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The Files

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Oral Argument in Broussard v. The Houston Independent School District

Dave Norman and I attended the oral argument in the appeal in Broussard, which took place on January 25, in Houston. The panel consisted of Judges Rives, 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; none questioned 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 Wood began the argument for appellants; and Joseph Tita completed the argument and handled the rebuttal. Joe Reynolds argued the case for appellees.

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 interrupted and informed him that appellants' motion for an injunction pending the determination of 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.

Judge Rives then began a line of inquiry designed to astertain the number of construction projects that were involved in the suit.

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Judge Rives: 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?

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: 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. 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 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 then pursued another line of inquiry which began with a recount of the fact that a full evidentiary hearing was conducted below by Judge Hannay.

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 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 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. In the North they have neighborhood schools. 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 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 pointed to 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 real applicability to Houston. He said: we recognize that freedom of choice is a permissible transitional concept, but not in Houston.

Tita then discussed the construction program 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 furthest 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 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. He apologized for the lateness of the motion. But, he explained, 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 only on January 5; that report indicated 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 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 board's sites but it is more difficult to say what they should have done. I am not saying that this is necessary but it would definitely help your case.

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 Connally: What solution would you suggest? That is the hard question.

Tita: I suggest that the perogative 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 fullfilling its responsibility. [This statement caused some concern on the part of the judges and Tita immediately toned down his statement.] The school board could be trusted to do the job only if this court established overall criteria and guidelines, and required the district court to supervise compliance with those standards.

Judge Wisdom: The feeder system is an obvious form of discrimination. 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 Connally [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 the racial residential patterns. I would take into consideration segregation and desegregation.

Judge Connally: 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. 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 borderlines?

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 so as to put on evidence 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 Head-start 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. Only school administrators 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 bona fides of 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 on 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 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.

Judge Rives: 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.

Judge Rives: 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 getto schools is to bring in the best white teachers to these schools.

Judge Wisdom: But it is sound education policy to eliminate segregation. Integration is an educational goal. Suppose the school board has two alternative 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 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 require the school board to discharge its 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 Rives: But the question is whether it is bad constitutionally.

Judge Wisdom: The Supreme Court said it was.

Judge Rives: (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 in a de jure system. Braxton v. DuVal said as much.

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

At this point Judge Rives 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 Rives 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 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 led to an analysis of the freedom of choice plan 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 othe s 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 guidelines standards?

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

Reynolds: Yes. Mr. Doar and I disupted 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 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 racial balance in every school.

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

Judge Wisdom: My theory is that integration is an educational, constitutional goal. Integration 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 was no perfect cure 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 Sixth 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.

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

Then the following 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 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 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.

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

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

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 brought along an investigation team with him on 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.

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

Then Mr. Tita got on to the subject of bus transportation. Judge Connally asked "Is transportation the issue"? It was unclear what Tita's response was although Tita did refer to Mr. Doar's letter of December 23, in response. Then Judge Rives asked, particularly in reference to the motion to enjoin construction pending a determination of the merits: "If you are right, can't we give you relief later after the construction is finished? Aren't there things that can be done to eliminate segregation after the building is up"? Tita admitted that there are things that can be done, but that the elimination of segregation would be much more difficult after the construction is completed. He also emphasized that the only ones selected for the injunction pending determination of the merits are those that, according to Fletcher, will be segregated for the next five or ten years.