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Answer
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Special Asst.

Kern

Exhibit dialogue

Oral argument in

Re: / Broussard v. The Houston Independent School District

Dave Norman
and I attended
the

^{in Broussard, which}
Oral argument in the appeal took place on January 25,
in Houston. The panel consisted of Judges ^{Rives} Reeves, Wisdom
and Connally. The courtroom was crowded. Representatives
of the press were present, as well as U. S. Attorney
Morton Sussman and Superintendent Fletcher. During the
course of the oral argument, a large map was ^{frequently} used by
appellants' counsel and occasionally by counsel for
appellees. ^{It was identified as an exhibit below.} This map was extremely helpful to the Judges;
~~and non asked any questions~~ ^{into} the accuracy of the
map or any of the population information upon which the
map was based. The argument began about 11:15 and ended
about 1:40. ^{William} Bill Wood began the argument for appellants;
and ^{Joseph} Joe Tita completed the argument and handled the
rebuttal. Joe Reynolds argued the case for appellees.

Bill Wood began his argument with a statement of
the chronology and some of the facts. He emphasized
that the construction program in question involved some
\$60 million dollars and some 50 schools and argued
that it was designed "to promote, strengthen, perpetuate"
the system of segregation. Shortly after his argument
began, Judge ^{Rives} Reeves interrupted and informed him that
appellants' motion for an injunction pending the determi-
nation on the merits would be taken under advisement
with the consideration of the merits. The argument then

proceeded and Wood began to refer to and analyze the maps. He spoke about the Negroes being concentrated into 3 areas and the Judges looked at the map with great interest. Judge Wisdom asked "Where is Ward 5"? *Wood indicated on the map. Rives*
Judge ~~Reeves~~ then began a line of inquiry designed to ascertain the number of construction projects that were involved in the suit.

Rives
Judge ~~Reeves~~: You say the construction program of \$60 million dollars was to be used for 50 schools. How many of these schools were you attacking in this suit? Are you attacking all *of* them or some of them? What are we called upon to decide?

indirect
Wood: We sought a preliminary injunction against the construction of only 21 schools. That means in effect that we released 29 schools that we believed were urgently necessary for the Houston system and which we didn't believe had as adverse ^{an} impact on desegregation as ^{did} the 21. However, this suit really also involves the remaining 29 projects. We are not only asking that the 21 projects be preliminarily enjoined but a plan be formulated for *all the projects.*

Judge ^{Rives}~~Reeves~~: What is this an appeal from? This is only an appeal from the denial of a preliminary injunction. However, I see your point. Maybe all the projects are involved.

Judge Wisdom: Appellants are attacking only 21 construction projects; but their real purpose is to have the board consider desegregation in choosing ^{all} school locations. This is their overall purpose, and ^{if} they win on the 21 projects it will inevitably affect all the school construction projects.

At this point, Judge Wisdom began asking about the motion for injunction ~~made to the court~~ pending determination of the merits of the appeal.

Judge Wisdom: You say that many of the proposed schools tend to perpetuate segregation. It looks as though the school board is very anxious to get those schools built first. Hence, in a sense we are interested in particular schools.

Wood: The only work that is being carried on on an accelerated basis is the "Negro schools," those schools which will be attended only by Negroes in the near future.

Judge ^{Rives} Reeves then ^{permitted} began another line of inquiry which began with a recount of the fact ^{that} ~~a~~ a full evidentiary hearing ^{had} ~~we~~ conducted below by Judge Hannay.

Judge ^{Rives} Reeves: Isn't it true that Judge Hannay had an extensive factual hearing below.
How long ~~did~~ it last?

Wood: Six days.

Judge ^{Rives} Reeves: Didn't he visit ~~the~~ school sites?


Wood: ^{Seventeen Sites.} Yes. | But ^{you} really could not ~~regard~~ that careful consideration of the projects.
He merely drove by the sites.

Judge ^{Rives} Reeves: Judge Hannay made a finding of fact. That finding was that the school board was not "influenced" by racially discriminatory motives. Are you attacking that finding of fact? Wouldn't the standard then be whether the finding of fact was clearly erroneous? Are you also attacking the ~~law~~ the standard of law that Judge Hannay applied?

Wood: Yes.

Judge Wisdom: It is not necessary to show racial motive. If the effect of the school board action is to create segregated schools and there is no evidence to locate the school elsewhere, that would be sufficient. Isn't that your theory?

Wood: Yes. The question of the affirmative duty is with the heart of this case. Is *there* an affirmative duty to integrate? That is the question. Jefferson County says "yes." The school board must undo the evil that *they created.*
~~has already been done.~~



who carried the
municipal burden for
appellants.

At this point, ~~William~~ Wood turned the argument over to ^{John} Tita. Tita began by briefly reviewing the case again. His theme was that the case had to be put in the proper perspective. That perspective was ~~an~~ ^{an} ~~total~~ ^{total} absence of any good faith on the part of the school board. He emphasized that the "real facts" would show that the board has not been acting in good faith. As an instance, he began talking about the school board's use of the term "neighborhood school."

[Does person] Tita : The term "neighborhood school" has no meaning in Houston. The school board talks about the neighborhood school but look what they have done. Wheatley Junior High School and McReynolds Junior High are located right next to one another, but all the Negro children are sent to Wheatley and all the white children are sent to McReynolds, regardless of what neighborhood they live in. Also, look at the white children living in Houston Gardens. Their closest school is Kashmere Gardens, but they are bussed out of their neighborhood.

Judge Wisdom: There is no such thing as a neighborhood school under dual zoning. Children are assigned to school, not on the basis of the neighborhood they live in, but rather, on the basis of the zone they might be in. And the zones are based on race. Houston never had any neighborhood schools. I'm surprised to see you use the term neighborhood school. I am

*In the North
they had neighborhood
schools.*

really criticizing the appellees more than I am criticizing you. The neighborhood school is something they have in the North and connected to defacto segregation. Defacto segregation is caused by Negroes migrating from the south and moving into an area around the school. All the whites then leave the neighborhood and the school becomes segregated. In this context, the ~~neighborhood~~^{school} school has applicability; but it has no applicability in a school system such as Houston which has a system of dual zoning.

Tita: You are right. This is illustrated by what happens to the children living in Piney Point. They are transported 26 miles across the city to the schools to which they are assigned.

Tita then ~~presented~~^{to} discuss the segregated situation within the Houston schools in general. He emphasized that 95% of the Negro children attended segregated schools and that only 5% were in white schools. He then began to discuss the freedom of choice plan. It was difficult to determine what his position was regarding the freedom of choice^{plan}, but the ultimate thrust was that freedom of choice has no really applicability to Houston. He said! we recognize that freedom of choice is a permissible, transitional concept, but not in Houston.

Tita then began discuss^{ed} the construction program a little bit more specifically. He emphasized that Houston needs new schools and needs them quickly, but that this need should not be satisfied in a segregated manner.

Judge Wisdom: Is the construction going forward?

Tita: Yes. It is going forward on ten projects. For example, Isaac east, Sanders west, and E. O. Smith Relief School. These will be segregated schools.

Judge Wisdom: Is any of the construction going forward on white schools?

Tita: Yes. One school (Wainwright) is being built at the further~~est~~ end of a white area.

Tita then mentioned the Jefferson County opinion. Judge Wisdom quickly piped up, "Don't get the idea that Jefferson County meets with the approval of everyone on our Court." (This was said in a rather good natured way and produced a laughter in the courtroom.) Judge Wisdom then asked how many high schools were ~~XX~~ in the city and Tita replied, 15 or 16.

Tita then referred to the motion for injunction pending determination of the appeal. This motion was filed on Monday, January 23, ~~and apparently was not served on appellee's counsel until Tuesday, January 24.~~ He apologized for the lateness of the motion. But, he explained, ~~that~~ the motion was so late because all the information upon which it is based was obtained in a report put out by the school board on January 5; ^{that report} indicating the progress on the construction. He also emphasized that the contract for the E. O. Smith construction project was not signed until November 1966.

Judge Wisdom then ^{questioned him} ~~began a line of inquiry~~ concerning the alternative locations.

Judge Wisdom: Is there any evidence on the alternative locations? Where should the new schools be built?

It is easy to point out the weaknesses in the school boards sites, but it is more difficult to say ~~effectively~~ what they should have done. I am not saying that this is necessary, but it would definitely help your case. / *begin pg 6*

Tita: We recognize that. But we didn't have the time to study the problem of alternative sites. I am only a lawyer in private practice, and not an expert, capable of telling the school board where to put the schools. We tried to get experts before the trial to say where the schools should be located, but there just wasn't enough time. This whole matter came up on preliminary injunction. We are only asking for a preliminary injunction so that we can have time in which to make the study. Our initial request was for a 90 day preliminary injunction so as to give us the time to study possible alternative sites.

Judge Connally¹: What solution would you suggest? That is ~~the~~^{it's} hard question.

Tita: I suggest that the ~~pre~~^{prerogative} be taken away from the school board and that the responsibility be placed in the Court. The school board has demonstrated, over and over, that it is totally incapable of fulfilling its responsibility. The school board could be trusted to do the job only if this court established overall criteria and guidelines, and ^{required} ~~permitted~~ the district court to supervise compliance with those standards.

- 10 - [This statement caused some concern on the part of the judges, and Tita immediately ~~of~~ toned down his statement]

Judge Wisdom: The feeder system is an obvious form of discrimination, ~~that~~ ^{that} can be easily eliminated. However, even with the location of new schools, things can be done. The schools can be placed outside the area of heavy density. I am not suggesting the Court should do this. The board should. The board has admittedly not set out to consider alternatives; but it is still competent to do the job.

Judge Connally¹ [to Tita]: What factors would you take into consideration in locating a school?

Tita: The residence of students; the needs, the location of other schools, transportation, etc., and ^{racial} the residential patterns. I would take into consideration segregation and desegregation.

Judge Connally¹: Do you mean that integration is the most important dominating criteria and that all the others are subordinate?

Tita: Yes, in Houston.

Judge Wisdom [to Tita]: But you don't have to say as much. All you have to say is that integration is just one pertinent consideration. It is educationally relevant.

Judge Rives: The effects of segregation may be overcome without changing the location of the schools. Consider one example, there are two schools near one another. One is in the center of a Negro residential area, and the other is in the center of the white residential area. You can overcome the effects of segregation without *regard to where the schools are located*. For example, you could have a Princeton plan. Why can't the board be free to decide which

plan it should have?

Tita: I admit that this could be done in Houston. [At that point he gave an example which I didn't catch.] However, the board still needs an overriding plan. The board can decide how to overcome the effects of segregation but it won't do so unless there is a "clear, unmistakable direction from the Court." Without such a direction, we will be back before this Court many times.

Judge Connally: What would you do about E. O. Smith? Admittedly, it is in the center of a large geographic area in which only Negroes live. Why shouldn't the school be built in the center of this large geographic area?

Tita: No.

Judge Rives: *Are you* saying that schools must be built on the border lines?

Judge Connally: Doesn't the case boil down to this? You say the board doesn't live up *to* its obligation, but what are the other solutions? Must the children be bussed across town?

Tita: Experts could find many solutions. Bussing children across town is not the only solution.

Judge Wisdom: But they are bussed across town now.

Judge Rives: How many days *did* the trial court take evidence? Didn't you say five or six days?

Did you ask for additional time *in which to prepare* so as to ^{*put on evidence*} ~~indicate~~ where the schools should be located?

Judge Wisdom: *Did* you have any experts testify on where the schools should be located?

Tita: The problem was time. The construction program was announced in March. On May 23 we filed the papers in Court. On June 6 the Court began the hearing. There was no time. We tried to obtain experts but we just couldn't find them in time. Most of those in the state were busy with Headstart projects. We *did* have some testimony by experts on the effects on segregation and on population distribution, but we couldn't get any school administrators. ~~It is~~ Only school administrators ~~that~~ could say where the schools should be located. I am only a lawyer in private practice. I am not qualified to say where the schools should be located. This is our whole case. We say the board should have consulted experts. It never consulted experts.

Judge Connally: In this case you not only attack the construction of new schools, but also expansion and remodeling. What about placing a new cafeteria in an old ^{*NEGRO*} school? Are you saying that that shouldn't be done because it would make the school more attractive?

Tita: No. That's why we left out 29 construction projects from the suit. Cullen is an example of that.

Judge Connally: Doesn't this case boil down to the ~~bonafide~~^{it} freedom of choice. Suppose you have two new schools and all the students have absolute freedom of choice. All the Negro students choose to go to one school and all the white students choose to go to another school. Would you oppose that?

Tita: Yes, there is no possibility of freedom of choice in this district. The desegregation plan must "work."

Judge Rives: By "work" you mean "integration" - not the "absence of discrimination." There is a difference.

Tita: Freedom of choice is no good in Houston. ^{the} history of this city is one of official segregation. The Negroes have been intimidated.

Judge Rives: Maybe you are asking that the Negro be residentially located. After all, it is another way to produce "actual integration."

Joe Reynolds began his argument with the statement of the good faith of the school board. He insisted that the school board has performed in good faith. He said: "We have never been involved with the pupil placement Act. We have never asked the Negro children to exhaust remedy. We have integrated our kindergarden without being ^{Ordered} ~~required~~ to do so. We have accelerated the grades to be desegregated. We are proud of our progress." Reynolds

then began to discuss Mr. Doar's activities in Houston. Reynolds: We called upon the Department of Justice and Mr. Doar to visit our school system and to help us solve desegregation problems. He was invited to point out deficiencies in our system. We have an effective freedom of choice plan in Houston.

^{Rives}
Judge Reeves: But as quoted in Appellants' reply brief Mr. Doar criticizes your plan.

Reynolds: We invited Mr. Doar to look at our system and he only found three out of 180 bus routes that are invalid. Come September 1967 all illegal bus routes will be done away with. The transportation from the Piney Point system will be eliminated and the children in Piney Point can go to Lee High School, which is one of the best high schools in the system. We have a good record of desegregation in Houston. Appellants say that

we only have 5 percent desegregation. But that is not true. We have 12 percent desegregation, and that is the best in the South,

^{R. v. S.}
Judge Reeves: Is that in the record?

Reynolds: No. Our job is to educate children. We cannot keep going around getting these racial statistics. We must be concerned with the education of the children. The real solution to the ghetto schools is to bring in the best white teachers to these schools.

Judge Wisdom: But it is sound education policy to ^{eliminate} afford segregation. Integration is an educational goal. Suppose the school board has two alternatives ^{sites} where to locate a new school. ^{Aside from segregation/integration, they are equally available. But...} One location will perpetuate segregation, the other one will eliminate segregation. The school board must choose the latter alternative. There are some things that could be done to eliminate segregation. But Fletcher said at trial that he never gave any consideration to them.

Reynolds: He never gave any consideration to achieving integration because that was not the law. The Courts of Appeal for the First Circuit, Second Circuit, Third Circuit and Fourth Circuit said that ^{is not} that not the law.

Judge Wisdom: I disagree with that. Those opinions said no such thing. (He then read from the First Circuit's opinion).

Reynolds: We believe that we should ignore race, we should be color blind. That is what the Civil Rights Act of 1964 says we should do.

Judge Wisdom: But we look at race all the time. For example, we look at race in jury cases, in conducting censuses, in adoption proceedings. Shouldn't this case be remanded to the district court for future consideration ^{to square the} ~~in the light of the school board's~~ affirmative duty to consider the elimination of segregation in selecting sites.

Reynolds: But that is not the law.

Judge Wisdom: Segregation is bad educationally.

Judge Reeves: But the question is whether it is bad constitutionally.

Judge Wisdom: The Supreme Court said it was.

Judge Reeves: (Shook his head to indicate disagreement)

Judge Wisdom: The difficult problem has to do with inaction and de facto segregation. That is what the Supreme Court has not ruled on. There is no doubt about State action, ^{in construction is a de jure one} Braxton v. DuVal said as much.

Reynolds: But look at the Six Circuit's case decided on December 15, 1966. We rely on that case.

At this point Judge ^{River} Reeves brought up the problem of the motion for an injunction pending determination of the appeal. He said that the motion was very important because if the school board kept building the schools, the case before the court might become mooted. He then noted that the appellants had not filed an answer to the motion. Reynolds then explained that he only received the motion the ^{day} before the argument and that he did ~~not~~ have the time to read it. Judge Reeves asked whether he wanted time to answer and if so, how much time. ^{was necessary} Reynolds asked for 10 days to answer and the court granted that time. Reynolds also said that it was not true that all the construction ~~that was~~ in process was at Negro schools.

Judge Connally then asserted that the school system has a freedom of choice plan and that children are assigned to schools irrespective of neighborhoods. The thrust of the comments was to suggest that location of the new schools was not critical because a child could go to any school he wanted to. This lead to an analysis of the ~~Freedom of choice~~ ^{plan} system in Houston and Judge Wisdom started by asking him about the ~~Feeder~~ system.

Reynolds: I do not ^{believe we} have a ~~Feeder~~ System in the classical sense. It is true that Fletcher and the others admitted that we have a ~~Feeder~~ System, but they used the term in a different sense.

Judge Wisdom: The ~~Feeder~~ ~~System~~ is bad in any sense.

It puts the burden on the kids. It requires them to take the initiative and get out of the school to which they are assigned on a racial basis.

Reynolds: But only the cards are sent on to the junior high or high school.

Judge Connally: Isn't it true that the kids can go to any school in the city?

Reynolds: Yes

Judge Connally: What about overcrowding? What happens when there is not enough room?

Reynolds: This is one problem we are discussing with the Department of Justice. The Justice Department criticizes us on this. But we don't have any overcrowding problem. We have no transfers, we have a ~~Freedom of Choice~~ System. A child does not have to get permission from the principals in order to go to the school he wants to. He can just show up.

Judge Wisdom: What about the Notice provisions?

Have you satisfied the ^{HEW} guideline standards?

Reynolds: Not exactly, but we are going to improve this.

Judge Wisdom: Do you have a mandatory choice?

Reynolds: Yes. Mr. Doar and I disputed that. But it seems to me that we do have a mandatory choice. Wherever the students show up at the beginning of

the school year, that is the school he is assigned to. He shows up at the school of his choice and that is mandatory.

Judge Wisdom: What about your transportation system? You say that ^{under freedom of choice} children in Ward 5 can go to the River Oak School? Will you provide them with transportation to that school?

Reynolds: No. We cannot afford to pay for his transportation to go all that distance. Mr. Doar only criticizes three bus routes, not our entire system. [Reynolds then mentioned the buses available to Piney Point and Rogers]. We meet the requirements in the Jefferson County opinion. We have a Freedom of Choice Plan that works. We have the greatest amount of integration in the South.

Judge Wisdom: Do you keep racial statistics?

Reynolds: No. This is another suggestion that the Department of Justice has made. The Department has asked us to keep statistics. That is something that we are getting ^{around to do that} now. That is what we are trying to do.

At this point Reynolds emphasized that the adequacy of the desegregation plan is not at state in its law suit. He said that the major desegregation suit of the city is now before Judge Connally. He admitted under question by one of the judges that he sought to have the construction suit also before Judge Connally on the theory that the

school construction is related to the desegregation plan in general. ^{But} He said, this is a separate suit now.

Then the following exchange took place:

Reynolds: The only question in this suit is whether there is an affirmative duty on the school board to strike a perfect racial balance in all the schools in the system.

Judge Wisdom: No one said that. No one said that you must have an ^{accurate} ~~adequate~~ racial balance in ^{every} ~~the~~ school.

Rives: [to Judge Wisdom] To what extent ~~the~~ integration is required under your theory?

Judge Wisdom: My theory is that integration is an educational, constitutional goal. ^{Integrations} ~~Education~~ must be taken into consideration.

Judge Connally [to Judge Wisdom]: There are three schools side-by-side. One is all Negro, one is all white and one is integrated. They get this way because of the Freedom of Choice System. What's wrong with that?

Judge Rives: Must there be a "nonracial system", or must there be "integration"?

Judge Wisdom: I am saying that you cannot ignore the fact that location of the school will perpetuate segregation. Affirmative action is required. Look at the faculty problem. The Constitution requires that affirmative action be taken to reorganize the faculty. The school board has an affirmative duty to take action tending to reduce or eliminate segregation. This is the heart of the case.

At this point, Judge Wisdom began discussing the unique aspects of school construction. He emphasized that in locating schools, a choice had to be made. There would be no question that there is state action involved ^{because of} in that choice. He also said that there was no perfect ^{cure} ~~course~~ for the problem of segregation but segregation can be reduced and that school boards should do as much as they can. In response, Reynolds said that the ^{South} ~~6th~~ Circuit opinion was to the contrary and also that they asked appellants what to do. Judge Wisdom in response said:

But Fletcher admitted that he never took into consideration the reduction or elimination of segregation.

^{following}
Then the ~~an~~ exchange took place between Judges Rives and Wisdom:

Rives: What is the obligation of the school board?

Is the obligation of the school board to educate children or is it to integrate?

I want argument on that question.

Judge Wisdom: In Bradley, the Supreme Court required faculty desegregation and faculty desegregation is something that requires affirmative action by the state.

Judge Rives: In Bradley, the Supreme Court ^{did} ~~does~~ not say that faculty desegregation is required. It only said that there must be an evidentiary hearing on it.

Judge Wisdom: But, of course, the hearing was to result in something. The anticipated outcome was affirmative action.

Judge Rives: So far, the Supreme Court has only considered forced segregation; it has outlawed that. Now we are coming to the point of deciding whether integration is required.

Reynolds: The location of the schools does not determine the residence.

Judge Rives: Is there only zoning in Houston?

Reynolds: No.

Judge Rives: Then the residential patterns are due to socio-economic factors.

Reynolds: We have ^{been} guided by the Civil Rights Act. The Civil Rights Act prevents us from taking race into consideration. It prohibits the correction of racial imbalance.

Judge Wisdom: Those provisions are only applicable to de facto segregation. Read the reports contained in the legislative history. Also those provisions only relate to Title VI. That provision ^{governs} ~~relates~~ to the distribution of federal funds. We are dealing with Constitutional rights.

Reynolds: Jefferson County is wrong. We have de facto segregation in Houston. I understand de facto segregation to mean segregation brought about by residence, other than by state action.

Judge Rives: The Supreme Court has said that education is the most important function that local government provides. We do not want to saddle the school board with the burden of promoting integration. Nor do we want to have the federal courts take on the responsibility.* The federal courts would be "taking over the operation of the school system -- lock, stock and barrel." I realize that the 14th Amendment changed some of our principles of federalism and it limited the effect of the 9th and 10th Amendments. But isn't there something left of federalism?

Judge Wisdom: The school board must act reasonably or rationally; that includes trying to eliminate segregation. There is no conflict with federalism, there is a duty to act.

* In the course of this statement Judge Rives mentioned the possibility of having the job performed by a master appointed by the District Court.

Reynolds then read a portion from a circuit court opinion stating that the Constitution does not require that every Negro child go to a white school.

→ Judge Wisdom immediately said that he agreed. He was not urging a per se rule but only that the school board do as much as it could. ¶ Tita began the rebuttal emphasizing that notwithstanding the freedom of choice system, the location of schools could have the effect of being "a wall to impede desegregation." He also emphasized that Mr. Doar had been studying the Houston system since 1965 and that the study had resulted in criticism, not approval of the system. He then stated that the invitation to Mr. Doar in November 1966 "had political ramifications," and ^{that Mr. Doar} ~~he~~ brought along an investigation team with him, ^{as his visit.}

Judge Connally: Good faith has been found by the District Court. Can you get around that? Isn't there evidence to support the finding of the District Court? Moreover, you offer no solution. Where should the schools be located? Should they be built in the white area, the gray area or the black area? These are the two problems with your case.

Tita: First, we do say that there is no evidence to support the finding of good faith. Moreover, I cannot be expected to find a solution. We want this injunction only for purposes of conducting a 90 day high-priority study. *

Judge Rives: What goals are we seeking? Are we seeking "mixing of the races," as you suggest. Or is the goal the "elimination of discrimination"? I thought the Constitution only requires the latter. What are the goals?

Tita: They are the same. The elimination of discrimination involves the mixing of the races. Our goal is equality of educational opportunity.

Judge Wisdom: Mr. Reynolds says that the construction now underway is not confined to Negro schools. You say that all construction underway is on Negro schools. Is there a factual disagreement between you two?

Tita: Yes.

* In the course of his rebuttal Tita apologized for suggesting that the Court should take over the task of allocating the schools; ~~and~~ he emphasized that there were many solutions and made reference to Judge Rives' ^{earlier} suggestion of appointing a Master.