IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHNSON	v. JACKSON PARISH SCHOOL BOARD	No. 23,173
BANKS	v. CLAIBORNE PARISH SCHOOL BOARD	No. 23,192
UNITED STATES	v. CADDO PARISH SCHOOL BOARD	No. 23,274
UNITED STATES	v. FAIRFIELD BOARD OF EDUCATION	No. 23,331
BROWN	v. BOARD OF EDUCATION OF THE CITY OF BESSEMER	No. 23,335
UNITED STATES	v. JEFFERSON COUNTY BOARD OF EDUCATION	No. 23,345
UNITED STATES	v. BOSSIER PARISH SCHOOL BOARD	No. 23,365
APPELLANTS	APPELLEES	

SUPPLEMENTAL MEMORANDUM
OF THE UNITED STATES

JOHN DOAR,
Assistant Attorney General

DAVID NORMAN,
ELIHU LEIFER,
JOEL FINKELSTEIN,
Attorneys,
Department of Justice,
Washington, D. C. 20530

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHNSON v. JACKSON PARISH SCHOOL BOARD	No. 23,173
BANKS v. CLAIBORNE PARISH SCHOOL BOARD	No. 23,192
UNITED STATES v. CADDO PARISH SCHOOL BOARD	No. 23,274
UNITED STATES v. FAIRFIELD BOARD OF EDUCATION	No. 23,331
BROWN v. BOARD OF EDUCATION OF THE CITY OF BESSEMER	No. 23,335
UNITED STATES v. JEFFERSON COUNTY BOARD OF EDUCATION	No. 23,345
UNITED STATES v. BOSSIER PARISH SCHOOL BOARD	No. 23,365
APPELLANTS APPELLEES	

SUPPLEMENTAL MEMORANDUM
OF THE UNITED STATES

The United States submits this memorandum pursuant to the request of the Court made during oral argument of these cases.

1. During oral argument the question was raised whether the proposed decree submitted by the United States allows for special assignment of students to special classes or schools for gifted or handicapped children. In order to clarify that point, we offer the following modification: insert after subsection (n) of Section II an additional subsection (o) as follows:

> (o) If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded or gifted children,

> the defendants may assign children to such schools or classes on a basis related to the function of the school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

2. During oral argument the question was raised whether the proposed decree submitted by the United States covers assignment of children entering kindergarten in school systems which offer kindergarten classes. As to this point, we offer the following modification: amend Section I by inserting after "grades _____" and any kindergarten grades. Section I would then read:

> Commencing with the 1966-67 school year, grades _____ and any kindergarten grades shall be desegregated and pupils assigned to schools in those grades without regard to race or color in accordance with the provisions of this decree. Commencing with the 1967-68 school year, all grades will be desegregated.

3. During oral argument the question was raised whether Section II, subsection (n) entitled "Official not to Influence Choice" of the proposed decree submitted by the United States prohibits bona fide professional guidance and counseling designed to assist students in choosing a school or selecting courses of study. In order to clarify this point, we offer the following modification: insert after the first sentence ending "a choice made." in subsection (n) of Section II the following sentence:

> If the defendant school board employs professional guidance counselors, such persons may give guidance and counseling to individual students based on the student's particular academic and vocational needs. Such guidance and counseling shall be available to all students without regard to race or color.

4. During oral argument the feasibility of requiring local boards to distribute by first class mail an explanatory letter and choice form to the parent or other adult person acting as parent of each student was questioned on the ground that such a requirement would impose on the boards an unreasonable and excessive expense. In light of the constitutional obligation which rests on school authorities to desegregate the schools, we believe that the boards should provide notice of a type that will, without question, bring home to all students their rights under the plan. Under some circumstances, conspicuous publication might suffice. But where the boards have consciously chosen to desegregate under a plan which depends for its success on the adequacy of the notice sent to the students and their parents, it is reasonable to require personal notice, which unlike newspaper publication, does not depend on the whereabouts and habits of intended recipients. We think notice which is personally delivered either to the student at his school or his parent is sufficient. In view of this, we offer the following modification to our proposed decree: delete subsection (f) of

Section II entitled "Mailing of Explanatory Letters and Choice Forms." and insert the following:

> (f) Personal Notice. On the first day of the choice period the defendant school board shall distribute an explanatory letter and a choice form to all students who will be entering a desegregated grade in the following year. The defendant school board shall make the distribution of the letter and form either by distributing such letter and form to each student at the school with instructions to transmit to his parent or other adult person acting as his parent or by mail to each student's parent or other adult person acting as the student's parent. The text for the explanatory letter and choice form shall conform as nearly as possible to the sample letter and choice form appended to this decree (Appendices A and B).

5. During oral argument, counsel for the United States cited Skidmore v. Swift & Co., 323 U.S. 134 (1944) in further support of our position that it is proper for the Court to give great weight to the policy statements issued by the Department of Health, Education and Welfare. In accordance with the suggestion of the Court, we include a brief discussion of that case.

In Skidmore v. Swift & Co., 323 U.S. 134 (1944), an action had been commenced in a federal district court by employees of Swift & Co. to recover wages at the overtime rates prescribed by the Fair Labor Standards Act (52 Stat. 1060, et seq.) for certain services which they had performed. At issue was whether these services constituted "employment" within the meaning of section 7(a) of

that Act. The district court and this Court, on appeal, decided this issue against the plaintiffs. The Supreme Court reversed. After acknowledging (323 U.S. at 137) that the statute had granted no rule-making power to the Wage and Hour Administrator with respect to the issue at hand ("[i]nstead, it put this responsibility on the courts"), the Court referred to an "interpretative Bulletin" which had been issued by the Administrator, and which contained his interpretation of the statutory phrase in question.[1/] The Supreme Court stated (323 U.S. at 139-140):

> There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of

---

1/ Interpretative Bulletin No. 13 (1939), Wage and Hour Division, Department of Labor.

> official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.
>
> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Finding that the lower courts had misunderstood their function vis-a-vis the Interpretative Bulletin, the Court remanded the case for a decision based upon proper evaluation of the position taken therein. See also, United States v. American Trucking Association, 310 U.S. 534, 549 (1940); Goldberg v. Servas, 294 F. 2d 841, 847 (C.A. 1, 1961).

We submit, as we did during oral argument, that the principles announced by the Court in Skidmore

apply to the policy statements issued by the Department of Health, Education and Welfare and that this Court should draw upon the guidelines published by HEW in formulating relief in these cases. Indeed, for the reasons set forth in our briefs in these cases and the considerations expressed in Skidmore and this Court's decisions in second Singleton and Price, we urge the Court to adopt the proposed decree which we set forth in the appendix to our briefs with the modifications suggested above.

Respectfully submitted,

JOHN DOAR
Assistant Attorney General.

DAVID NORMAN,
ELIHU LEIFER,
JOEL FINKELSTEIN,
Attorneys,
Department of Justice,
Washington, D. C.

Certificate of Service

I hereby certify that a copy of the foregoing Supplemental Memorandum of the United States has been served by official United States mail in accordance with the rules of this Court to each of the attorneys in the cases to which the foregoing memorandum applies addressed as follows:

Hon. Fred L. Jackson
District Attorney,
2nd Judicial District
Homer, Louisiana

Hon. Hal R. Henderson
Assistant District Attorney,
2nd Judicial District
Homer, Louisiana

William H. Baker, Esq.
Holloway and Baker
Jonesboro, Louisiana

Harris David, Esq.
932 Royal Street
New Orleans, Louisiana

Alvin Bronstein, Esq.
603 North Farish Street
Jackson, Mississippi

Mils Douglas, Esq.
Collins, Douglas and Elie
211 Dryads Street
New Orleans, Louisiana

Hon. Jack P. F. Gremillion
Attorney General
State Capitol Building
Baton Rouge, Louisiana

Hon. Harry Kron, Jr.
Assistant Attorney General
State Capitol Building
Baton Rouge, Louisiana

Haskell A. Kassler, Esq.
One State Street
Boston, Massachusetts

Carl Rachlin, Esq.
38 Park Row
New York, New York

J. Bennett Johnston, Jr., Esq.
930 Giddins-Lane Building
Shreveport, Louisiana 71101

Hon. Louis H. Padgett, Jr.,
District Attorney for the
26th Judicial District
Bossier Bank Bldg.,
Bossier City, Louisiana

William P. Schuler, Esq.
Assistant Attorney General
State of Louisiana
State Capitol Building
Baton Rouge, Louisiana

Hon. John A. Richardson
District Attorney
First Judicial District
Caddo Parish Courthouse
Shreveport, Louisiana

Mr. Demetrius C. Newton
408 North 17th Street
Birmingham, Alabama

Mr. Orzell Billingsley, Jr.
1630 - 4th Avenue, North
Birmingham, Alabama

Mr. Norman C. Amaker
Mr. Jack Greenberg
Legal Defense
NAACP
10 Columbus Circle
New York City, New York

Mr. Maurice F. Bishop
Bishop & Carlton
325-29 Frank Nelson Building
Birmingham, Alabama

Mr. Oscar Adams
1630 Fourth Avenue, North
Birmingham, Alabama

Mr. David H. Hood
2001 Carolina Avenue
Bessemer, Alabama

Mr. J. Howard McEniry
McEniry, McEniry & McEniry
1721 - 4th Avenue, North
Bessemer, Alabama

Mr. Reid B. Barnes
Lange, Simpson, Robinson
and Somerville
317 North 20th Street
Birmingham, Alabama

Dated: June 3, 1966

JOEL FINKELSTEIN,
Attorney,
Department of Justice
Washington, D. C. 20530