregate athletics and other functions, and, if George Washington Carver is "to be abandoned" and there is capacity for the students in other schools it should be abandoned. If there are fewer than 525 Negro students in the system no expansion of the school should be allowed.

Judge Rives:

Could the state superintendent close the school?

Judge Grooms:

The Alabama Supreme Court has held to the contrary. Aren't we bound by the Alabama Supreme Court?

Mr. Aronson:

In the voting cases the court has often ordered that state law not be followed. But that need not necessarily be done here. The state superintendent could tell the court when local systems refuses to follow his recommendation. The court could bring the recalcitrant school systems before it. Or the superintendent could refuse to dispense funds.

Judge Rives:

Our prior decree was general. We can get more specific. But it is hard to see what more we can do than stop the State from becoming a party to discrimination. Perhaps we could go so far as to cut off funds. But I am not sure we should do that without having local boards before us. Shouldn't we give the local boards their day in court. Maybe we could make them parties.

Mr. Aronson:

No one has taken any desegregation steps in Alabama that they didn't have to take. Something must be done to force desegregation. Our decree attempts to set out with particularity what the state board should do. Other problems that our proposed decree deals with are inequality and transfers into and out of systems.

Mr. Barrett argued on behalf of the United States. Mr. Piss took notes on this portion of the argument and is having them transcribed separately. After Mr. Barrett, Maury Smith argued on behalf of the defendants.

Mr. Smith:

The interference alleged to have been committed by the defendants since 1964 differs greatly from the interference which this Court found they had engaged in before 1964. Their past actions included closing schools, the use of state troopers, transferring teachers, and ordering students transferred. But every incident of alleged interference before the Court today is directly and solely related to the implementation of the Guidelines in Alabama. There has been no interference with any court order.

Judge Johnson:

How about interference with faculty desegregation?

Mr. Smith:

The Court deferred faculty desegregation for a year. The Guidelines required more than the Court did.

Judge Rives:

How do you explain the state survey proposals?

Mr. Smith:

The state superintendent cannot require the local system to locate a school in any particular place. Faculty desegregation is not necessarily required. You have to see whether it influences the children's choice.

Judge Johnson:

How would you prove whether it influences the children's choice or not.

Mr. Smith:

Through testimony by the children.

Judge Rives:

We shouldn't need that. The Court is entitled to use its common sense. Free choice is not the only method to eliminate discrimination. You can use the Princeton Plan for example.

Judge Johnson:

The burden is on the school board to show that free choice will work. Neighborhood schools are the ideal situation. The courts have gotten into trouble trying to live with free choice plans. Maybe that is where Judge Wisdom got into trouble.

Judge Rives:

Judge Wisdom may have meant that if the free choice plan does not work another plan must be adopted.

Judge Johnson:

In Montgomery, for example, you could send grades 1-7 to Booker T. Washington and grades 8-12 to Lanier. The alternative is to make the free choice plan work.

Judge Grooms:

I was reversed in the Fairfield case on an issue I didn't try - the Guidelines.

Mr. Smith:

The defendants had a right to dissent and to disagree with the Guidelines. The pressure that the state applied to local systems was required to balance the more extensive pressure exerted by the Office of Education. The United States' proposed decree adds nothing to the 1964 decree.

Mr. Maddox then argued on behalf of the defendants. His argument touched on the invalidity of the ratification of the 14th Amendment, the validity or invalidity of the Brown decision, and the fact that there is no evidence in this case of any individual claiming that he is being discriminated against. Mr. Maddox also mentioned the requirements for a written complaint. Mr. Gray gave a rebuttal argument on behalf of the plaintiffs. He pointed out that on page 10 of the mimeographed copy of this Court's opinion in July 1964 the Court uses the term dual system. He urged that this case be promptly decided without waiting for the Jefferson County opinion.