No. 72-1418

In the Supreme Court of the United States

OCTOBER TERM, 1972

THEODORE L. SENDAK, ATTORNEY GENERAL OF THE STATE OF INDIANA, PETITIONER

v.

THE HONORABLE S. HUGH DILLIN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–1418

THEODORE L. SENDAK, ATTORNEY GENERAL OF THE STATE OF INDIANA, PETITIONER

v.

THE HONORABLE S. HUGH DILLIN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. This petition arises out of an Indianapolis school desegregation suit instituted by the United States in 1968 under Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c–6.[1] After entry of an initial decision

[1] Review in this Court has been sought with respect to several different aspects of this litigation. See *School Town of Speedway* v. *Dillin*, certiorari denied, 407 U.S. 920; *Citizens of Indianapolis for Quality Schools* v. *United States*, No. 72–710, certiorari denied January 22, 1973; *Metropolitan School District of Lawrence Township* v. *Dillin*, No. 72–1377, petition for writ of certiorari pending; *Board of School Commissioners of Indianapolis* v. *United States*, No. 72–1450, petition for writ of certiorari pending.

503–582—73——1

finding unlawful segregation in the Indianapolis public schools, petitioner and others were added as parties defendant in order that further legal questions affecting them could be resolved prior to entry of a final desegregation order. Petitioner thereafter filed a motion to recuse (App. A, *infra,* pp. 5–7), alleging prejudice or personal bias on the part of the respondent district judge. Petitioner's motion was overruled and the court of appeals affirmed without opinion (Pet. App. A).

2. Petitioner contends (Pet. 8–12) that the summary affirmance by the court of appeals constitutes a judgment that the court lacked jurisdiction over the petition for a writ of mandamus, and he attacks that judgment as being in conflict with the decisions of other courts of appeals. But the court of appeals did not suggest that it lacked jurisdiction over mandamus petitions with respect to recusal. Thus the decision below does not represent a conflict on the jurisdictional question raised here by petitioner.

Petitioner further contends (Pet. 13–16) that his affidavit alleging prejudice (App. B, *infra,* pp. 8–10) was sufficient to support his motion to recuse. But to be sufficient, such an affidavit must set forth specific facts which establish the existence of bias or prejudice. See, *e.g., Inland Freight Lines* v. *United States,* 202 F. 2d 169 (C.A. 10). Petitioner's broad conclusory allegations of prejudice did not meet the requirements of *Berger* v. *United States,* 255 U.S. 22, on which he relies.

In any event, the facts on which petitioner's affidavit apparently was based do not reveal prejudice or bias. Petitioner's claim of prejudice is apparently grounded in comments attributed to the respondent by several local newspapers (see Pet. 6–7, 15). These comments appear to be nothing more than capsule summaries of portions of the district court's prior opinion finding unlawful segregation (see, *e.g.,* 332 F. Supp. 655, 676–679, 681). Such restatement of previously published findings does not indicate personal bias or prejudice. See *Hanger* v. *United States,* 398 F. 2d 91 (C.A. 8), certiorari denied, 393 U.S. 1119; *Tucker* v. *Kerner,* 186 F. 2d 79 (C.A. 7). The issues now before the district court concern the nature of the remedy for the unlawful segregation already found and the constitutionality of certain Indiana statutes providing for the governmental organization of the City of Indianapolis. Petitioner has made no showing that the respondent has prejudged these issues.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1973.

APPENDIX A

In the United States District Court for the Southern District of Indiana, Indianapolis Division

(January 11, 1973)

Civ. No. IP–68–C–225

UNITED STATES OF AMERICA, PLAINTIFF,

DONNY BRURELL BUCKLEY, ET AL., INTERVENING PLAINTIFFS

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., DEFENDANTS

MOTION TO RECUSE

Comes now added defendant, Theodore L. Sendak, as Attorney General of the State of Indiana, personally and by Donald P. Bogard, Deputy Attorney General, and pursuant to 28 U.S.C. § 144, files his "Motion to Recuse", and in support of said Motion would show the Court as follows, to wit:

1. That pursuant to the aforementioned statute such a motion may be made upon filing a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against the party making the affidavit or in favor of any adverse party.

2. That the aforementioned added defendant has reason to believe that such personal bias or prejudice exists for the following reasons:

A. That on Wednesday, December 27, 1972, an interview with Federal District Court Judge S. Hugh Dillin was published in six weekly newspapers being The Lawrence Topics, The North Side Topics, The Nora Topics, The North West Topics, The North East Topics, and the Carmel Topics, wherein said judge made remarks showing said bias or prejudice.

B. That said extra judicial statement made before commencement of the trial on the merits of the above-entitled cause clearly shows the prejudgment of said judge in said cause.

3. That said judge should proceed no further as judge in this cause, and that another judge be assigned to hear such proceeding.

4. That attached hereto and made a part hereof is an Affidavit, with supporting exhibits, by Theodore L. Sendak, as Attorney General of the State of Indiana, and also attached hereto and made a part hereof is a supporting Memorandum.

5. That said Motion, Affidavit, and Memorandum are timely in that they were filed with all due diligence after learning of the publication of said remarks in the aforementioned weekly newspaper.

Wherefore, for all the above and foregoing, the added defendant, Theodore L. Sendak, as Attorney General of the State of Indiana, respectfully prays this Court grant his "Motion to Rescue," that the Honorable S. Hugh Dillin, judge in the above entitled cause proceed no further therein, that another judge be assigned to hear such cause, and for all other just and proper relief in the premises.

Respectfully submitted,

THEODORE L. SENDAK,
Attorney General of Indiana.
/s/ DONALD P. BOGARD,
Deputy Attorney General.

OFFICE OF INDIANA ATTORNEY GENERAL,
219 State House,
Indianapolis, Indiana 46204.
(317) 633-6240.

APPENDIX B

In The United States District Court for the
Southern District of Indiana, Indianapolis Division

Civ. No. IP–68–C–225

UNITED STATES OF AMERICA, PLAINTIFF,

DONNY BRURELL BUCKLEY, ET AL., INTERVENING PLAINTIFFS,

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., DEFENDANTS

AFFIDAVIT

Theodore L. Sendak, being first duly sworn, upon his oath deposes and says:

1. That he is the Attorney General of Indiana, and an added defendant in the above-entitled cause.

2. That to the best of his knowledge and belief, on or about December 27, 1972, the Honorable S. Hugh Dillin, issued public remarks in which there is a prejudgment on the liability of the added defendants.

3. That said remarks were published in an interview for six weekly newspapers, being The Lawrence Topics, The Nora Topics, The North Side Topics, The North East Topics, The North West Topics and The

Carmel Topics, which are all published and distributed in the Indianapolis Metropolitan area.

4. That the prejudgment on the liability of the added defendants was an extra judicial opinion not based on direct evidence heard in court, in that no court proceeding which involves the added defendants as parties has in fact occurred.

5. That the prejudgment on the liability of the added defendants shows that the Judge has formed an opinion and has arrived at factual conclusions not based on any evidence presented, in that no court proceeding has in fact occurred which involves the added defendants as parties.

6. That the Judge stated in his public remarks that the racial imbalance in the Indianapolis Public School system exists because of housing patterns in the city area, which is an alleged fact yet to be litigated in this case.

7. That the articles, published in the six aforementioned weekly newspapers in which these public statements showing a prejudgment on the liability of the added defendants, are attached to this affidavit as Exhibit A through and including Exhibit F.

8. That a Memorandum in support is attached hereto and made a part hereof.

Further affiant sayeth not.

THEODORE L. SENDAK,
Attorney General of Indiana.
OFFICE OF INDIANA ATTORNEY GENERAL,
Room 219, State House,
Indianapolis, Indiana 46204
(317)633–5512

STATE OF INDIANA,
County of Marion, ss:

Subscribed and sworn to before me, a notary public in and for said County and State, this 10th day of January, 1973.

PHYLLIS ANN MCTAISNEY,
Notary Public.

My Commission expires: September 11, 1974.

CERTIFICATE OF COUNSEL OF RECORD

I hereby certify that I am counsel of record for Theodore L. Sendak, Attorney General of Indiana, added-defendant in the above entitled cause, and that the above Affidavit is made in good faith.

THEODORE L. SENDAK,
Attorney General of Indiana.
DONALD P. BOGARD,
Deputy Attorney General.
219 State House,
Indianapolis, Indiana 46204.
(317) 633–6240

U.S. GOVERNMENT PRINTING OFFICE: 1973