





1 THE COURT: (Judge Wisdom)

2 Very well.

3 We have, and we don't usually allow amicus  
4 curiae to argue unless we have given permission to argue.

5 Mr. Levbarg --

6 MR. LEVBARG:

7 I was told that I had permission to argue, and  
8 I only need about five minutes.

9 THE COURT: (Judge Simpson )

10 And we have another, Mr. Alschuler.

11 THE COURT: (Judge Wisdom)

12 Is he here?

13 MR. LEVBARG:

14 He is not here.

15 THE COURT: (Judge Wisdom)

16 He submitted a brief, and he was not given  
17 permission to argue.

18 Do we have any intervention in this case?

19 MISS DREW:

20 Intervenors request half an hour. \*

21 MR. SERNA:

22 Mexican-American intervenors --

23 THE COURT: (Judge Wisdom)

24 We don't usually allow intervenors that much  
25 time, but perhaps you can confine it, and you might find

1 that you don't need thirty minutes, if part of your argu-  
2 ment would be repetitious, or if you would repeat some of  
3 the arguments of the previous counsel.

4 We will give you permission to argue and ask you  
5 to try to hold it down to less than thirty minutes.

6 This is an important case and we don't want to  
7 cut anybody off.

8 Mr. Norman, I believe that you will lead off.

9 MR. NORMAN:

10 May it please the Court, and I'm honored to ap-  
11 pear once again before this distinguished Court, represent-  
12 ing the United States in a case which presents, we think,  
13 difficult and novel issues.

14 There are two rather distinct issues in our view;  
15 first is whether the District Court erred in finding that  
16 we had not proved any discrimination in any manner against  
17 Mexican-American students in Austin; and, second, whether  
18 the District Court erred in approving the Austin School  
19 Board plan for desegregation.

20 Since those two questions are fairly distinct,  
21 I would beg leave of the Court to ask Mr. Landsberg at this  
22 time to address himself to the question of discrimination.

23 THE COURT: (Judge Wisdom)

24 Very well, Mr. Landsberg.

25 MR. LANDSBERG:

1 May it please the Court:

2 THE COURT: (Judge Wisdom)

3 Are you going to deal with the question of  
4 discrimination against Mexican- Americans?

5 MR. LANDSBERG:

6 Yes, your Honor, and I think that the question  
7 in this case on that issue boils down to whether the  
8 District Court applied a proper standard in deciding  
9 whether Mexican-American segregation was the result of  
10 official discrimination.

11 The standard that was applied by the District  
12 Court is not clear. We think that the Court may have been  
13 referring to and requiring proof of an overt policy of  
14 discrimination against Mexican-Americans.

15 We think that the proper standard is to require  
16 proof that the school district knowingly assigned students  
17 in a manner which the school system could foresee would  
18 segregate the children. It chose construction sites, and  
19 drew zone lines in such a manner that the natural and  
20 foreseeable consequence was segregation, in spite of the  
21 fact that the selection of other sites would have produced  
22 a desegregated school.

23 The District Court's most explicit statement of  
24 the standard that it was applying is found on page three of  
25 its opinion of June 20th, and the court states that to

1 Mexican-Americans, but to black students.

2 The Court says, "...the Government has made no  
3 showing that in the period from 1955 to the present the  
4 AISD has intentionally perpetuated segregation of blacks.  
5 The record instead indicates that during this period the  
6 school administration's official acts have not been moti-  
7 vated by any discriminatory purposes."

8 That finding was made in spite of the fact that  
9 after 1955 the defendants opened four schools not only with  
10 all black student body, but also with all black faculties  
11 assigned to them.

12 One of those schools, the St. John School was  
13 built in an area which on all four sides was almost entire-  
14 ly white, Anglo.

15 When that new St. John School opened in 1958,  
16 the Board drew its zone line for the school. It was a  
17 square. The zone line of the adjoining school was in the  
18 form of a closed fist with a thumb sticking up next to the  
19 St. John zone. That thumb was an Anglo residential area.

20 With respect to the Mexican-Americans the Court  
21 is not so explicit in requiring a showing of purposefully  
22 harming children on account of race.

23 THE COURT: (Judge Coleman)

24 Is it your contention that the Latin Americans or  
25 Mexican-American citizens are of a different race so the

1 white race?

2 MR. LANDSBERG:

3 Your Honor, they are of a different ethnic back-  
4 ground, and the District Court held that they were a  
5 separate, identifiable group, minority group, in Austin,  
6 based not only on prior Court decisions of this Court, and  
7 the Supreme Court, but based also on the evidence that  
8 Mexicans had been considered by the community and by the  
9 school system as constituting a separate minority group.

10 THE COURT: (Judge Coleman)

11 What I'm getting at is not what somebody con-  
12 siders, but what the actual fact and the constitution re-  
13 quires. It seems to me, to come right down to the point,  
14 that Mexican-American people are certainly not black. It  
15 seems that they have always been considered to be white  
16 people, and as far as I know that is the correct considera-  
17 tion.

18 Now, are we going to set up a new standard by  
19 which we do not go on race, but we go on ethnic background?

20 THE COURT: (Judge Wisdom)

21 You had that in, of course, Hernandez against  
22 Texas, which answers that question.

23 MR. LANDSBERG:

24 I don't believe it is a new standard.

25 THE COURT: (Judge Wisdom)

1 That was in 1954.

2 THE COURT: (Judge Coleman)

3 I'm trying to get from your argument -- well,  
4 I didn't hear your answer.

5 MR. LANDSBERG:

6 I don't believe it is a new standard, and I be-  
7 lieve, as Judge Wisdom says, that in the Hernandez case,  
8 on the record in the Hernandez case the Supreme Court  
9 recognized that if you have an all white jury, which is an  
10 all Anglo jury that there may have been discrimination  
11 against Mexican-Americans as an ethnic group.

12 THE COURT: (Judge Coleman)

13 You think that trying people in Court for a  
14 criminal offense is the same as educating them in the  
15 schoolhouse?

16 MR. LANDSBERG:

17 I think that the analysis of whether the Mexican-  
18 Americans constitute a separate group would be the same  
19 for both purposes, where in both cases we're talking about  
20 the application of the equal protection clause. That  
21 clause does not specifically mention race. I might also  
22 point out that the Civil Rights Act refers not only to  
23 race, but also to national origin.

24 THE COURT: (Judge Coleman)

25 Mr. Landsberg, and you are saying to this



1 race alone is not it, and your position is that various  
2 and sundry ethnic groups may be considered in the context  
3 of this problem. For example, Polish people could be con-  
4 sidered separate and apart from the Irish, and so forth.

5 MR. LANDSBERG:

6 If the record were to substantiate the distinction,  
7 yes.

8 THE COURT: (Judge Wisdom)

9 That brings up this question: In addition to  
10 the Hernandez against Texas and other cases recognizing  
11 Mexican-Americans as a separate ethnic group which may be  
12 discriminated against as a group, what does the record  
13 show with respect to discrimination in Austin?

14 MR. LANDSBERG:

15 Discrimination apart from the school system?

16 THE COURT: (Judge Wisdom)

17 No, in the school system.

18 MR. LANDSBERG:

19 Against Mexican-Americans?

20 THE COURT: (Judge Wisdom)

21 Within the school system, yes.

22 MR. LANDSBERG:

23 Well, I wanted to address that by discussing  
24 the standards that the Court applied in analyzing the  
25 evidence on that.

1 THE COURT: (Judge Wisdom)

2 That is all right.

3 MR. LANDSBERG:

4 And the Court makes findings on pages two and  
5 three which are very general in nature, and in footnote  
6 eleven and twelve, in essence, the finding that the Austin  
7 Independent School District has never adopted, published  
8 or promulgated any written or unwritten rules, regulations  
9 or policies having as the purpose to discriminate against  
10 or segregate or the isolation of Mexican-Americans. And  
11 that the Austin Independent School District has never  
12 discriminated against, or attempted to discriminate against,  
13 isolate, or segregate Mexican-Americans in any form whatso-  
14 ever.

15 And then the Court says, particularly in an  
16 analysis of various aspects of school operation, such as  
17 site locations, school construction, and that finding was  
18 made in spite of another finding that at least two Mexican-  
19 American schools had dual overlapping zones with Anglo  
20 schools, predominantly Anglo schools, and that those schools  
21 were referred to as Mexican-American schools, and that  
22 they were always Mexican-American schools.

23 The testimony, to which the Court makes one  
24 passing reference, reflects that Mexican-Americans were  
25 usually assigned to the Mexican school. This is

1 during the period before 1955. They were expected to go  
2 to the Zavala School, if they lived in the Zavala-Metz  
3 area. They were expected to go to the West School if they  
4 lived in that area.

5 Those facts reflect the case of dualism, similar  
6 to the kind of dualism that existed prior to Brown with  
7 respect to black schools, the only distinction being that  
8 Mexican-Americans were in some instances allowed to attend  
9 the predominantly Anglo schools.

10 But I think that the only possible explanation  
11 for the Court to find that this dualism was not discrimina-  
12 tory, again, the Court was requiring some kind of intent  
13 to harm Mexican-Americans.

14 THE COURT: (Judge Coleman)

15 I beg your pardon?

16 MR. LANDSBERG:

17 I think that the only possible explanation for  
18 the Court to hold that the existence of dual overlapping  
19 zones between Mexican-Americans and Anglo schools, the Court  
20 found that was not discriminatory, and I think that must  
21 have been based on the premise that in order to have dis-  
22 crimination there should be some intent to harm the  
23 children.

24 THE COURT: (Judge Simpson)

25 Mr. Landsberg, do I correctly understand the

1 Government's position to be that only in certain areas  
2 was there discrimination against Mexican-Americans, and  
3 that there should be then a sort of a patchwork treatment  
4 there rather than across-the-board treatment? Is that a  
5 fair summation? And that you don't do it all over?

6 MR. LANDSBERG:

7 I think our position is that in an equity case,  
8 that it is a traditional principle that the relief should  
9 be related to the wrong that is proved.

10 THE COURT: (Judge Simpson)

11 It comes down to something similar to what I  
12 have stated, doesn't it? As opposed to the position of  
13 the intervenors, for instance, who say mix it all over?

14 MR. LANDSBERG:

15 In this case, and I did not bring the map forward--

16 THE COURT: (Judge Wisdom)

17 I think it might be well if you would have that  
18 map.

19 Mr. Walden, will you give him some assistance,  
20 please, because you may want to move that over.

21 MR. LANDSBERG:

22 While that is being done, I might refer the Court  
23 to the appendices to our brief, and the areas of minority  
24 groups concentrations are shown in Appendix C.

And the secondary areas are shown in prior.

1 appendices.

2 The map that has been brought forward here shows  
3 the elementary school zones as they existed during the  
4 1970-71 school year.

5 And if I may leave the microphone, this is the  
6 Colorado River (indicating) and this is the Interregional  
7 Highway, and this area below the airport is generally re-  
8 ferred to as East Austin.

9 Now, this is below the river (indicating), Now,  
10 this is a school which is predominantly Mexican-American,  
11 and it does have some Anglo population in it. We found,  
12 and we presented no evidence reflecting any discrimination  
13 with respect to the location or the zone lines or the  
14 student assignments for that school.

15 And that is an example of the kind of distinction  
16 that we are drawing.

17 Now, I think that I'm cutting into Mr. Norman's  
18 time --

19 THE COURT: (Judge Wisdom)

20 If you feel that you have completed your presenta-  
21 tion, all right.

22 MR. LANDSBERG:

23 I would like to make one more mention, and that  
24 is that the District Court, which appears to be concerned  
25 of schools, alluded to testimony that the school district

1 followed a policy of racial neutrality in locating facili-  
2 ties.

3 Again, my point is that traditionally in this  
4 kind of case the Court would go beyond, would go behind  
5 that kind of testimony and look to see whether in selecting  
6 site locations the school district, in fact, did.

7 I think that the documentary evidence which is  
8 presented in our brief shows that it did not.

9 THE COURT: (Judge Wisdom)

10 Very well.

11 THE COURT: (Judge Simpson)

12 This finding that they followed a policy of  
13 racial neutrality, you said is what?

14 MR. LANDSBERG:

15 Based simply on the testimony of school officials  
16 and not on documentary evidence, which the Government  
17 proved. In fact, there are criteria which are in the  
18 record which are not cited in our briefs, and they are cited  
19 in the school board's briefs, on pages 11 through 13. And  
20 the briefs quote from some of the criteria that were  
21 allegedly followed by the school district, and we think that  
22 the proof in the case shows that with respect to the location  
23 of the Johnson School in particular those criteria were not  
24 followed. I think that where the school system deviated  
25 from its own criteria with the effect of racial segregation,

1 that establishes a prima facie case.

2 Thank you.

3 THE COURT: (Judge Wisdom)

4 Mr. Norman.

5 MR. NORMAN:

6 If I may first summarize the discrimination  
7 aspect of it, your Honor. We did not prove system-wide  
8 discrimination against Mexican-American students; we do  
9 feel, however, that we did prove incidents of discrimination.  
10 Yet, the District Court found that in the face of that,  
11 there was none.

12 That moves me then to the question of relief.

13 We think that the District Court's approval of  
14 the school board's plan was in error in two basic respects.  
15 First, the school board plan basically is a very innovative  
16 plan for inter-cultural educational experience between and  
17 among the three ethnic groups, if I may call them that. And,  
18 in the elementary schools.

19 However, the plan does not deal with the five  
20 traditionally black-fed elementary schools that got to be  
21 that way under the traditional dualism.

22 And we think that what is essentially part-time  
23 desegregation of those black students does not come to grips  
24 with the problem of conversion from a dual to a unitary  
system as to the black elementary students. Essentially,

1 those black elementary students, those five black elementary  
2 schools spend seventy-five per cent, at least, of their  
3 educational time in schools that were constructed for them  
4 under a traditionally dual system.

5 We just don't think twenty-five per cent de-  
6 segregation converts them.

7 Secondly, as to the Mexican-Americans, we think,  
8 in the light of, and I must say that we had, HEW had drawn  
9 a plan to the Board before any discovery was made, before  
10 any trial on the merits was held; the fact is that we did  
11 not prove system-wide discrimination against Mexican-  
12 Americans, although the HEW plan was based on the assumption  
13 that we would.

14 On the other hand, the school board assumed in  
15 its plan, I think, that it had no real obligation to de-  
16 segregate the Mexican-American schools, and, indeed, the  
17 District Court agreed with them.

18 Thus, although laudedly the Austin School Board  
19 is undertaking an inter-cultural educational experience in  
20 or for Mexican-Americans in elementary schools, the plan  
21 doesn't contemplate doing anything with the Mexican-  
22 American secondary schools -- two Junior High Schools and  
23 a Senior High School. And we think that our proof probably  
would warrant some relief as to these secondary schools.

What we recommend to the Court, therefore, is



1 that the case be reversed and remanded to the District  
2 Court, first pointing out the proper standard that we are  
3 required to meet to prove a case of discrimination, which  
4 Mr. Landsberg addressed.

5 And, secondly, for the development of such new  
6 plans as may be required to meet the problem of the five  
7 all black elementary schools, to meet the problem of the  
8 Mexican-American high schools if the proof warrants.

9 That is precisely and succinctly our position .

10 THE COURT: (Judge Wisdom)

11 You have not so far adverted in your argument,  
12 either you or Mr. Landsberg, to the technique that was ap-  
13 proved in Swann, and which is a major issue in school de-  
14 segregation, and that is relief through busing.

15 This is certainly made the issue in this case.

16 MR. NORMAN:

17 I don't know if it is an issue in this case,  
18 your Honor.

19 I think in the inter-cultural educational ex-  
20 perience that the students are getting, or, at least, should  
21 be getting under the plan that has been approved by the  
22 Court, there would necessarily be busing. It is the School  
23 Board's plan.

24 THE COURT: (Judge Wisdom)

There would have to be some busing, but there is

1 quite a difference between busing as that which would be  
2 required by the Court's plan, or the Board's plan, and the  
3 busing that would be required by HEW's plan, or perhaps  
4 even by the Government's plan.

5 MR. NORMAN:

6 Well, this is quite right.

7 The HEW plan was based on the assumption that all  
8 of the schools, including all of the Mexican-American  
9 schools would have to be integrated, and the HEW plan, as  
10 I recall, is based on the assumption that the schools  
11 ought to be more than fifty-one per cent Anglo. Which, I  
12 don't think is a necessary assumption under the Swann case.

13 Certainly, that would require massive busing,  
14 and I think a lot of busing may be necessary under a plan  
15 which is geared to relief of the violation.

16 THE COURT: (Judge Wisdom)

17 The Government's position really is that the  
18 problem is more piece-meal than system-wide, is that  
19 correct?

20 MR. NORMAN:

21 Yes, sir.

22 THE COURT: (Judge Wisdom)

23 And that, therefore, the plan has to be tailored  
24 to meet the racial problems arising from the incidence of  
25 piece-meal discrimination.

1 MR. NORMAN:

2 Yes, your Honor, and the reason is that we did  
3 not prove nor is it true that a traditionally dual school  
4 system existed for the Mexican-Americans in Austin prior  
5 to Brown. So we are thrown into a new kind of case in this  
6 Court, the case in which the Court is asked to decide as  
7 well as the District Court, first, where is there discrimina-  
8 tion, if any? And what does it take to remedy it against  
9 Mexican-Americans?

10 We are in the situation in Austin where, and I  
11 believe the Austin School Board has agreed, that they did  
12 have a traditionally dual system for the blacks. They did  
13 not have for the Mexican-Americans.

14 THE COURT: (Judge Wisdom)

15 But when new schools are constructed today,  
16 yesterday, or subsequent to Brown, and the site selection  
17 in effect determines the composition of the school, in  
18 effect you have de jure or more than that, or, in fact,  
19 you have de jure segregation.

20 Would you admit that that is a fair statement?

21 MR. NORMAN:

22 I don't think this follows automatically, Judge  
23 Wisdom. I think, for example, in a city like Austin, which  
24 has fifty-five elementary schools, or, in other words, in  
25 any city where there is a large number of elementary schools,

1 there are many times, numerous times, when it would make  
2 good educational and non-racial, or not-ethnic sense to put  
3 schools where the kids are,

4 I get the feeling from your suggestion, Judge  
5 Wisdom, that, or the consequence of the suggestion would  
6 be that since Brown they could never build a neighborhood  
7 school, and that all elementary schools would have to be  
8 universities, essentially.

9 THE COURT: (Judge Wisdom)

10 No, I don't say that. I think, though, that  
11 proper site selection should, in the interest of avoiding  
12 say an all black or all Anglo or all Mexican-American student  
13 body, should be so that the location of the school, we will  
14 say on the periphery of a neighborhood might be in the  
15 higher interest of desegregation.

16 MR. NORMAN:

17 But, under certain circumstances, the School  
18 Board ought to seek where possible, to promote desegregation  
19 in site location, I think that that is a well accepted  
20 principle.

21 I don't think that precludes the building of  
22 neighborhood elementary schools that may end up to be all  
23 or virtually all one race.

24 THE COURT: (Judge Coleman)

25 Mr. Norman, I will have to ask you, please, to

1 since you suggest, of course, that the case has to be  
2 remanded as to everything, and has to go back not because  
3 there has been general discrimination, but because you said  
4 there has been incidents of discrimination, but wouldn't  
5 that mean that there would only be a partial remand?  
6 Wouldn't we direct the attention of the Court to those in-  
7 stances in which we think discrimination was proved, and  
8 tell him to do something about it? Or do you take your  
9 whole school system, because there are a few defects, and  
10 throw the whole thing back into the vortex?

11 MR. NORMAN:

12 Judge Coleman, that is what I think would be  
13 avoided by a remand with a reopening of the record, so  
14 that we might crystalize the discrimination that we find,  
15 and the District Judge hopefully applying a less stringent  
16 standard of proof of discrimination after remand, we could  
17 then determine what kind of relief would remedy that dis-  
18 crimination.

19 I am not interested in a dragnet. \*

20 THE COURT: (Judge Coleman)

21 You are sort of suggesting, aren't you, that we  
22 just grant a new trial on the idea that maybe other things  
23 could be developed?

24 MR. NORMAN:

25 The alternative really is this, I think, Judge

1 Coleman, for us to spend the day here, or another day here,  
2 going through very carefully this record, and for you  
3 Judges to determine independently of the District Judge,  
4 any --

5 THE COURT: (Judge Simpson)

6 And for us to become the fact finders?

7 MR. NORMAN:

8 Well, that is the alternative. I don't think it  
9 is feasible for you to determine here independently what  
10 you think the discrimination is. I don't think it has to  
11 be done.

12 I just think that the District Judge was proceed-  
13 ing under too stringent a burden of proof on the Government,  
14 and he said that the Government, standing on that stringent  
15 burden of proof, that there wasn't any discrimination  
16 against Mexican-Americans. And we think there was.

17 THE COURT: (Judge Wisdom)

18 Let me return to the question of busing. Does  
19 the Government take any position on busing here, as to how  
20 much is required?

21 MR. NORMAN:

22 Did we below, or do we now?

23 THE COURT: (Judge Simpson)

24 Or here, either way.

THE COURT: (Judge Simpson)

1 Yes, either way?

2 MR. NORMAN:

3 I don't think that busing -- well, we don't treat  
4 busing in the abstract.

5 THE COURT: (Judge Simpson)

6 Put it in these terms: What is there about  
7 Austin to distinguish it from Charlotte-Mecklenberg, as  
8 approved by the District Court and affirmed by the Supreme  
9 Court? Or Macon-Marion County, Georgia, as approved by  
10 this Court and requiring busing? Or St. Petersburg-  
11 Pinellas, or Orlando, Orange County, Florida, and so on,  
12 and Mobile?

13 What makes Austin different?

14 I have often heard it said that all of these  
15 school cases are different, but I would like to have the  
16 differences pointed out. Other than the intervention that  
17 is present in this thing, what else --

18 MR. NORMAN:

19 The cases you cite dealt with the conversion from  
20 a finding, proved, admittedly traditionally dual system to  
21 a unitary system. I don't think that the approach there  
22 would be comparable where you have not had a dual system.

23 That doesn't speak to the issue of busing, but I  
24 would think that if the Court found nationwide dualism in  
25 Austin, or anywhere else, it would be proper for a district

1 Judge, or, at least, it would not be outside his discretion  
2 to order a far-reaching plan. That is what happened in  
3 Charlotte-Mecklenberg.

4 But that is not this case.

5 THE COURT: (Judge Wisdom)

6 Are you saying that unless there is system-wide  
7 discrimination, there need be no busing?

8 MR. NORMAN:

9 I am saying, and I think you said it, Judge  
10 Wisdom, in Jefferson County decision of December, 1966,  
11 that where there is system-wide discrimination, then system-  
12 wide relief may be required. And I think that is the  
13 recognized principle that I'm trying to point out here.

14 THE COURT: (Judge Wisdom)

15 So then busing is not inconsistent, or more  
16 busing than there is now and that the Court approved, is  
17 not inconsistent with, let us say, partial discrimination,  
18 or the special non-system-wide discrimination?

19 MR. NORMAN:

20 I don't know --

21 THE COURT: (Judge Wisdom)

22 Can you cite to me, and let me pursue this, com-  
23 plete my thought on this, and is it possible here to solve  
24 the problems of discrimination, or non-system-wide dis-



1 MR. NORMAN:

2 Well, I don't have a plan of desegregation before  
3 me or in the record that would tell me what data or what  
4 has to be done, or to what extent, or whether any busing  
5 would be required.

6 But let me get back to that. And I don't know  
7 why you asked the question because our position is in  
8 many school districts it may be necessary to bus students  
9 to and from schools, and that where possible, where the  
10 costs are enormous, where disruption is enormous, if it  
11 were possible, that should be minimized; costs, disruption,  
12 distances, time spent, should be minimized if it could be  
13 done consistently with the Constitution.

14 THE COURT: (Judge Wisdom)

15 We would all agree with that. But we are talking  
16 about Austin now, and the special problem of discrimination  
17 that is not system-wide discrimination.

18 MR. NORMAN:

19 That is correct, and we have not designed any  
20 plan, nor has the School Board in our judgment, that deals  
21 with something less than system-wide discrimination.

22 The HEW plan was designed before discovery of  
23 the main case, and it was drawn on the assumption that there  
24 was system-wide discrimination, and traditional dualism  
25 against Mexican-Americans. That just is not so.

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THE COURT: (Judge Wisdom)

Mr. Norman, we have given you ten more minutes than your time, but we will allow you time for rebuttal, of course.

Judge Coleman, any further questions?

THE COURT: (Judge Coleman)

I have one question that goes to the record. The group of Mexican-Americans, perhaps the same ones that later entered or tried to intervene during the trial level, the District Judge denied that?

That is correct, isn't it?

MR. NORMAN:

I think that is correct.

THE COURT: (Judge Wisdom)

Now, what was the Government's position with respect to permitting those Mexican-American parents to intervene?

MR. NORMAN:

We did not object.

THE COURT: (Judge Wisdom)

You did not object?

MR. NORMAN:

We did not.

THE COURT: (Judge Simpson)

The Judge did not on his own motion.

1 MR. NORMAN:

2 The Judge made that decision independently of  
3 our position.

4 THE COURT: (Judge Wisdom)

5 That is what I wanted to know.

6 MR. NORMAN:

7 We did not object.

8 THE COURT: (Judge Wisdom)

9 You didn't take the position that you sufficient-  
10 ly represented them, and that this would just clutter  
11 things up by letting them in there? And that is, more or  
12 less, what the Judge told to you?

13 MR. NORMAN:

14 We did not.

15 THE COURT: (Judge Simpson)

16 Thank you very much, Mr. Norman.

17 THE COURT: (Judge Wisdom)

18 Mr. Thomas.

19 MR. THOMAS:

20 I hope that I can clarify and answer some of the  
21 questions that you have asked as to the representation of  
22 the Austin School Board.

23 First, let me say that the Mexican-American  
24 discrimination question is not the child of Brown vs. Board  
25 of Education. This issue reaches out beyond the late

1 forties, and in '48, '49, and in the fifties, where it  
2 was dealt with effectively by our local District Judges,  
3 Judge Ben Rice, and Judge James V. Alfred.

4 Judge Allred was at that time Judge for the  
5 Southern District of Texas. The State of Texas has long  
6 been aware that by the operation of its school system, that  
7 it could effectively discriminate against the Mexican-  
8 Americans in violation of Mexican-Americans' constitutional  
9 rights.

10 As a result of this decision, there was great  
11 scrutiny by the school system in Texas. There was a great  
12 deal of academic or scholarly interest in our schools as  
13 to how we were handling the Mexican-American problem. Were  
14 we doing our best to educate those children in a non-  
15 discriminatory fashion?

16 Fortunately for Austin, I believe, a great number  
17 of candidates for advance degrees at the University of  
18 Texas wrote their theses and their dissertations on the  
19 study of this issue.

20 And in each instance, Dr. Sanchez, who appeared  
21 already as a witness in this case, was on the degrees  
22 committee. And in depth studies were done. What those  
23 studies which are in evidence clearly indicated by expressed  
24 words is that throughout the years there has been dis-  
25 crimination against the Mexican-American in some portions

1 of Texas.

2 But, in each instance, Austin was pointed to with  
3 pride as being a school system which had sincerely and  
4 honestly strove to offer the best possible education to  
5 meet the special needs of those children.

6 It is clearly developed that the Mexican-American  
7 in Austin was a displaced person. He had originally been  
8 along the Rio Grande River. He had been displaced by the  
9 intrusion of wetback labor, by Brazeros, and he came to  
10 Austin with agricultural skills. And Austin is not a great  
11 agricultural community.

12 So, when he arrived there he found that his main  
13 means of livelihood was to follow the migratory labor  
14 pattern, which is still a problem but far less a problem  
15 for these people than it was before.

16 I would say that up until World War II, and the  
17 records so indicate, the Mexican-American was primarily an  
18 agricultural worker. And, if you lived in Austin, there  
19 was no place for him to ply his talents on a regular basis.  
20 And, the normal pattern of those children was to be taken  
21 out of a school in early April, mid-April at the latest,  
22 and to follow the harvest over the nation, and to return to  
23 the school system around the 15th of November, reaching its  
24 highest peak sometime in February. That is when the highest  
25 peak of Mexican-American enrollment, traditionally, prior to

1 World War II, was found in the Austin school system.

2 Now, this generated two problems. It was not a  
3 problem of the child; it was a problem of the child's  
4 opportunity. He was permitted to attend school half a day --  
5 not half a day, but half a session. He had no real op-  
6 portunity to keep up with the more advantaged children who  
7 attended school on a full time basis.

8 So, the natural and normal, inescapable result of  
9 that was simply that they did not reach grade level, that  
10 you had children twelve, thirteen and fourteen years old  
11 in the first grade, with six and seven year old children.

12 Now, where the only evidence in this record of any  
13 discrimination by the Austin school district are excerpts  
14 from minutes in which there are references to some schools  
15 as being "Mexican schools," and we would readily admit it  
16 at this moment that they were really Mexican schools, that  
17 they were designed to meet the needs, the special needs of  
18 the Mexican-American child, where he would or could go to  
19 get an ordinary type of education, he didn't complete high  
20 school -- he was too far behind. So what we have, and  
21 pointed to, and this is disturbing if you're proud of a  
22 system, what we have was at all times in the total history  
23 of the Austin school district from its beginning in 1890 --  
24 the earliest record we could find -- down to today, never a  
single incident, never a single incident of discrimination

1 child being denied access to any school.

2 And every student, every school in the City of  
3 Austin and all of the students have consistently, through  
4 the years, had a Mexican-American component. So we're  
5 pointed to as being discriminatory because two things oc-  
6 curred:

7 First, we say that in Austin originally, the  
8 good part of Austin, the wealthy part of Austin, the silk  
9 stocking district in Austin -- all the Tenth Ward -- was  
10 once down in the Zavala area that we are talking about  
11 now, and has converted to a largely Mexican-American popula-  
12 tion. In that area we had the Palm School, and we had  
13 Metz, and all of these schools had a substantial Mexican-  
14 American component at all times.

15 Now, on account of the problem of the children  
16 who came late, and who were over age in grade, our school  
17 system decided that there should be a special school to  
18 which voluntary access was accorded. No forcing. Anyone  
19 could go who wanted to go, but schools that would have a  
20 curriculum that would meet the special needs of these  
21 people.

22 So, in our elementary schools -- but first let  
23 me say, or let me call this a satellite -- this is a common,  
24 good word, these were Pearce and Conal, and the other was  
25 Zavala and Metz School, and both of which had Mexican-

1 American students.

2 Now, if we are looking for de jure segregation  
3 that is brought about where the building had the purpose or  
4 the effect of achieving segregation, then we can lay aside  
5 completely the West Avenue School that you see so much of in  
6 this brief, because it was long ago closed, and there is  
7 not a Mexican-American community in that area and has not  
8 been for a number of years. It didn't have the effect of,  
9 or had no effect on residential patterns. When the school  
10 was closed there were no more Mexican-Americans in that  
11 area.

12 Now, over on the other side, in this Zavala  
13 School, and you first had the Comal School, which goes back  
14 for a number of years, and there is no complete record on  
15 it, but the Comal School was closed at the request of the  
16 Mexican-American community, and a new school was built,  
17 the Zavala School, as the Mexican school, and it is so  
18 identified, and I say that it was a Mexican school.

19 THE COURT: (Judge Simpson)

20 How far apart, or what is the distance between  
21 the Comal's former location and where the Zavala was built?

22 MR. THOMAS:

23 It would be in the same school district, a matter  
24 of a few blocks, probably four or five blocks.

25 THE COURT: (Judge Simpson)



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In the same school district?

MR. THOMAS:

In the same school district.

THE COURT: (Judge Simpson)

The same school district, but that is in the Austin school district, the same neighborhood?

MR. THOMAS:

Yes, drawing the same children.

THE COURT: (Judge Wisdom)

But you did have overlapping zones?

MR. THOMAS:

Yes.

THE COURT: (Judge Simpson)

Did I understand that this was a voluntary thing?

MR. THOMAS:

The child had the opportunity to stay at home, to go to school, and if he wanted to go to Metz School, the record shows that in these years there was about a ten per cent of Metz that was Mexican-American, when the Zavala School was built. And in that school, you had a physical education department and --

THE COURT: (Judge Wisdom)

Was the idea of overlapping zones ever attacked?

MR. THOMAS:

Never. Never, we were never subject to any

1 litigation.

2 THE COURT: (Judge Wisdom)

3 I mean in this litigation it was not attacked?

4 MR. THOMAS:

5 Well, it was pointed to as being, yes, being  
6 evidence of discrimination.

7 THE COURT: (Judge Wisdom)

8 This is the point I was making.

9 MR. THOMAS:

10 Yes.

11 There is the argument that is made, simply saying  
12 that we went in there and met the special education needs.  
13 We had physical education structures in that school, where  
14 we had them in no other elementary school. We taught  
15 industrial arts which was not taught in any other. We  
16 taught homemaking in that school, where we didn't have that  
17 in any other school, and we did this in order to meet the  
18 social needs of these Mexican-Americans, these children.

19 As reflected by these records, we put in the first  
20 visiting teacher program. And the visiting teacher pro-  
21 gram was really a social worker, and he was paid the truant  
22 officer's salary, a gentleman from the Truant Office, and  
23 we called him a visiting teacher; and we put a social  
24 worker there to go into their homes, to meet the families  
of these children in their homes, and try to get them to

1 school, and to try to get their parents to participate in  
2 school activities.

3 This is the kind of school system that Austin has  
4 run, and throughout the time we were meeting those special  
5 education needs, and we have continued to try to do it by  
6 the curriculum, bi-lingual programs then, and during the  
7 time we were trying to do this. And in the Austin school  
8 system they had all the athletic and extra-curricula  
9 activities, and not a sign, not a point of any discrimina-  
10 tion against the Mexican-American child.

11 So then, we get on the other part of this Mexican-  
12 American problem, and to say that we have designed some  
13 school locations that had the purpose or the effect of  
14 segregating the Mexican-American, that simply is not con-  
15 sistent with the facts.

16 In 1946, and this is a splendid school system  
17 that we're talking about here today, but in 1946 we hired  
18 a professional engineering firm to make a twenty-year  
19 projection of the educational needs of Austin, to make the  
20 site acquisitions. And that engineer was instructed in the  
21 records that it was the purpose to put the schools where the  
22 children were, and expressly not to influence where the  
23 areas of residential development would turn up in the future.  
24 That is the Mexican-American thing. Maybe we have created  
25 them differently, but we have treated them differently in a

1 loving and in an educationally sound approach to their  
2 problem.

3 THE COURT: (Judge Simpson)

4 May I ask you this: Were the instructions to  
5 this engineering consultant, or the contract with them, or  
6 whatever it was, the supporting documents, put in the  
7 record?

8 MR. THOMAS:

9 Yes, they are. We put them in.

10 And I will say that the schools have been built  
11 where -- there may be one or two exceptions -- but they  
12 were built exactly, and they may not be on the exact loca-  
13 tions, but the zones would be the same, and there would be  
14 some reason, some legitimate reason, such as that we had  
15 two crises in Austin: We had integrated Allen Junior High  
16 School, and it was a perfect example of integration, and  
17 it burned. And the University Junior High was operated as  
18 a fully integrated school, about equal or almost in its  
19 ethnic composition, and the University of Texas simply took  
20 it back and closed that school.

21 THE COURT: (Judge Simpson)

22 It was integrated tri-ethnically, or bi --

23 MR. THOMAS:

24 Tri-ethnically, all three groups represented,

yes, your honor.

1 THE COURT: (Judge Wisdom)

2 And this was post-Brown? This was in the '50s,  
3 wasn't it?

4 MR. THOMAS:

5 That it burned and was closed? Yes.

6 THE COURT: (Judge Wisdom)

7 When you say that it was integrated --

8 MR. THOMAS:

9 Of course, but we had no control, we had no  
10 right, no legal right to have it integrated --

11 THE COURT: (Judge Simpson)

12 You were following the Texas Constitutional Act?

13 MR. THOMAS:

14 Yes.

15 THE COURT: (Judge Wisdom)

16 And then Brown probably struck that down.

17 MR. THOMAS:

18 Actually, and which the record shows in the State,  
19 and in the City of Austin, shows that when Austin brought  
20 out a committee of some sort of professional outside educa-  
21 tors group to come there and study our schools, and to report  
22 to our School Board on the needs of Austin, that equal  
23 emphasis was placed on our black schools. And it will show  
24 that Anderson High, which had been built for the blacks  
25 pre-Brown, was the first air-conditioned school, and a fine

school plant, and that Austin has not been discriminatory  
in the utilization of its resources.

THE COURT: (Judge Coleman)

What is the division in the student population  
ethnically, the percentage?

MR. THOMAS:

About thirty-five Anglo, twenty Mexican, and  
fifteen black.

THE COURT: (Judge Coleman)

So the black population is about or less than  
one-sixth of the total?

MR. THOMAS:

Yes.

THE COURT: (Judge Coleman)

And the Anglo -- I don't much like to use that  
term -- but the Anglo is about sixty-five per cent?

MR. THOMAS:

Yes.

THE COURT: (Judge Coleman)

And the Mexican?

MR. THOMAS:

About ten and a half to twenty per cent.

THE COURT: (Judge Coleman)

Does that include the children who have to go with

1 their parents off to Florida to pick oranges, or to  
2 California to pick grapes?

3 MR. THOMAS:

4 This has changed.

5 THE COURT: (Judge Simpson)

6 That was pre-World War II.

7 THE COURT: (Judge Coleman)

8 Tell us about what has happened since the war.

9 MR. THOMAS:

10 In the first place, the boys went off in the  
11 service and acquired skills in the service. They were a  
12 second generation Mexican-American, and they could com-  
13 municate better, and they were better off culturally in  
14 the community.

15 Number 2: Those of them that stayed at home and  
16 who had no skills when the war started, and no employment  
17 opportunity, found that there was a shortage of labor dur-  
18 ing the war, and that they had the opportunity to acquire  
19 skills so as to acquire employment.

20 So now we don't have this, and this is an entire-  
21 ly different characteristic of the ethnic minority --

22 THE COURT: (Judge Simpson)

23 They don't have very much to do.

24 THE COURT: (Judge Bladen)

25 I don't mean to state your position unfairly, but

1 it seems to me that what you are saying is that you did  
2 segregate, you did discriminate, but you did it with a  
3 benign motive.

4 MR. THOMAS:

5 I can't say that we discriminated, and I will  
6 not say that we segregated. These were all schools to  
7 which a child had the option of going. He was not required  
8 to go.

9 And, I say that we were not being benign, and  
10 that the dual system was looking at the educational needs  
11 of the children, and it did a good job.

12 THE COURT: (Judge Wisdom)

13 This is the argument that is always made in  
14 terms of benign motive, that they presented different  
15 problems, and one of the difficulties in the present situa-  
16 tion is that the same arguments are made by the radical  
17 separatists.

18 MR. THOMAS:

19 We didn't exclude them in the first place, your  
20 Honor.

21 THE COURT: (Judge Wisdom)

22 I don't question your motives, and I think it  
23 was benign, but it may be that the Constitution did not  
24 permit this kind of benign separation .



1       curricula -- not extra-curricula, but special studies to  
2       take care of cultural differences.

3               MR. THOMAS:

4               Well, if your Honor please, as I view the law,  
5       and maybe you know more -- well, I know that you read much  
6       more of this law than I ever do --

7               THE COURT: (Judge Wisdom)

8               I find that these school board attorneys read  
9       just about the same thing as I read.

10              MR. THOMAS:

11              Well, I am just kind of -- I'm not a school  
12     board attorney, and it is just for the love of my city  
13     that I --

14              THE COURT: (Judge Wisdom)

15              All right, then yours is labor for love --

16              MR. THOMAS:

17              Love of my city.

18              But let me say this about that, that the question  
19     here is if we have segregated, is it de facto or de jure?  
20     And as I read the cases, I find that by some action we  
21     must have brought about the segregation of the races which  
22     results in a de jure situation.

23              It simply hasn't happened here. It simply hasn't  
24     happened here because when the schools were built, the  
25     children were there, and the optional school was there.

1 The same thing is true when we only had two schools that  
2 they talk about, Mexican-American, -- well, we had Metz,  
3 and we had Palm, and we had Pearce, so I shall not argue  
4 that further, but I will say that if you read this record  
5 you will find that in each instance that Dr. Sanchez, the  
6 distinguished Mexican-American, said, "I have never seen  
7 discrimination in Austin schools, and if I had I would  
8 have been yelling at the courthouse door."

9 Let me pass on to the other question you asked:  
10 What is different about Austin?

11 What is different about Austin, as I see it, on  
12 the black situation is that we didn't come here with a  
13 program that sought to avoid busing, where we thought  
14 busing was the best solution. We didn't try to come in and  
15 conserve the status quo.

16 We offered a plan, complete desegregation of our  
17 secondary schools with substantial busing, when just over  
18 the hill, when our new construction program is completed,  
19 firstly, all of that busing would be eliminated, virtually  
20 all.

21 And we have been there because the Government  
22 has been slow in getting approval. But it finally approved  
23 our new school location. We have been delayed.

24 Now, I don't want to argue about busing; I don't  
want to argue about busing. I think it is far more reasonable

1 for us to defend the location, the advantages of a  
2 neighborhood school.

3 Let's talk in terms of a community center where  
4 you can take a young child and let him have security, no  
5 anxiety, and be among his neighbors and friends for this,  
6 his very tender years of education.

7 Now, that is not something that was produced by  
8 discrimination. It wasn't produced by segregation. The  
9 concept of the neighborhood elementary school is universally  
10 adopted and promoted by educators all over the nation,  
11 whatever their degree of --

12 THE COURT: (Judge Wisdom)

13 We never had such a concept in the South in most  
14 areas, certainly in the rural areas where whites were  
15 bused from one end of the County to a white school, negroes  
16 were bused from one of the County to a negro school. You  
17 do have some concept of neighborhood schools --

18 MR. THOMAS:

19 Within the city, that is correct, of course.

20 THE COURT: (Judge Wisdom)

21 When Austin started out, and you have grown  
22 enormously within the past few years, have you not?

23 MR. THOMAS:

24 THE COURT: (Judge Wisdom)

1           So that probably when this system was set up  
2 you had a good deal of it, when buses first began to be  
3 used, you must have had a great deal of busing?

4           MR. THOMAS:

5           I don't believe that we did much; I think that  
6 the Austin Independent School District wouldn't --

7           THE COURT: (Judge Wisdom)

8           Well, it seems to me that you are something like  
9 Charlotte, Charlotte has grown enormously in the past few  
10 years. And here we have a decision of the Supreme Court  
11 saying that busing is one of the techniques --

12          MR. THOMAS:

13          True, that is correct.

14          THE COURT: (Judge Wisdom)

15          And you have a decision of the Supreme Court say-  
16 ing that while each school need not reflect the population,  
17 or the black and white population, still it is proper to set  
18 goals. And Charlotte's goal was 71-29.

19          THE COURT: (Judge Coleman)

20          I just want to offer an observation. About the  
21 worst thing you can do with cases of this kind is to try to  
22 generalize, even with reference to busing.

23          I was going to say that I grew up in a rural area  
24 in Mississippi, and our schoolhouse was in walking distance,  
25 throughout the tenth grade. We walked there.

1                   After, high school was too far away and they  
2 had buses. And it wasn't really a matter of busing from  
3 one side of the county to the other, but it was a matter  
4 of getting to school.

5                   Then today, under Mississippi law you can't bus  
6 any children who live within two miles of the schoolhouse  
7 because it is presumed that they are near enough to walk,  
8 and so forth, whatever his race.

9                   But I agree that you shouldn't bus anybody to  
10 avoid integration. I don't think you should bus anybody  
11 for any ulterior motive. And, I was just getting to the  
12 generalities of the thing.

13                   Now, what do you propose to do with the five all-  
14 black schools?

15                   MR. THOMAS:

16                   That is what I wanted to tell you. Whenever we  
17 reach the point where we start off with no regard for  
18 these matters, culture, customs, and with massive busing,  
19 and total destruction in Austin for, I guess, forever, of  
20 the whole neighborhood school concept --

21                   THE COURT: (Judge Coleman)

22                   You had five, did you?

23                   MR. THOMAS:

                  We had five schools, yes.

24                   THE COURT: (Judge Coleman)

1                   And your black people constituted only fifteen  
2 per cent of the school population?

3                   MR. THOMAS:

4                   That is right.

5                   THE COURT: (Judge Coleman)

6                   Yet you had five schools that were all black?

7                   MR. THOMAS:

8                   Yes, that is right.

9                   THE COURT: (Judge Coleman)

10                   What did the District Judge say should be done  
11 about that?

12                   MR. THOMAS:

13                   He approved the Austin plan. And, I would like  
14 to indicate what the Austin plan is, because I think it is  
15 a good faith plan, a plan that the Government has compli-  
16 mented. And the reason why the Government really had no  
17 plan in the Court, was that their plan was just totally  
18 fallacious --

19                   THE COURT: (Judge Wisdom)

20                   Is the Government's plan identical with the HEW  
21 plan?

22                   MR. THOMAS:

23                   Yes.

24                   THE COURT: (Judge Wisdom)

25                   I will ask you, in the lower Court?

1 MR. THOMAS:

2 Yes.

3 THE COURT: (Judge Wisdom)

4 Because it seems to me quite clear that the  
5 Government very candidly stated that the HEW plan was based  
6 on a theory of system-wide discrimination, and that that  
7 is not the Government's position here today.

8 MR. THOMAS:

9 Well, I think that, as I understand their plan,  
10 was system-wide and massive busing, and just the complete  
11 totality of our --

12 THE COURT: (Judge Simpson)

13 That is right, that was the HEW plan, but the  
14 Government has abandoned that, even on this appeal.

15 MR. THOMAS:

16 I don't know what position the Government has  
17 taken, I'm ready to --

18 THE COURT: (Judge Wisdom)

19 We find the Government confusing, too, as I read  
20 it, or as I understand it now. And I think that I under-  
21 stand it now, that the Government's position here before  
22 this Court is that Austin did not present a case -- it is  
23 novel -- that, rather, it did not present a case of  
24 system-wide discrimination, but only discrimination with  
25 respect to certain individuals, or certain institutions.

1 MR. THOMAS:

2 I think that they are talking about Mexican-  
3 Americans only, and I think that they are talking about the  
4 Johnston High School, and what I am attempting to or trying  
5 to point out is that in the ten years that we have had  
6 Johnston High School, which is predominantly Mexican-  
7 American, that the rate of dropouts decreased, or the rate  
8 of graduations has quadrupled in a short ten years in that  
9 school. It wasn't designed to be a Mexican-American school,  
10 and the probability is that if Zavala School --

11 THE COURT: (Judge Wisdom)

12 I diverted you; however, I have done it not  
13 intentionally, but I diverted you from answering Judge  
14 Coleman's questions with respect to what about the all-  
15 black schools?

16 MR. THOMAS:

17 All right, sir.

18 I want to say this, that in Austin we went into  
19 in-depth, total massive study of this whole problem before  
20 Swann was decided, to see what we could do with our elemen-  
21 tary schools that would have an educational purpose, an  
22 educational soundness.

23 And when we got to that point, despite the argu-  
24 ments that we have heard about the Mexican-American, he  
25 was included, just as the blacks, and just as the Anglo was in



1 the development of this plan. We think you know the ad-  
2 vantages of the neighborhood school -- there are a multitude  
3 of them -- with small children. And you know that it is a  
4 universal concept, and that it is worth preserving, if it  
5 can be preserved, and distinguish our schools in the South  
6 by doing something more than is considered to be legal in  
7 the North.

8 So, we developed this plan, the Austin plan, which  
9 would reach every child in Austin, and make every child in  
10 Austin, in the elementary school, a part of this controlled  
11 mixing of the students --

12 THE COURT: (Judge Simpson)

13 One day a week?

14 MR. THOMAS:

15 Judge, maybe numbers are the answer. I would like  
16 to speak to --

17 THE COURT: (Judge Simpson)

18 You think that is substantial?

19 MR. THOMAS:

20 Three is, about between a fifth to a third of the  
21 time --

22 THE COURT: (Judge Simpson)

23 And that's when they go to the Center, and there  
24 change --

25 MR. THOMAS:

1 Well, they take certain field trips, cultural  
2 learning center. And, in the first place, this gets to be  
3 a very difficult logistical problem to operate this system,  
4 and it is not something that you just pull out of the air,  
5 and maybe some days we would think that maybe as many as  
6 two or three days was necessary.

7 THE COURT: (Judge Simpson)

8 It just seems to me real naive and unrealistic  
9 for this School Board, or this District Judge, to think  
10 that Austin can integrate one day a week, when we are making  
11 other people integrate five days a week. I just don't  
12 understand that. I don't understand how that is substantial,  
13 where maybe they just give them a taste one day a week,  
14 and the rest of the days they stay right in the same situa-  
15 tion.

16 MR. THOMAS:

17 White and black, that is true, but during the  
18 period of time, approximately between a fifth to a third  
19 of the time --

20 THE COURT: (Judge Simpson)

21 Somebody is dreaming, and that is all.

22 THE COURT: (Judge Coleman)

23 Let me ask you, are these all-black schools,  
24 elementary schools?

1 Yes.

2 THE COURT: (Judge Coleman)

3 How high in grade do they go?

4 MR. THOMAS:

5 One to six.

6 THE COURT: (Judge Coleman)

7 Only to the sixth grade? That means that the  
8 children up to thirteen years of age go there?

9 MR. THOMAS:

10 Yes.

11 THE COURT: (Judge Coleman)

12 Suppose you went through children, say through  
13 the third grade, you would have a better argument, to say  
14 the least, wouldn't you?

15 After all, the Court doesn't have to, you know,  
16 leave all of their knowledge and common sense at the door-  
17 step as they enter the courthouse, because we know that it  
18 takes from -- well, say first grade kid, or second grade,  
19 or third grade, but especially the first year student, be-  
20 cause I know that I built a home in town even though I  
21 wanted to live in the country, just so that I could get my  
22 boys closer to school, closer to the schoolhouse, where he  
23 wouldn't have to ride the school bus, and all that sort of  
24 business. I'm still "old enough" to remember the first day  
25 I saw him walk up the sidewalk to the schoolhouse, looking

1 at every bird that flew over. There's some human values  
2 in this thing besides just mere percentages, quotas and  
3 standards. These children in the 4th, 5th, and 6th grade,  
4 how can you just --

5 MR. THOMAS:

6 Your Honor, if you disregard the problems that  
7 we avoid, the problems that are normally argued against  
8 busing but which we say are argued affirmatively as  
9 advantages of the neighborhood school, and if you assume  
10 that the program will not bring about a proper cultururation,  
11 a proper appreciation, a proper sociological effect, then  
12 you can say that this means nothing.

13 But if those things are worth preserving; and if  
14 you believe that in this effective learning area which is  
15 our starting point, that by organizing children into  
16 permanent little study groups of say eight people, with  
17 your exact racial mix, with a student teacher that is  
18 assigned to those people at all times, where they are brought  
19 together all of the time in this program, and they are all  
20 working together, selected according to their ability to  
21 achieve or to get along with each other, and all these  
22 things; and if you can take this effective learning component  
23 of the elementary education and use that in the fashion that  
24 we advocate, and advocate strongly, and boldly urge that  
25 this is not just to avoid integration -- it is something

1 to avoid total, forty-five minute bus rides, and massive  
2 transportation of all these children.

3 And when you got through, you would have maybe  
4 four-fifths of the time that neighborhood schools, just like  
5 the neighborhood school in Detroit, or Los Angeles, or even  
6 Cleveland, Ohio, they will have their neighborhood schools,  
7 elementary schools I'm talking about, but we would have  
8 done something --

9 THE COURT: (Judge Simpson)

10 Detroit is not a very good example.

11 MR. THOMAS:

12 Well, let's make it another city, Des Moines.  
13 But I am up in Austin, Texas, and let's preserve the  
14 neighborhood school concept, and you will be reaching out  
15 beyond that and doing more than is required, by taking this  
16 third of the time or this twenty-five per cent of the time,  
17 which is where they do these things, they make these field  
18 trips, and they go to these cultural centers, and all of  
19 this should be, in my judgment, should be acceptable because  
20 of the educational soundness that advocates it.

21 THE COURT: (Judge Wisdom)

22 Any questions?

23 You have completed your position?

24 MR. THOMAS:

25 Yes, sir.

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THE COURT: (Judge Wisdom)

Very well.

The Court will take a five-minute recess.

(Short recess.)

1   P R O C E E D I N G S

2   (After recess.)

3   THE COURT: (Judge Wisdom)

4   Miss Drew.

5   MISS DREW:

6   Mr. Serna will go first, if it is acceptable.

7   MR. SERNA:

8   May it please the Court: I represent the  
9 Mexican-American intervenors in this case and, therefore,  
10 I will address myself to the problem of the Mexican-  
11 American issue.

12   Now, our position is basically the same as that  
13 which the Federal Government has just taken, so I won't go  
14 over or repeat most of the argument, the position they  
15 stated.

16   Now, I, like the Federal Government, believe that  
17 this case does show on the facts segregation of the  
18 Mexican-American. We believe that it does show segregation  
19 by de jure, through the use of attendance zones, through  
20 school site locations, location of sites for schools,  
21 through faculty and administration assignments, and we be-  
22 lieve that the District Court erred in finding that there  
23 was no de jure segregation, based upon the facts which  
    qualified the court.

24   THE COURT: (Judge Coleman)

1                   You understand that the Government agreed with  
2 the District Court on that subject, that there was no de  
3 jure --

4                   MR. SERNA:

5                   No, your Honor. My understanding of the Govern-  
6 ment's position is that there was de jure segregation as  
7 to certain schools, certain Mexican-American schools; and  
8 that there wasn't evidence of discrimination as to all of  
9 the Mexican-American schools in the district.

10                   It is on this point that we differ with the  
11 Government. We allege that the record does establish  
12 system-wide discrimination against the Mexican-Americans,  
13 and that the relief which should be rendered by this  
14 Court should, likewise, be system-wide.

15                   It would be exceedingly difficult, if not impossible,  
16 to go on a school-by-school basis and prove which school,  
17 which student were discriminated against, and which student  
18 and which school weren't.

19                   We believe that the whole pattern of discrimina-  
20 tion against Mexican-Americans is evident here.

21                   THE COURT: (Judge Coleman)

22                   You have not, or those whom you represent, have  
23 not filed any plan? Did you file one in the District Court?

24                   MR. SERNA:

25                   We intervened in this case at the appellate stage.



1 We did not take part in the District Court.

2 THE COURT: (Judge Simpson)

3 The District Court would not permit an inter-  
4 vention from the Mexican-Americans at the trial level.

5 MR. SERNA:

6 We attempted at the District Court, and were de-  
7 nied. We have filed a separate lawsuit in behalf of the  
8 Mexican-Americans, which is now pending, presumably on the  
9 outcome of this appeal.

10 This is at the appellate level, and we did not  
11 participate at all in the District Court trial.

12 But, as I mentioned earlier, we contend that the  
13 relief will have to be system-wide. This is going to be  
14 exceedingly difficult to prove exactly what Mexican-  
15 American schools were discriminated against, and which  
16 Mexican-American schools were not.

17 THE COURT: (Judge Coleman)

18 Assume for the sake of argument that you are  
19 right, what kind of injunction would you propose? How  
20 would you do it? By extensive busing, or how? Would you  
21 want the Latin American children bused out of their home  
22 community and hauled over to another area?

23 MR. SERNA:

24 Your Honor, we are as opposed to busing as anyone.  
25 Mexican-Americans don't necessarily favor busing; they are

1 as afraid of sending their children into white children's  
2 neighborhood, as the whites are of sending their children  
3 into the Mexican-American neighborhoods.

4 But we believe this is one of the means which  
5 will be necessary, particularly in the Austin district.

6 THE COURT: (Judge Coleman)

7 So you say that the only way that this can be  
8 done there is for busing to be used?

9 MR. SERNA:

10 Yes, your Honor, in certain cases, we do.

11 THE COURT: (Judge Wisdom)

12 You are for it in the sense that you favor  
13 limited busing, some busing, but more busing than the  
14 present plan allows?

15 MR. SERNA:

16 That is correct.

17 I would hate to say "limited busing," but I would  
18 say we are in favor of as much busing as would be necessary  
19 to achieve a unitary system on a tri-ethnic desegregated  
20 basis. Maybe that would include limited or massive busing,  
21 but --

22 THE COURT: (Judge Wisdom)

23 Of course, you haven't had an opportunity to  
participate in here; and you are not able to show the extent  
24 to which you consider busing as necessary in terms of

1 dollars. There is quite a difference between the Board's  
2 plan and the HEW plan.

3 MR. SERNA:

4 Yes, your Honor, we didn't, and, as I mentioned  
5 earlier, we didn't participate in the lower level, and I  
6 am familiar with the figures through figures which are  
7 listed in the briefs, but I don't recognize an expense, or  
8 I don't know what the expense would be.

9 However, at this point we don't feel that we have  
10 to address ourselves to that particular issue, as to what  
11 the expense is going to be.

12 THE COURT: (Judge Simpson)

13 I think what you mean is that you would like for  
14 the District Court to be told to let you in and let you  
15 develop this thing?

16 MR. SERNA:

17 If this Court deemed that the record is not sub-  
18 stantial so as to reverse the lower Court and find a de jure  
19 segregation of the Mexican-Americans, then we would, of  
20 course, request that the case be remanded to augment the  
21 record with regard to segregation of Mexican-Americans.

22 THE COURT: (Judge Coleman)

23 This case was tried at the lower Court by the  
24 Government which theoretically represents everybody, and  
25 as far as I'm concerned it does represent everybody, and

1           tried by the counsel for the school district, and what  
2           contribution could you have made in the trial below, if  
3           you had been allowed to intervene? •

4                   MR. SERNA:

5                   That is hard to say at this level, your Honor.  
6           We could have introduced witnesses that could testify to  
7           some of the discriminatory actions that went on in the  
8           Austin community at the time. We could introduce more,  
9           perhaps --

10                   THE COURT: (Judge Simpson)

11                   The students are not responsible for what goes  
12           on in the community, and you would be limited to what the  
13           School Board had done, wouldn't you?

14                   MR. SERNA:

15                   No, your Honor.

16                   Our position is (1) that if you have a segregated  
17           community, let's say through city planning, and so forth,  
18           and if the School Board acts on these procedures which are  
19           conducted by outside sources, that they, in effect, have  
20           adopted those acts; and their acts, therefore, constitute  
21           de jure segregation of the Mexican-Americans.

22                   This is what we are arguing that happened, that  
23           Mexican-Americans settled in certain areas of Austin through  
24           one form or another, and that the School Board acted on  
25           these residential patterns -- they saw where the Mexican-

1 Americans were settling, and they built schools there.

2 THE COURT: (Judge Wisdom)

3 Your view is the United States may represent  
4 everybody, but it doesn't represent your point of view?

5 MR. SENNA:

6 At this point, with the exception of those schools  
7 that the Government alleged, that the Government is arguing  
8 did show discrimination of Mexican-Americans, the Govern-  
9 ment does not necessarily reflect our overall view.

10 THE COURT: (Judge Coleman)

11 Your statement is, and I'm not trying to argue  
12 the case, but your argument is that it's all where the  
13 children were, so they built the schoolhouses there, and  
14 that constitutes discrimination. Now, suppose they had  
15 built them ten miles away in those days, and ordered your  
16 children to be bused to either that or another where they  
17 were not being bused? What would you say about that?

18 Would these be attended primarily by Mexican-  
19 Americans, these schools that were built far away, or would  
20 they be attended -- well, in any event, what is wrong with  
21 building schoolhouses where the children are, if there is  
22 really no basic discrimination according to race?

23 MR. SENNA:

24 Well, the thing that is wrong with that, your

25 ... and in ... the ... school district,

1 we believe that there was discrimination through the City,  
2 through the City Planning Commission, through various  
3 individuals that made it almost mandatory that Mexican-  
4 Americans, or, at least, lower income Mexican-Americans,  
5 would have to settle in certain areas.

6 The School Board subsequently built schools in  
7 and around those areas.

8 Now we, in effect, are saying that they recognized  
9 that a separate and distinct ethnic minority existed in  
10 this area, and acted upon that separate and distinct  
11 minority to separate it, to keep it apart from the majority.

12 THE COURT: (Judge Coleman)

13 You are arguing for the rule that if we were to  
14 follow, and everybody followed us, would set this whole  
15 field afire from one end of the United States to the other  
16 based on what or where somebody has intentionally built a  
17 school, but whether they had other means by which this  
18 could have been --

19 MR. SERNA:

20 No, your Honor, we are arguing basically the same  
21 idea, the same position that was taken by the Court in the  
22 Davis case.

23 THE COURT: (Judge Wisdom)

24 I don't think you've got to go to the Davis case;  
25 all you have to go to is the Swann case, in which the

1 Supreme Court says that this site selection is a classic  
2 method of extending segregation.

3 THE COURT: (Judge Coleman)

4 I have reference to the racial question, and  
5 Swann dealt, as you said, with the de jure system, black  
6 and white --

7 THE COURT: (Judge Wisdom)

8 But when you get to the question of a site selec-  
9 tion by a legally constituted school board, even post-Brown,  
10 you get a de jure --

11 THE COURT: (Judge Simpson)

12 On overlapping dual zones.

13 THE COURT: (Judge Wisdom)

14 -- you get de jure action by the school board;  
15 however, this last position is not necessarily uniformly  
16 approved.

17 MR. SERNA:

18 Then, I would go on, if there is no further  
19 questions --

20 THE COURT: (Judge Wisdom)

21 All right, you may proceed.

22 MR. SERNA:

23 Then I would go on to explain that the school  
24 district themselves have recognized the Mexican-Americans  
25 as being a distinct and separate ethnic minority; and the

1 school district themselves -- well, the counsel for the  
2 school district has referred to the Mexican-American as  
3 displaced persons. And, they have mentioned the fact that  
4 if they have treated the Mexican-Americans differently,  
5 it has been in a loving way, that it has been to help them.  
6 I might add that this argument is undertaken by school  
7 districts throughout the Southwest, particularly throughout  
8 Texas. And I believe that the Superintendent in this case  
9 testified that the achievement --

10 THE COURT: (Judge Wisdom)

11 You're being killed with kindness, is that it?

12 MR. SERNA:

13 Right. And they're going to love us to death.

14 The Superintendent testified in this case that --

15 THE COURT: (Judge Coleman)

16 And you don't want to be loved to death.

17 MR. SERNA:

18 I would rather be treated equally and just re-  
19 ceive equal opportunity.

20 THE COURT: (Judge Coleman)

21 That is what it is all about, yes.

22 MR. SERNA:

23 It has been shown that the Mexican-American  
24 students are achieving less in Austin, their achievement

25 is less than that of the other students any in the



1 white schools in Austin; and not necessarily in Austin,  
2 but throughout the Southwest this pattern has manifested  
3 itself.

4 This has resulted in the Federal Government  
5 undertaking many studies of the Mexican-American and the  
6 educational problems. The most recent one is the United  
7 States Civil Rights Commission on the problem of the  
8 Mexican-American in the Southwest.

9 THE COURT: (Judge Wisdom)

10 Was that put in the record, by the way?

11 MR. SERNA:

12 Yes, in the intervenors brief we have quoted --

13 THE COURT: (Judge Simpson)

14 It is quoted in an intervenors brief, but the  
15 Commission report is not in the record?

16 MR. SERNA:

17 No, your Honor, it was not put in the record  
18 down below.

19 THE COURT: (Judge Wisdom)

20 I just wanted to be sure that we had a copy.

21 MR. SERNA:

22 I can furnish a copy, if the Court so desires.  
23 I have an extra one, but the report is quoted in the inter-  
24 venors brief.

THE COURT: (Judge Simpson)

1 We can get some copies, so don't bother about  
2 that. And I think that we can judicially note it, too.

3 THE COURT: (Judge Wisdom)

4 I do, too.

5 MR. SERNA:

6 I was going to ask the Court also to take judicial  
7 notice of the plight of the Mexican-American educational  
8 problems --

9 THE COURT: (Judge Coleman)

10 You have it for the Southwest, but we are in the  
11 Austin case. And, of course, we've got the Corpus Christi  
12 case that's going to be argued in two weeks, and a Dallas  
13 case that's going to be argued in about a week, and you  
14 don't propose that we settle Austin's problems by what is  
15 going on all over the Southwest, do you?

16 MR. SERNA:

17 Your Honor, I believe that the facts in the  
18 record with regard to Austin, with regard to the Austin  
19 case, will of itself furnish this Court the basis by which  
20 it can solve the Austin problem, but we're merely referring  
21 to the fact that the City of Austin is indicative of what  
22 has transpired, what has occurred to the Mexican-American  
23 throughout the Southwest.

24 ...and, you mentioned  
25 earlier the difficulty of dealing in generalities, but I

1 believe that the educational plight of the Mexican-American,  
2 to some extent, can be dealt with in generalities. This  
3 Commission's report deals with it in general principles,  
4 and it takes its facts from specific school districts,  
5 specific instances.

6 THE COURT: (Judge Simpson)

7 May I ask you, Mr. Serna, since you have read the  
8 Commission report and I have not, or you referred to it in  
9 your brief, or you cite from it in your brief, but does this  
10 Commission report develop the extent to which the Mexican-  
11 American throughout the Southwestern portion of the United  
12 States are immigrants, or second generation Mexicans? And  
13 also what portions of them are people whose forebears were  
14 there when we acquired the Southwestern part of the United  
15 States either by conquest or purchase?

16 MR. SERNA:

17 Your Honor, I don't think that is treated very  
18 thoroughly in this Commission's report.

19 THE COURT: (Judge Simpson)

20 Some of these people were there before the Anglos  
21 were there, or some of their forebears were there.

22 MR. SERNA:

23 This may have been a problem in the earlier years  
24 of the school district, the earlier years of the Austin  
25 community, but this certainly is no longer a problem now.

1                   The fact that they were at one time migrants,  
2 or may have been migrants, as they call them, certainly  
3 does not justify their being separated now.

4                   THE COURT: (Judge Wisdom)

5                   There must be a lot of them who come from well  
6 educated families, or as well educated families as the  
7 white children.

8                   THE COURT: (Judge Simpson)

9                   You can't stigmatize them all at once as wetbacks  
10 and say that they are all migrant workers, and that that is  
11 all they do and that sort of thing; they are individuals  
12 just like white people or black people are.

13                  MR. SERNA:

14                  I agree with that.

15                  THE COURT: (Judge Coleman)

16                  Do you allege that anybody of Mexican-American  
17 ethnic origin has been excluded from any school in Austin  
18 on that account?

19                  MR. SERNA:

20                  No, your Honor, I am not arguing that anyone of  
21 Mexican-American extraction has been excluded, because the  
22 school district and the records reflect that throughout  
23 the various schools there have at times been one or two or  
24                  for some time - I am not arguing that they are excluded in the  
25 white schools.

1           What I am arguing is that as a class, an overall  
2 class, they have been excluded to some extent, and, again,  
3 this could be primarily based on their economic situation,  
4 on their language difficulties which they face. This could  
5 have been the primary reason, but this is one of the reasons  
6 which the school district has hinged on to segregate the  
7 Mexican-American, but not every Mexican-American can get up  
8 and say that he has been discriminated against or has been  
9 made to attend such a school. But I would say that the  
10 majority have, and, therefore, the attainment level in  
11 years of education for the Mexican-American in general is  
12 considerably less than that of the white in the Southwest,  
13 and even of the blacks.

14           In Austin, the attainment level of the Mexican-  
15 American in years of education in 1960 was four years over-  
16 all average as compared to eight years for the black, and  
17 12.45 years for the white.

18           So this problem of the Mexican-American being  
19 treated as a separate and distinct ethnic minority, and  
20 being isolated in schools and not receiving a proper educa-  
21 tion when isolated in those schools, exists in Austin, and  
22 exists universally throughout the Southwest.

23           THE COURT: (Judge Wisdom)

24           Your court has really not distinguished between the  
25 cause in Brown and those earlier cases the Court permitted

1 the attorneys for the negroes to go into just this very  
2 thing, to show that they were disadvantaged, regardless of  
3 motive.

4 MR. SERNA:

5 Yes, your Honor.

6 THE COURT: (Judge Wisdom)

7 One argument was that they had been disadvantaged  
8 because mandatorily she had been separated purely for race,  
9 and no other reason. I don't believe that you could quite  
10 make a case on her here.

11 MR. SERNA:

12 Well, your Honor, I don't believe that I have to  
13 go and make a case that they have been segregated by race  
14 overall; I believe it is sufficient to prove that they were  
15 separate -- well, that they were separated through  
16 economics, through racial factors, and that in this isola-  
17 tion which occurred, the School Board subsequently acted  
18 upon that.

19 THE COURT: (Judge Wisdom)

20 You can go further than that, because you say  
21 that the selection of the sites promoted it.

22 MR. SERNA:

23 Subsequently, yes, your Honor.

24 As sites were developed in Mexican neighborhoods,  
25 Mexicans, of course, would go to these schools, and this

1 would perpetuate the isolation, and segregation which  
2 existed, of the Mexican-American.

3 THE COURT: (Judge Wisdom)

4 Now, as to the so-called part-time, twenty-five  
5 per cent desegregation, or special acts of discrimination.

6 MR. SERNA:

7 Your Honor, we view this as simply being a case  
8 where the Austin Independent School District must be made a  
9 unitary school system, and that part-time integration  
10 through inter-cultural exchange, or whatever they want to  
11 call it, is not following or in keeping with the Supreme  
12 Court decision that a dual school system -- in this case  
13 perhaps you would call it a tri-ethnic dual school system --  
14 is not eliminated into a branch. So, we are opposed to  
15 that part-time plan.

16 THE COURT: (Judge Wisdom)

17 I think you'd better save some time for Miss  
18 Draw.

19 MR. SERNA:

20 I have no further argument.

21 THE COURT: (Judge Wisdom)

22 Judge Coleman.

23 THE COURT: (Judge Coleman)

24 No questions.

THE COURT: (Judge Wisdom)

1 And Judge Simpson.

2 THE COURT: (Judge Simpson)

3 No.

4 THE COURT: (Judge Wisdom)

5 All right, Miss Drew.

6 MISS DREW:

7 May it please the Court: I would like to address  
8 myself to the issue of segregation of blacks in this system.  
9 This case does involve the segregation of black students;  
10 and there is no question that they have been segregated by  
11 law throughout the history of the Austin School System.

12 The District Court found, however, that there were  
13 only remnants of segregation remaining, and that the school  
14 system had not segregated blacks after 1955.

15 We find that, and we urge the Court to find that  
16 in error, and that segregation has been practiced against  
17 blacks since 1955 in the same manner that it has been  
18 practiced historically against the Mexican-Americans, in  
19 the drawing of the zones, the placing of schools, and in  
20 the assignment of faculties.

21 The method chosen by the District Court to de-  
22 segregate the schools is clearly discriminatory plan  
23 against the black students in this system.

24 The secondary plan we oppose because it inte-  
25 gresses blacks and white students, placing the entire burden



1 on the black students. There are going to be twenty-three  
2 hundred students bused under the secondary plan, as it  
3 stands now, virtually all of whom are black. There is no  
4 white busing planned.

5 THE COURT: (Judge Wisdom)

6 How many would we have?

7 MISS DREW:

8 Two thousand three hundred and fifty.

9 THE COURT: (Judge Wisdom)

10 Two thousand three hundred and fifty.

11 THE COURT: (Judge Simpson)

12 And they would close the black school and bus  
13 them to a present white school, and build or buy these  
14 portable setups around there to house them?

15 MISS DREW:

16 Yes.

17 THE COURT: (Judge Coleman)

18 That is two thousand three hundred and fifty  
19 black children?

20 THE COURT: (Judge Simpson)

21 And this is to high schools?

22 MISS DREW:

23 That is what I was talking about, those that  
24 would be bused, would be two thousand three hundred and fifty.

25 THE COURT: (Judge Coleman)

1                   And they haven't provided any busing of elementary  
2 school children, except the one day a week, maybe, the  
3 exchange?

4                   MISS DREW:

5                   The busing plan as approved, is a part-time plan  
6 under which white children will be bused and black and  
7 Mexican-Americans, but --

8                   THE COURT: (Judge Coleman)

9                   Well, that is what I was trying to get to, was  
10 the two thousand three hundred and fifty black children,  
11 and you said that no white children --

12                   MISS DREW:

13                   No white children are to be bused into the black  
14 schools, that is correct.

15                   THE COURT: (Judge Coleman)

16                   No white children to be bused into the black  
17 schools.

18                   MISS DREW:

19                   They are closing, and there is only one black  
20 high school in the Austin system and one black junior high  
21 school. The Court has ruled that black schools can be  
22 closed to effect desegregation if the plants are physically  
23 inadequate, if the sites are inadequate, and if the impact  
24 on enrollment in other schools will not be negative.

25                   None of these things were proved in this case.

1 THE COURT: (Judge Wisdom)

2 We have also said that if the closing of schools  
3 imposes a burden on the blacks not imposed upon whites,  
4 that that is improper.

5 MISS DREW:

6 Yes, your Honor.

7 And this Court has also ruled that it is improper  
8 where it is done for reasons of avoiding white flight.  
9 And I think that there is ample testimony in the record  
10 that that is why the black schools were closed in these  
11 cases, because they felt that the white students would not  
12 attend formerly black schools.

13 There are several schools which are smaller and  
14 more adequate from every standpoint than the schools closed  
15 in this instance. And we ask the Court to require those  
16 schools to be reopened and used within the system with the  
17 other schools.

18 The other point that I would raise is that the  
19 Court find, that the intervenors, both black and Mexican-  
20 American, ask the Court to find that the discrimination,  
21 incidents of discrimination in this system, are sufficient  
22 to establish a pattern or system-wide discrimination  
23 against both blacks and Mexican-Americans at the present  
24 time, and that the plan as proposed be implemented on that  
25 basis.

1 We don't think it is necessary to remand for  
2 further hearing for a finding of discrimination against  
3 either group. The record is clear, we feel, with the in-  
4 cidence of segregation of both groups.

5 We might also point out that it is discriminatory  
6 against blacks to establish a secondary plan as has been  
7 done here, which does not include desegregation of the  
8 Mexican-American students.

9 Blacks have a right, under the desegregation pro-  
10 cess, to be integrated in the whole system with all of the  
11 students in the system. If that happens to include a  
12 Mexican-American or some Chinese children, or any other  
13 minority, those children should be included in the plan.

14 I think that there is no possible way of working  
15 at a desegregation plan that does not include all groups,  
16 without discriminating unconstitutionally against the black  
17 children.

18 THE COURT: (Judge Wisdom)

19 You take the position that the record is clear  
20 that there was system-wide discrimination against blacks?

21 MISS DREW:

22 System-wide discrimination against blacks and  
23 Mexican-Americans, too.

24 THE COURT: (Judge Wisdom)

25 And Mexican-Americans, too?

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MISS DREW:

Yes.

THE COURT: (Judge Wisdom)

And you don't feel the necessity of a remand?

MISS DREW:

No, your Honor, we started the school desegregation cases years ago --

THE COURT: (Judge Simpson)

Not to retrace the established decisions, but do you think there is a necessity for a remand, I take it, as to the plan?

MISS DREW:

On the plan?

THE COURT: (Judge Simpson)

To formulate the Court's decision --

MISS DREW:

But on the findings, which we think is a matter of law in this case, we don't feel that this Court is asked to review a functional plan; under 52 this is a matter of law that the District Court found this was a de facto situation.

THE COURT: (Judge Simpson)

Will you or Mr. Serna kind of comment on the argument advanced by Professor Alchuler that even assuming there has been no discrimination demonstrated, de jure

1 discrimination demonstrated against Mexican-Americans,  
2 that planning or setting up a plan simply white skin  
3 against black skin, that that in itself is discriminatory  
4 against Mexican-Americans, and he's got that, if you recall,  
5 in his amicus brief.

6 MISS DREW:

7 Yes, I am familiar with that argument, and I think  
8 that is a valid argument.

9 Intervenors have not presented that because we  
10 don't feel we have to reach that.

11 THE COURT: (Judge Simpson)

12 You don't have to reach that? You think it is  
13 demonstrated on the record, and that is what you are urging  
14 this Court to find?

15 MISS DREW:

16 Yes.

17 And that if the plan is allowed to go forward  
18 which excludes Mexican-Americans, the blacks are being  
19 discriminated against.

20 And then, a third valid argument is that Mexican-  
21 Americans, of course, themselves are being discriminated  
22 against by the formation of what would essentially be a  
23 system, a new school system for blacks and Mexican-Americans  
24 which leaves whites out altogether.

25 THE COURT: (Judge Wisdom)

1 Does that complete your argument?

2 MISS DREW:

3 That completes my presentation.

4 THE COURT: (Judge Wisdom)

5 Very well.

6 MR. LEVBARG:

7 May it please the Court, I am Mark Levbarg --

8 THE COURT: (Judge Wisdom)

9 You may have just a few minutes, Mr. Levbarg,  
10 and what do you have to say?

11 MR. LEVBARG:

12 In a contemporaneous Austin federal case, the  
13 United States through its Department of Housing and Urban  
14 Development, has argued in favor of building more public  
15 housing in the East Austin ghetto, which is the lower right-  
16 hand corner of that map.

17 This proposed public housing will primarily have  
18 black and Mexican-Americans, and it will add to the housing  
19 pattern segregation in Austin if it is built at the HUD  
20 proposed location.

21 In this other case which is Blackshear against  
22 the Austin Housing Authority, the HUD regional administra-  
23 tor has said on deposition that the effect of housing  
24 projects upon racial balances in schools was not his concern,  
25 that it was the concern of HEW.

1 THE COURT: (Judge Coleman)

2 Now, that is not in the record before us, is it?

3 MR. LEVBARG:

4 That is right, and I'm trying to, or bringing  
5 this to the attention of the Court.

6 THE COURT: (Judge Coleman)

7 As an amicus curiae, I think that you should  
8 argue the facts that are already in the record, and  
9 certainly you can not be a self-appointed messenger to  
10 bring in factual considerations which were not even con-  
11 sidered by the Court. You can tell us what you feel about  
12 the law and the facts that are before us, if you have any-  
13 thing to tell us.

14 MR. LEVBARG:

15 May I be permitted a little bit of leeway,  
16 latitude, in this case? I think that this has not been  
17 presented to this Court by any party, and it would not be  
18 within the normal course of presentation of evidence on  
19 appeal, and I think that it is blindness not to look at the  
20 effect of public housing upon racial balances in the schools.

21 May I be permitted a little latitude on that?

22 THE COURT: (Judge Wisdom)

23 Wouldn't this be an argument that you would have  
24 to make if the case should be remanded, that you would  
25 bring out the fact that there will be accelerated or



1 increased segregation if this new housing goes through, but  
2 you can't do anything about that new housing anyway, can  
3 you?

4 MR. LEVBARG:

5 Your Honor, I believe that I can, or I believe  
6 that this Court can --

7 THE COURT: (Judge Wisdom)

8 That is not really before us, and that is a matter  
9 that someone might then argue that the Supreme Court has  
10 approved a plebiscite for housing which will further impede  
11 desegregation, so we would get involved in side arguments  
12 which have nothing to do with this actual case.

13 I think you'd better stick to the record.

14 MR. LEVBARG:

15 Your Honor, if that is the Court's feeling --

16 THE COURT: (Judge Wisdom)

17 I think you'd better stick to the record.

18 MR. LEVBARG:

19 I don't want to duplicate the arguments<sup>e</sup> of the  
20 other representatives of the NAACP or the Mexican-Americans,  
21 and I have nothing further to present to the Court on  
22 argument. I don't want to duplicate my written brief's  
23 argument either.

24 Thank you.

25 THE COURT: (Judge Wisdom)

1                   You're welcome.

2                   Mr. Norman, in rebuttal.

3                   MR. NORMAN:

4                   I have nothing further, no further statement,  
5 your Honor.

6                   THE COURT: (Judge Wisdom)

7                   Mr. Landsberg.

8                   MR. LANDSBERG:

9                   Nothing further, your Honor.

10                  THE COURT: (Judge Wisdom)

11                  Mr. Thomas, you are apparently in the position  
12 of having to argue before hearing some of your opponents,  
13 so perhaps you should be permitted a moment for some  
14 rebuttal as to the intervenors.

15                  MR. THOMAS:

16                  If the Court please, I think that insofar as the  
17 Mexican-American issue is concerned, I fully developed the  
18 fact, I think, that there was nothing new in this record  
19 added by any of the arguments other than the admission that  
20 we have always had an open school policy in Austin, that we  
21 have not discriminated.

22                  I think that the Court can be overcome with the  
23 ex post facto approach to some of these school site selec-  
24 tion things, things of that nature.

25                  But I would like to point out that HEW as recently

1 as 1968, or as late as 1968 suggested that we use Mexican-  
2 Americans to achieve a racial balance in the black schools,  
3 which was something that Austin was not willing to do.

4 THE COURT: (Judge Simpson)

5 We're again going outside of the record. Of  
6 course, if anybody is interested in going outside of the  
7 record --

8 MR. THOMAS:

9 I believe that this is in the record.

10 THE COURT: (Judge Simpson)

11 It is? Excuse me.

12 MR. THOMAS:

13 I don't believe that I'm making any argument not  
14 on the record, because really it is almost impossible to  
15 fully depict this situation by written briefs or argument  
16 of equal length --

17 THE COURT: (Judge Wisdom)

18 Anything else?

19 Court is adjourned.

20 (Whereupon, Court adjourned.)

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