

MY WORK IN THE CIVIL RIGHTS DIVISION'S EDUCATION SECTION. 1968-1987

Joseph Rich

On August 31, 2018 I formally retired exactly 50 years after starting my first job as an attorney in the Department of Justice's Civil Rights Division where my first day was September 3, 1968. I had left the Department in 2005 after almost 37 and after that, I worked at the Lawyers' Committee for Civil Rights Under Law from 2005-20018. After hearing some random stories about my career over the years, my son Bob and a few others urged me to do a paper about my experiences and views of this work. I also had found memoirs of both my grandfathers that were fascinating and further inspired me.

I was very fortunate to be able to do such interesting and rewarding work my entire career. I was also extremely fortunate to work with some of the most talented and inspiring people I know. As I started drafting this, I made a decision not to personally name most in my discussion of my work because I know I would leave some out. But my deep thanks and admiration go out to all who shared this experience with me, especially those who were my supervisors and taught me so much.

I. BACKGROUND

My interest in civil rights was spurred first by the civil rights movement during my undergraduate years at Yale University, especially after some classmates spent the summer of 1964 in Mississippi working on assisting blacks to register to vote. This was very dangerous work and that was the summer of the infamous murders of three civil rights workers near Philadelphia, Mississippi. Later, in my second year of law school at Michigan, I attended a lecture by a veteran trial attorney in the Civil Rights Division. He described the work being done by Division attorneys which inspired me and led me to apply for a position in the Department's honors program in the fall of 1967 during my third year of law school. At that time, I was somewhat conflicted in seeking a job with the federal government because of an intense opposition to the Vietnam War and the

government's lies in maintaining it. I raised these feelings at my interview for the job in the fall of 1967 and in retrospect was very fortunate to receive an offer.

The year 1968 turned out to be the most memorable (and chaotic) year of my life. Early in the year the Tet offensive in Vietnam intensified opposition to the war and led me to support Eugene McCarthy's presidential campaign in the Wisconsin primary late in March. I was in Wisconsin on March 31, two days before the primary, and still clearly remember watching Lyndon Johnson's famous speech in which he announced he would not run for President. More than anything, my opposition to Johnson came from his constant lying about the war and I at first inexplicably thought this announcement was some kind of ploy to win the primary.

On April 4th, three days after returning to Ann Arbor from Wisconsin, Martin Luther King was assassinated, a shock that led to rioting in close to 100 cities throughout the country. Two months later at the end of May, I graduated from law school. Shortly after that, while I was studying for the New York bar exam at my home in Buffalo, Robert Kennedy was assassinated. Another shock. I took the bar exam in July and then at the end of August, only a week before I was to move to Washington to start my job at the Department of Justice, the Chicago Democratic convention took place and on August 28th violence exploded when police attacked the protesters in a Chicago park, leading to 4 days of violent clashes. It was in this chaotic time that I moved to Washington to start my job on September 3, 1968.

II. THE CIVIL RIGHTS DIVISION

When I joined the Civil Rights Division, it was renowned for the role it was playing in advancing civil rights. It was created in 1957 as part of the 1957 Civil Rights Act, the first civil rights legislation since Reconstruction nearly a century earlier. The 1957 and 1960 Civil Rights Acts limited most civil rights enforcement authority of the federal government to voting rights which was the primary work of the Division in the early 60s. When John Kennedy became President and Robert Kennedy was appointed as Attorney General in 1961, civil rights enforcement became a high DOJ priority.

The Division was a relatively small unit then, but under the leadership of Attorney General Kennedy and Assistant Attorney General Burke Marshall, the volume and accomplishments of its work on the voting rights provisions of the 1957 and 1960 Acts were extraordinary. Court decisions in voting rights cases obtained and the litigation strategies and experience of the Division in the early 60s established voting rights principles that would become the basis of the 1965 Voting Rights Act. In addition to the voting rights work, the Division played an important role in many of the major civil rights events of that period, including the riots that occurred during the desegregation of the University of Mississippi in 1962 and the assassination of Medgar Evers in 1963.

Until 1964, other areas of civil rights enforcement fell to private civil rights organizations and attorneys. Then in 1964, 1965 and 1968 landmark civil rights legislation was passed and greatly strengthened the role of the federal government in civil rights enforcement. The Civil Rights Act of 1964 granted authority to bring school desegregation, public accommodations and employment discrimination cases for the first time and prohibited racial discrimination in programs and activities receiving federal financial assistance. The Voting Rights Act of 1965 gave unprecedented new enforcement authority to the federal government, greatly expanding its ability to fight voting discrimination. It is considered the most successful and effective civil rights legislation ever and watching it being gutted by the Supreme Court in recent years has been very painful. Finally, in April 1968, only a few months before I started, and shortly after Martin Luther King's assassination, the Fair Housing Act was passed.

Leading the Division most of that time was John Doar who served as the First Assistant to Assistant Attorney Generals Harold Tyler and Burke Marshall from 1960-1964 and then as the Assistant Attorney General from 1964-1967. The list of his accomplishments is long and demonstrates why he is a legend in the civil rights movement. They include protecting the Freedom Riders in Alabama in 1961; escorting, along with a federal marshal, James Meredith when he integrated the University of Mississippi in 1962; playing a major role in dissipating a potential racial riot in Jackson MS in 1963 after the murder of Medgar Evers; leading the Department's response to the attack on civil rights workers in Selma, AL in 1965

and successfully prosecuting the murderers of Viola Liuzzo who had been murdered in the Selma to Montgomery march; and, investigating the 1964 murders of three civil rights workers in Neshoba County, MS and successfully prosecuting them for criminal civil rights violations in 1967. His leadership of the Division was recognized as central to its success in this crucial period and established an approach to litigation that has been the model followed ever since.

■ Overview of My Assignments in the Division, 1968-2005

When I started in 1968 the Division was organized geographically. Lawyers worked in geographic sections and were responsible for handling all types of civil rights enforcement cases, including employment discrimination, voting discrimination, police brutality, and school desegregation. I was assigned to the Southern Section, and within that section, to the Alabama unit.

Two months after starting Richard Nixon was elected President. During the 1968 Presidential campaign, he expressed misgivings about civil rights, especially school desegregation requirements that were evolving at the time. Under Nixon, the aggressive civil rights enforcement of the Kennedy and Johnson Administrations changed. The structure of the Division also changed less than a year into the Nixon Administration when in the fall of 1969, the Division was reorganized along subject matter lines which included Criminal, Education, Housing, Employment, Voting and Public Accommodations sections and an office that had responsibility for Title VI of the 1964 Civil Rights Act. Later, an Appellate Section was created in 1974 and over the years new sections were created as new civil rights laws were passed -- the Disability Rights Section in 1991 and the Special Litigation Section in 1994 to enforce new laws designed to protect the rights of people in state or local institutions and to investigate and bring civil cases concerning a pattern and practice misconduct by police agencies.

In the fall of 1969 when the geographical organization was implemented, I was assigned to the new Education Section. As discussed below, during the Nixon Administration, school desegregation had become the most controversial area of civil rights enforcement at that time. The amount of school desegregation litigation in these years exploded and most of the in-court trial experience occurred

from 1970 to 1973. In 1973 I was promoted to one of the deputy chief positions in the Section. While I continued to be lead trial attorney in cases I had been handling at the time, my work became primarily one of supervising litigation of the work of line attorneys in the Section. At times I would appear in the cases that I was supervising to assist the trial attorneys, but my main role was to oversee, not try them.

The election of Jimmy Carter in 1976 changed the focus of the Division back to more aggressive civil rights enforcement. A new section – the General Litigation Section – was created in 1978. It merged the Education and Housing Sections and I became a Senior Litigation Counsel in the Section, but my work continued to be solely on school cases. The rationale for the merger was the close relationship between housing and school segregation and a vision of bringing cases attacking both in the same lawsuit. This led to the famous Yonkers case that was filed in December 1980. There was also an increased emphasis on school desegregation cases against northern school districts. However, there was a decline in the number of fair housing cases initiated and while significant efforts were devoted to develop exclusionary zoning cases, only a few were brought.¹

In 1981 Ronald Reagan became President, resulting in a turning point for civil rights enforcement. Policies and actions initiated by the new Administration weakened established pro civil rights enforcement, especially with regards to school desegregation and affirmative action in employment cases. An explicit

¹ After the formation of the General Litigation Section, considerable efforts were devoted to developing exclusionary zoning cases in which local zoning codes prohibited the construction of affordable housing. The proposed cases were based on applying the disparate impact standard of prove to prove racial discrimination, a standard that was first applied to employment cases in 1971 and to fair housing cases in 1972. Attorneys in the Section conducted in depth investigations into a few white suburbs whose zoning codes precluded affordable housing development. Based on these investigations, they proposed innovative exclusionary zoning suits. The proposed suits relied on the disparate impact standard of proof applicable to cases brought pursuant to the Fair Housing Act. But shortly before the end of the Carter Administration, the proposed suits were not approved by the Assistant Attorney General. It was my understanding that this decision was influenced by the threat of legislation being proposed by Sen. Orrin Hatch which would have prohibited application of the disparate impact standard of proof to fair housing cases.

policy against seeking school desegregation remedies requiring busing was immediately announced shortly after the Reagan Administration started in 1981.

In 1983 the General Litigation section was split back into separate education and housing sections. I was again assigned to the Education Section as deputy chief. While existing school desegregation cases brought prior to the Reagan Administration continued to be litigated, new affirmative enforcement efforts ground to a halt and priority was directed to identifying desegregation orders that could be terminated. The momentum built in the 1970s promoting desegregation litigation was essentially reversed and a long decline began. I continued to work on existing cases but morale in the Section was very low and leadership of the Section was weak. While a significant number of career attorneys left the Division during the Reagan Administration, I felt it important that experienced civil rights attorneys not leave because of their experience in civil rights enforcement and the importance of maintaining institutional knowledge of the Division. But, after several frustrating years in the Section in that period, I sought and was granted a transfer from the Education Section to the Housing Section in 1987 and became one of the deputy chiefs in the Housing Section.

Unlike school desegregation and other education cases, there had been relatively little negative interference with enforcement of the Fair Housing Act during the Reagan Administration. Indeed, one of the reasons for splitting the General Litigation section in 1983 was to increase the number of fair housing cases. In addition, at the time I started in the section, there was a major legislative push to strengthen the Fair Housing Act which for the most part was supported by the Reagan Administration. This resulted in passage of the Fair Housing Amendments Act in 1988 which significantly strengthened the Act, especially the enforcement authority of the federal government. It made for a very productive period when I was in the Section during both the remainder of the Reagan and Bush 1 Administrations, and especially during the Clinton Administration.

In July 1999 I was named chief of the Voting Section. I had not done any voting work since my first few months in the Division in 1968 so it was a challenge to get up to speed on voting law and the section's work enforcing the 1965 Voting Rights Act. In the first year and a half in this position, enforcement

of the Act was very productive. But, in November 2000, over a year after becoming section chief, the controversial Bush-Gore election took place. Being in the Voting Section during the six-week post-election period in which the outcome of the election had not been decided gave me an inside view of how the Department reacted to this crisis.

However, once the Bush 2 Administration took control in 2001, it was soon very apparent that the most conservative wing of the Republican party had been given full control of the Department. Division leadership was especially hostile to career Division attorneys who were wrongly viewed as crazy liberal radicals. Several career section chiefs and deputy chiefs were forced out and replaced. The political appointees overseeing the Voting Section were the worst people I ever had to work with during my long career. Decision making in the Section on enforcement of the Voting Rights Act was badly politicized as was hiring policy for the entire Division. I was stripped of much of my authority as section chief and was surprised that I was not one of the section chiefs who was removed. After Bush 2 was re-elected in 1984, buyouts were offered to staff resulting in a large number of career attorneys leaving the Division. By that time, although not replaced, I had lost my ability to manage the work of the section because of the hostile leadership and I expected to be removed if I stayed on. Thus, I decided to take the buyout and my retirement was finalized on April 30, 2005 after almost 37 years in the Division.

III. MY WORK ON EQUAL EDUCATION MATTERS, 1968-1987

When I started this paper, I planned to discuss all my work at the Department of Justice and the Lawyers' Committee. As I started drafting, I expected it to be more of a general and anecdotal discussion of my work. But, as I began to piece together and recollect my past work, I decided it was important to describe some of my cases and assignments in more detail than I originally intended in order to provide a full flavor of my civil rights experiences and to give some idea of how the subject matter law developed. This required much research and because of the time it took to do this, I decided to focus solely on my nearly 18 years in the Education Section from 1968 to 1987. Hopefully I will be able to continue this paper in the future discussing my work after 1987.

■ Southern Section, 1968-69

My first major assignment in the Southern Section was to review court records in Selma, Alabama related to a case involving one of the infamous southern sheriffs of the period, Jim Clark. Clark had a long history of illegal arrests of Black civil rights workers who were attempting to register voters and in this case the court had previously ordered that arrest and conviction records associated with Clark be expunged. The records to be examined were located in Selma, Alabama. The events in 1965 had made Selma famous and it was a little daunting to do my initial work there.

Not long after that trip virtually the entire Division was assigned to monitor the November 1968 election. The Voting Rights Act gave the Department authority to assign federal observers in covered jurisdictions in the South to help deter intimidation, suppression and discrimination against Black voters. I was assigned to a team covering Wilcox County in the black belt of Alabama, not far from Selma. At the time I had a large cast on my right hand from finger surgery I had shortly before the election. During the election coverage in Wilcox County, I was introduced to the Probate Judge who had primary authority over local elections. Because of the cast on my hand, I couldn't shake hands and when the probate judge saw the cast he remarked, "What'ya do boy, hit a N..... in the head." That was my welcome to Alabama, 1968.

The 1968 election was extremely close, with Nixon beating Hubert Humphrey by only 43.42% to 42.72% of the vote. Alabama governor George Wallace was a third-party candidate and was able to draw 13.53% of the vote and win five southern states, including Alabama, a vote which reflected the success of his racial demagoguery. In the campaign before this election, Nixon had developed the well documented "Southern strategy" that was designed to attract the anti-integration, states' rights and law-and-order sentiments of many Southerners who historically voted Democratic, but were increasingly opposed to Johnson Administration's vigorous support for civil rights. While Nixon narrowly prevailed, Wallace's candidacy hindered that strategy by winning over many of the voters Nixon

targeted.² The southern strategy was the beginning of a major push back to the civil rights movement and has in many ways remained a central part of Republican political strategy ever since. I have often wondered how different civil rights progress would have been had Humphrey been elected in 1968, and even more if Kennedy had not been assassinated and had been elected President.

After the 1968 election, I had a variety of assignments that provided me some experience in enforcement of the employment and public accommodations provisions of the 1964 Civil Rights Act. The first two cases in which I recommended enforcement action were public accommodations cases. The first involved a truck stop in rural Alabama at which the owner would only serve black customers out of the backdoor of the facility. The case was assigned to Judge Frank Johnson, the famous Alabama judge who played a crucial role in the advancement of civil rights in the South. His landmark work included handling the early voting rights cases, many of the cases growing out of the 1965 Selma voting rights marches, and development of the first state-wide approach to school desegregation. In my truck stop case, he held an early hearing at which the defendant appeared without an attorney to represent him. The defendant was very recalcitrant, shouting out insults and racial slurs in front of Judge Johnson. Initially, the Judge was quite patient with him, warning him to calm down and control himself. But when the racist diatribes continued, Judge Johnson held the defendant in contempt of court and had him removed to a lockup in the courthouse. Even though an assistant U.S. attorney represented the government in this proceeding, I always like to say that in my very first case, the defendant was jailed.

Subsequently, I obtained approval to file a second public accommodations case in late 1968 against a swim club that banned Black members. It was brought six months before a 1969 Supreme Court decision addressing the factors to be considered in determining whether a facility was a private club and not subject to

² After Nixon became President, he worked to limit the ability of Wallace to challenge him again in the 1972 election. In the 1970 governor's race, the Nixon Administration quietly supported Albert Brewer, the relatively moderate Alabama governor at the time who was running against Wallace. This effort was unsuccessful and Wallace was again elected governor. In 1972 Wallace ran for President again and his support increased significantly in the north as well as the south. But his campaign ended in April 1972 when he was badly wounded in an assassination attempt and became disabled for the rest of this life.

the public accommodations provisions of the 1964 Act. Eventually, the district court found that the facility did not qualify as a private club and entered an order enjoining the prohibition of Blacks from using the facility.³ Other assignments in my first year included work on an employment discrimination case against an agency of the Alabama state government in which I got to take several depositions, my first litigation experience.

But most of my work in the Southern Section was on school desegregation cases. Until the 1964 Civil Rights Act, the Department had no authority to bring such cases. After the landmark *Brown v. Board of Education* decision there had been “massive resistance” to school desegregation in the South, and the schools remained almost completely segregated. In the school year before passage of the 1964 Act, 99% of black children in the southern states continued to attend all black schools. With passage of the 1964 Act, both the Department of Justice and Department of Health, Education and Welfare (HEW) assumed major roles in school desegregation enforcement which became one of the highest priorities of the Division. By the time I started in 1968, the Division had filed or intervened in cases involving a large number of school districts. Similarly, HEW, which had authority to cut off federal funds to school districts that were found to be discriminating, aggressively enforced school desegregation requirements, adopting desegregation guidelines and initiating hundreds of administrative proceedings against noncomplying school districts.

By the late 1960s, most southern school districts were implementing “freedom of choice” plans to meet school desegregation requirements. Under these plans, students were automatically re-enrolled in the same school every year, but had the option to change their enrollment if desired, which meant that a black child could enter a formerly all-white school. HEW guidelines required freedom of choice plans and two major court decisions in 1967 established model remedial freedom of choice decrees. In *Lee v. Macon County School District*, Judge Johnson, writing for a three-judge district court, required a uniform state-wide freedom of choice plan. This was a groundbreaking enforcement approach in that it required statewide relief covering 99 Alabama county and city school systems.

³ *United States v. Johnson Lake Inc.*, 312 F. Supp. 1376 (S.D. Al. 1970)

267 F. Supp. 458 (M.D. Al. 1967).⁴ At about the same time, the Fifth Circuit decision in *United States v. Jefferson County School Board, et al.* also set forth a model freedom of choice plan based on HEW guidelines which was required throughout the Fifth Circuit. 372 F.2d 836 (5th Cir. 1966), reaffirmed, 380 F.2d 836 (5th Cir. 1967) (*en banc*).

But such freedom of choice plans resulted in minimal progress because they placed the burden on black students to choose to attend formerly white schools. Such choices were understandably limited because of continued resistance and intimidation of Black families that chose white schools. Not surprisingly, no white students chose to attend the historically black schools which remained almost completely segregated. A U.S. Civil Rights Commission report on school desegregation in 1967 concluded that while there had been progress since the passage of the Civil Rights Act, it was only token progress and in the Deep South over 90 percent of black students still attended all-black schools. While permitting freedom of choice plans, courts recognized their shortcomings. The *Jefferson County* decision found that the slow pace of integration in the Southern and border States was in large measure attributable to the manner in which free choice plans worked. 372 F.2d at 888. Accordingly, it held that school districts had an affirmative duty to bring about an integrated, unitary school system in which there are no black or white schools, “just schools.” 380 F.2d at 389. Further, while permitting freedom of choice plans, it held that such plans are “but one of the tools available to school officials *at this stage* of the process” for eliminating a dual system of separate schools. *Id.* at 390.

The major impetus for real progress in school desegregation came a year after *Jefferson County* and *Lee v. Macon* in a Supreme Court case decided in May 1968, just a few months before I started -- *Green v. New Kent County*. 391 U.S. 430 (1968) While conceding that freedom of choice might be useful as a means of desegregation in some circumstances, the Court in a 9-0 decision the Court

⁴ Brian Landsberg was a longtime distinguished Division attorney. He led the litigation of this landmark case and recently published an in depth and fascinating book about it entitled “Revolution by Law: The Federal Government and the Desegregation of Alabama Schools.” Brian was the section chief of the Education Section from 1969-1974 and provided valuable guidance and support as a mentor for me in those years. He then led the Appellate Section from 1974-1986 and was one of the most respected attorneys in the Division. Since then he has been a law professor at the McGeorge Law School.

emphasized that such plans had been an ineffective tool and held that if a freedom of choice plan "fails to undo segregation, other means must be used to achieve this end." Moreover, the decision added great urgency to the duty to desegregate, holding that "the time for mere 'deliberate speed' has run out," and "the burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." 391 U.S. at 442. The *Green* decision was a major impetus for school desegregation enforcement in the South and almost immediately after the decision, school desegregation litigation shifted into even higher gear. Motions were filed by the Division in virtually all its existing cases (as well as by plaintiffs in private cases) seeking relief consistent with the Court's mandate in *Green* that school boards adopt desegregation plans that accomplished full desegregation of schools "now."

Thus, when I started my job four months after *Green*, it was at the start of a three to four year period in which school desegregation litigation peaked and more progress was made than at any other time before or since. My first school desegregation assignments were early in 1969, shortly after the Nixon Administration had begun. Initially, the new leadership generally continued the enforcement policies in place at the Department and HEW. Given that relief in the *Lee v. Macon* case was sought in 99 school districts in Alabama and there were separate cases against the state's major cities and counties (Birmingham and Jefferson County, Montgomery and Mobile), school desegregation litigation in Alabama was especially active. One of my first assignments was in the Mobile County case in which I had my first court appearance. The case was before Daniel Thomas, a judge who had consistently ruled against plaintiffs and I recall how nervous I was at that hearing, literally shaking as I presented the argument. Later, I did extensive work on the Birmingham and Jefferson County cases and a case in Choctaw County, Alabama

My most significant work at that time came in the spring of 1969 when I was assigned was to investigate discrimination against black faculty and staff that was occurring in the desegregation process. The remedial orders in desegregation cases included requirements for desegregating the faculties of historical white and black schools. But implementation of these orders typically resulted in many teachers from the historically black schools losing their jobs or being demoted. I spent

more than two weeks in Alabama interviewing many such teachers who had been discriminatorily demoted or lost their jobs. Some of the information from these interviews was used in later enforcement actions. The discriminatory employment practices that arose in the process of desegregating school districts was a constant problem and one of the negative impacts of desegregation. School boards were dismissing, demoting, and arbitrarily reassigning black teachers. Black principals were routinely assigned to white schools as assistant principals, often with a reduced salary and sometimes with additional teaching duties. In cases where dismissals were necessary, blacks were almost always the ones let go while whites were retained. It has been estimated that up to one third of black faculty in school districts undergoing school desegregation either lost their jobs or were demoted in the late 60s and early 70s.

■ Alexander v. Holmes

In the summer of 1969 toward the end of my first year in the Division, the Nixon Administration took action that signaled a major retrenchment in school desegregation enforcement policies the Division. Extraordinary events that summer led to a significant Supreme Court decision styled *Alexander v. Holmes* which undercut the Nixon Administration's efforts to slow down school desegregation and instead resulted in increased litigation in the South. In a case styled *United States v. Hinds County School Board*, thirty-three Mississippi school districts had been consolidated into one case. In May, 1969 the district court in the case rejected the *Green* motions filed in those cases seeking new plans and approved freedom of choice plans for these districts even though 96% of black students in those districts were projected to remain in all black schools. The judge in this case was Harold Cox, one the southern district court judges most notorious for his opposition to civil rights.

Private plaintiffs and the United States appealed this decision and sought expedited reversal which was granted by the Fifth Circuit Court of Appeals on July 3, 1969. In its opinion the Fifth Circuit noted the total absence of white enrollment in black schools and only minimal enrollment of blacks in white schools, and held that the freedom of choice plans were constitutionally inadequate. The court required the school districts to collaborate with experts from HEW to prepare plans

to disestablish the dual systems in these districts, and set August 11, 1969 as the deadline for submission of these plans and September 1 as the date for implementation of the plans.⁵

The entire Mississippi unit of the Southern Section spent the rest of that summer in Mississippi presenting to the district court desegregation plans prepared by HEW. After submitting the plans to the court on August 11, Hurricane Camille, one of the worst hurricanes in Mississippi history (even worse than Hurricane Katrina in 2005), hit the Mississippi coast on August 18. The very next day, August 19, HEW Secretary Robert Finch, without notice to the attorneys on the ground, sent a letter to Judge Cox requesting that the plans HEW had submitted to the district court on August 11 be withdrawn and that HEW be given until December 1, 1969 to submit new plans, with the time for implementation of those plans unspecified.

This was the first time that the Department of Justice had retreated in the struggle to achieve meaningful school desegregation and the first time the Department had taken a position contrary to that of the NAACP Legal Defense Fund (LDF), the private organization that had litigated the *Brown* decision and was a leader in seeking school desegregation. It set off a nationally publicized revolt in the Division in which most of the attorneys publicly objected to this effort to delay desegregation. The revolt was reported on the front page of the New York Times and LDF ran a full-page ad in the Times accusing the federal government of breaking its promise to the children of Mississippi. The newly appointed Assistant Attorney General of the Civil Rights Division, Jerris Leonard, defended the administration's action, calling its critics "a lot of people who are frankly running off at the mouth."⁶ Subsequently, one of the Division attorneys was fired because he publicly disagreed with Department policy while arguing a desegregation suit.⁷ Later it was reported that the Nixon Administration's retreat in this case was driven

⁵ See 417 F.2d 852 (5th Cir. 1969).

⁶ N.Y. Times, Oct. 3, 1969, at 25, col. 1.

⁷ Time Magazine, Oct. 31, 1969, at 77

in part by an agreement President Nixon had entered into with Mississippi Senator John Stennis whereby Stennis agreed to support an anti-ballistic missile treaty being sought by the Administration.

After the Finch letter, the consolidated case moved at a speed rarely seen in federal courts. On August 26 the district court approved the delay sought by the Division. LDF filed an immediate appeal, but on August 28 the court of appeals approved the delay. LDF then sought a stay of this decision from the Supreme Court. Justice Hugo Black reluctantly denied the application while at the same time urging the plaintiffs to seek full Supreme Court review. A formal request for review was then submitted by LDF on September 23, and the Supreme Court quickly agreed to hear the case -- which was now styled *Alexander v. Holmes* -- on October 9. Two weeks later, on October 23, the case was argued before the Supreme Court by Jack Greenberg, the famous head of LDF, for the plaintiffs and Assistant Attorney General Leonard for the Department. No other Division lawyer signed the brief. Six days after the argument on October 29, the Supreme Court, in a unanimous 8-0 *per curiam*, decision, reversed the delay approved by the lower courts and ordered immediate desegregation, emphasizing that the time for delay in the desegregation of southern public schools was over, abruptly ending the long delay in meaningful school desegregation.⁸ Along with *Green*, the *Holmes* case were the decisions which led to widespread desegregation in the early 1970s.

IV. EDUCATION SECTION

It was during the *Alexander v. Holmes* litigation that Division leadership decided to change from a geographical organization to one based on subject matter. One of the new subject matter sections was the Education Section. Division attorneys were given the opportunity of listing their top three choices. This was in the midst of the turmoil and protest arising after the retreat in the Mississippi cases. Because of the almost unanimous opposition of career Division attorneys to the retreat in *Alexander v. Holmes*, virtually none listed the new Education Section as their choice. Anyone who even listed it was assigned to the Section and many who didn't list it at all were also assigned. I listed Education as my third choice because

⁸ 396 U.S. 19 (1969)

of my school desegregation work in the Southern Section and was assigned to the Education Section.

After the *Holmes* decision, school desegregation litigation accelerated even more than it had after *Green* in 1968 and this had an immediate impact on the newly created Education Section. Nine days after the *Holmes* Supreme Court decision, the Fifth Circuit ordered that the desegregation plans previously formulated by HEW in the consolidated case were to be implemented by December 31, 1969 – in the middle of the school year.⁹ At the end of 1969, most of the Section's attorneys were sent to Mississippi to monitor the implementation of these plans. I was assigned to Forrest County where Hattiesburg is located.

There were more than thirty plans to be implemented in Mississippi in the middle of the school year. It was a very tense time and there was a considerable threat of violent opposition. The governor of Mississippi at the time was John Bell Williams who had been very active in the massive resistance to school desegregation when he was in Congress. He came close to advocating a boycott but in the end moderated his position, saying resistance would be useless. His moderation was reportedly urged upon him by the state's business community and his statement was commended as "statesmanlike" by Senator Stennis. Stennis voiced support for the public schools, and he and the Mississippi Attorney General attempted to take people's mind off the desegregation in Mississippi by promising to carry the fight to the rest of the nation. Desegregating the North, they argued, might lead to a reversal of the nation's commitment to desegregation.

In Hattiesburg there was significant opposition to the HEW plan required by the court. Most memorable to me was a parade held a few before schools opened in opposition to desegregation in which a pig with a sign with "HEW" posted on its back led the parade. Despite the very strong opposition throughout the State, implementation of the new plan in Hattiesburg and the plans in the other school districts in Mississippi proceeded without significant violence.

⁹ *United States v. Hinds County School District*, 423 F.2d 1264 (5th Cir. 1969).

■ The Reaction of the Nixon Administration to *Holmes*

The *Holmes* decision was a stinging rebuke to the Nixon's Administration efforts to slow down school desegregation and placate the opposition of whites to school desegregation in the South. Through the early months of 1970, it was not clear how the Nixon administration would address the mandate of *Holmes*. The retreat of the Department in *Holmes* increased concern in the civil rights community over the extent to which the Division would enforce school desegregation requirements. After all, Nixon had adopted a "southern strategy" when he ran for President in 1968, and the effort to delay integration in Mississippi was viewed as a part of this strategy and a major retreat in the Division's enforcement posture.

In March 1970 the Nixon Administration convened a Cabinet working group headed by George Schultz and Daniel Moynihan which subsequently issued a lengthy written school desegregation policy on March 24th. The policy statement walked a fine line between endorsing compliance with the commands of the court in *Green* and *Alexander*, and signaling to the South an effort to minimize the impact of school desegregation on white parents. Because of the urgency required by *Holmes*, the first part of the statement was a positive one for civil rights advocates. It stated that the administration would carry out the law "fully and fairly," emphasizing that "deliberate racial segregation of pupils by official action is unlawful wherever it exists" and that "in the words of the Supreme Court, it must be eliminated 'root and branch' and must be eliminated at once."

But the remedial principles for school desegregation set forth in the statement were designed to minimize the impact of *Green* and *Holmes*. At that time, some courts had ordered plans that included mandatory busing of students out of their immediate neighborhoods to achieve desegregation. This remedy was extremely controversial that dominated political disputes concerning school desegregation thereafter. The March statement made clear the Administration's opposition to this kind of mandatory busing. It emphasized that "the neighborhood school will be deemed the most appropriate" for school desegregation and that "transportation of pupils beyond normal geographic school zones for the purpose of achieving racial balance will not be required." Further, the statement placed

primary emphasis on the “good faith” of school districts in implementing desegregation plans rather than on the actual achievement of full desegregation as required by *Green*, stating that school boards should have "substantial latitude" as long as they demonstrate good faith.¹⁰

The Administration’s opposition to busing was met by much negative commentary from civil rights organizations and advocates. But, the commitment to desegregation enforcement by the Division set forth in the March statement was strengthened reflected in a May 1970 statement by Assistant Attorney General Leonard in which he said "I think everyone realizes the law is going to be enforced. This is it." Throughout the spring of 1970, Education Section attorneys obtained meaningful orders in existing cases in which motions for further relief had been filed after *Green*.

During the spring, I continued to work on desegregation plans in some of the school districts covered by the statewide order in *Lee v. Macon*. Most of these school districts were rural or small cities, and full desegregation usually could be achieved by plans that did not require mandatory non-contiguous busing to desegregate schools. In fact, most of the rural districts already were busing most of their students to school and many found that total busing miles actually decreased after desegregation because students no longer had to be bused to separate white and black schools.

In the summer of 1970, an even more vigorous enforcement effort was undertaken by the Administration and the Education Section in an attempt to ensure the desegregation of most southern school districts by the fall of 1970. The Section was directed to implement the most extensive school desegregation enforcement effort during my time in the Division and perhaps at any time in Division history. New cases based on a statewide approach similar to that developed in Alabama and Georgia (which had been filed in 1969) were filed in five states on July 8, 1970 -- Mississippi, Florida, South Carolina, North Carolina,

¹⁰ Statement About Desegregation of Elementary and Secondary Schools, 1970 PUB. PAPERS 304 (Mar. 24, 1970).

and Arkansas. A month later on August 7, 1970, four cases against a total of 27 school districts were filed in Texas, one in each of the State's judicial districts. Over 50 school districts were specifically named in these cases. The urgency of *Holmes* was recognized in these filings which sought implementation of desegregation plans in September 1970 less than two months later. Similar actions were taken in pending Department cases and in scores of private cases. In sum, school desegregation litigation and administrative enforcement by HEW reached a peak that summer and included most school districts in the South that remained out of compliance with the requirements of *Green* and *Holmes*.

Tom Wicker, a prominent New York Times columnist for many years, had been very critical of the Administration's desegregation efforts up until then. But, that perspective changed as a result of these actions. In a 1991 book, he concluded that "There is no doubt about it, the Nixon administration accomplished more in 1970 to desegregate southern school systems than had been done in the 16 previous years or probably since. . . . That effort resulted in probably the outstanding domestic achievement of his administration."¹¹ It was thought that the motivation for this major enforcement push was to try and dampen criticism of the Administration's desegregation efforts before the 1972 election. Nonetheless, Wicker's view is a fair assessment of the enforcement efforts of the Administration in the summer of 1970.

When schools opened in September 1970, the growth in the number of school districts in the south implementing meaningful desegregation plans for the first time was major. The level of school desegregation had increased more than in any other year before or since. As noted in 1970 annual report of the Attorney General, "prior to the 1969-70 school year, 5.2 percent of the black school children in 11 southern states attended school in desegregated systems; that as of June 4, 1970, systems enrolling 58.9 percent of those children were committed to

¹¹ Leonard Garment, one of Nixon's more liberal advisers, supported Nixon's rejection of a more conservative course of action and argued that "[m]ore school desegregation took place during Nixon's first term than in all the preceding eighteen years following Brown"). Leonard Garment, *Crazy Rhythm: My Journey from Brooklyn, Jazz and Wall Street to Nixon's White House, Watergate and Beyond*.

desegregate by September 1970 and that figure was expected to rise approximately 90% by the fall of 1970.

V. CASES I WORKED ON IN THE EDUCATION SECTION, 1970-1987

The remainr of this paper discusses in chronological order the most important and interesting cases during my 17 years in the Education Section. The most intense and exciting time in the Section was as a line attorney in the 1970-1973. Much of work in that period was on what I consider my two most important cases – the case against the Austin, Texas school district, *United States v. Texas Education Agency (Austin ISD)*, and a statewide case against the State of Texas and the Texas Education Agency (TEA), *United States v. State of Texas*. Discussion of these two cases is very detailed. After I became Deputy Chief in 1973 my work on these two cases continued for many years but I spent most of my time supervising many other cases and assignments of line attorneys in the Section that involved school districts that were in the process of desegregating. Although numerous I do not discuss most of them as the bulk of the litigation was handled by line attorneys who I supervised and did not require as much of my time as those discussed.

1. Boykins v. Board of Education of Fairfield

Shortly after the *Holmes* decision, another ongoing consolidated school desegregation case was decided by the Fifth Circuit on December 1, 1969, permitting fifteen school districts until the fall of 1970 to implement their student desegregation plans. But, the decision was immediately appealed and on December 13, 1969 the Supreme Court quickly vacated that decision, indicating that in light of *Holmes*, delay beyond the start of the second semester of the 1969-70 school would not to be tolerated. This was followed by another Supreme Court decision on January 14, 1970 requiring implementation of the student reassignment plans in these districts by February 1, 1970.¹² These decisions sent a strong message that courts would not tolerate further delay.

¹² *Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970)

This was followed by several court of appeals decisions rejecting free choice plans approved by district courts and requiring immediate meaningful desegregation. One such case was against the Fairfield, Alabama school district, a suburb of Birmingham where Willie Mays attended school in the 1940s. After returning from Hattiesburg in early January, I was assigned to this case and it became the first case that I litigated -- and a very memorable one. The United States was a plaintiff-intervenor and on January 9, 1970, the Fifth Circuit reversed the district court's earlier approval of a freedom of choice plan and required the submission of a new desegregation plan. Consistent with the mandates in *Holmes* and *Carter*, Fairfield was required to submit the new plan to the district court by January 15 and implement a new plan on February 1. *Boykins v. Board of Education of Fairfield*, 421 F.2d 1330 (5th Cir. 1970).

I immediately worked with a school desegregation expert from HEW preparing a proposed plan for Fairfield. The hearing was held shortly after January 15 and my first litigation experience turned out to be the most bizarre in my career. I appeared for the Department and normally I would have been accompanied by a more senior attorney from the Division or at least an Assistant United States Attorney from the Birmingham office. But for reasons I do not recall, I was the only attorney in court for the Department that day and there was no attorney representing the private plaintiffs present. In short, I was alone on my first case, with only a little over a year's experience in the Division and no trial experience.

At the hearing I presented the HEW expert's testimony which set out the proposed plan we had developed. He was then cross-examined by defense counsel who had long represented many Alabama school districts and was well known for his anti-desegregation advocacy and for his devious tactics. The HEW expert testified that he had worked with me in preparing the proposed plan and after he completed his testimony, defense counsel called me as a witness. I was completely taken aback by this move and objected to the District Judge, Hobart Grooms, who had initially approved the freedom of choice plan despite the mandate of *Green*. Judge Grooms overruled my objection and I was required to testify with no one representing me. At this point, I was at a complete loss as to what to do. My testimony proceeded and I found myself objecting to questions posed to me from

the witness stand. There was a large contingent of mothers of students attending the hearing and this spectacle quickly riled them up.

Eventually my testimony ended and the court took the matter under advisement. When I left the courtroom, many of the mothers were in the hallway yelling at me in a threatening way. I hurried to my rental car and returned to the motel where I was staying. At the motel desk the clerk informed me that some “friends” had been by looking for me. I knew I had no friends in Birmingham and was very alarmed. I called my office and then the FBI for directions on how to proceed. They instructed me to end my stay at that motel and register under another name at another motel. This event is so burned into my memory that I still remember the alias I used – John Webster, which was the name of a DC plumber I had recently used.

After the hearing, Judge Grooms rejected the HEW plan. I didn’t work on the case after that decision but there was much more litigation. Judge Grooms decision was appealed and after further hearings and another appeal a final plan was approved for the 1972-73 school year.¹³ But, as was typical of most school desegregation cases, there was further litigation to address problems that arose during the desegregation process. Whites objected to assignment to black schools resulting in was extensive white flight, resulting in the Fairfield school system going from majority white to majority black. Blacks objected strenuously to the closing of formerly black schools, including the historically black high school. Protests of black students resulted in widespread expulsions. From 1972-74 several district court hearings and two more appeals were required to address these problems.¹⁴

After the Fairfield litigation, I continued working primarily in Alabama on *Lee v. Macon* related school desegregation matters in the spring of 1970, including putting together a desegregation plan for the part of that case requiring desegregation of Alabama junior colleges and trade schools. In April, 1970 I was

¹³ See 429 F.2d 1234 (5th Cir. 1970); 446 F.2d 973 (5th Cir. 1971).

¹⁴ See 457 F.2d 1091 (5th Cir. 1972); 492 F.2d 697 (5th Cir. 1974).

assigned to a major school desegregation dispute in Manatee County, Florida, located on the west coast of Florida not far from Tampa. The Manatee County School district had been ordered to implement a school desegregation plan on April 6, but the day before the desegregation order was to take effect, Florida Governor Claude Kirk suspended the school board in an effort to frustrate the court order. The court appointed the Department of Justice as a friend of the court to help ensure implementation of the plan. Another Division attorney and I were assigned that role and together we attended further hearings in the case in April. The case received national attention because of the governor's interference and after further hearings the plan was implemented.

The 1970 enforcement effort of the Education Section was a massive undertaking and resulted in constant litigation throughout the summer of 1970. Because the cases had been filed so close to the opening of school in the fall of 1970, I and many other Division attorneys were on the road for most of the summer, going to federal courts throughout the six states sued in efforts to present plans to courts before school started in the fall and obtain at the least interim plans to be implemented in the fall of 1970. In the spring of 1970 I had been assigned to cover school desegregation in Texas and Arkansas and spent July working on the Arkansas cases and a case in Tyler, Texas. In August, after the filing of the cases against 27 Texas cases, I spent most of the month covering as many of these cases as I could.

2. United States v. Tyler Texas ISD

The Tyler case was the first that I litigated in the summer of 1970. Prior to filing the case on July 15, 1970, extensive efforts had been made to work out an agreed plan with the school district. Leading the negotiations for Tyler was William Steger who at the time was chairman of the Texas Republican Party.¹⁵ During negotiations, Tyler was arguing for a plan based on neighborhood schools, arguing that was what was required in light of Nixon's March policy statement. However, shortly before these negotiations, several cases decided by the Fifth

¹⁵ In October 1970 he was nominated and confirmed as a District Judge.

Circuit Court of Appeals required a desegregation technique known as pairing.¹⁶ The plan I was advocating had been drawn by experts at HEW and used this technique. There was also a dispute over the formerly all black high school in Tyler, Emmett Scott. The HEW plan proposed that it be converted to an integrated junior high. But the school district wanted to close the school which was vigorously opposed by the Tyler black community.

Negotiations broke down and we filed our complaint in federal court. The case was assigned to Judge William Wayne Justice, a 1968 LBJ appointment whose accomplishments in Texas over the next forty years made him a renowned judge in Texas. Many of his decisions were groundbreaking and far reaching and because most were very pro civil rights, he became an object of much scorn in the state. In addition to the Tyler case, I worked on two other cases in which he presided that are discussed later below.

In the Tyler case, we sought relief for the opening of school in September 1970. Thus, trial was held ten days after the filing of the complaint on July 25, 1970. We presented the system-wide plan recommended by HEW. Immediately after the hearing, Judge Justice ordered implementation of that plan. It required keeping Emmett Scott open as an integrated junior high. But after the hearing, the school district was successful in persuading Division leadership to agree to closing Emmett Scott and transfer its students to the two white high schools -- John Tyler and Robert E. Lee. Judge Justice accepted this modification over the opposition of an attorney representing the black community. Judge Justice later told his biographer that he had “ambivalent feelings” about this compromise, but agreed to it because it accomplished the desegregation of Tyler’s schools and there was little time to do anything else before the start of the new school year.

I returned to Washington after the order was entered. Unknown to me at the time, there had been complaints made to Assistant Attorney General Leonard by

¹⁶ See e.g., *Allen v. Bd. of Public Instruction*, 432 F2d 362, 367 (5th Cir. 1970). The pairing of schools was a desegregation technique which joined contiguous elementary schools – one predominantly white and the other predominantly black – and assigned grades 1-3 to one school and 4-6 to the other. It resulted in more extensive desegregation than neighborhood schools but assigned some students out of their neighborhood school.

Tyler officials who claimed that the positions I had taken in negotiations deviated from the President's neighborhood school policy. I was questioned closely by Division leadership and feared this incident could result in disciplinary action or worse. In the end, leadership concluded to me relief that my advocacy was appropriate. But in retrospect this was a much more serious matter than I realized at the time and could have ended my career at the Department less than two years after I had started.

Implementation of the plan in September 1970 was very controversial and exemplified the types of problems that arose in many school districts that were fully desegregating. After school opened, serious racial tension grew at the two formerly white high schools to which the black Scott students were reassigned as a result of closure of Scott. Like the loss of black principals and teachers, the closing of black high schools was widespread in the desegregation process. Black high schools under the segregated system were smaller and less well maintained than the white high schools and white parents uniformly resisted being assigned to formerly black schools. As a result, many historically black high schools were either closed or converted to middle schools when desegregation plans were ordered, and the burden of desegregation fell disproportionately on black students. More broadly, such closures had a very negative impact on longstanding black communities. In Tyler the black community viewed the closing of Scott as collective punishment for seeking integrated schools, and as a way to keep white children from being sent to schools in minority neighborhoods. One black leader was quoted as saying "it was a sad day, sad occasion when we got the announcement that the school would be closed."

Many other problems arose during implementation of the plan that were typical of the implementation of school desegregation plans. The tension arising from the closing of Scott led to significant unrest and protest. Even before school opened in the fall of 1970, there were efforts to change the name of the white school -- Robert E. Lee High School -- to which black students were assigned. During this protest there were bomb threats at Lee and several black students were charged with instigating these threats. Later in the school year a dispute surfaced concerning the way cheerleaders were chosen at John Tyler High School. Black students had complained that the election unfairly reserved four positions for

whites while giving only two to blacks. This spurred a walkout of 250-300 black students and extensive disciplinary action against these students.

Further disputes followed after the 1970-71 school year. In October 1971, four students representing black students at Robert E. Lee presented the school board with a petition to change the school's confederate symbols and name because they represented segregation and slavery to the black student body. Later, because white students waved confederate flags and sang "Dixie" at a pep rally, violence was threatened, requiring police intervention. Subsequently, after the state education agency threatened the school district with a loss of accreditation, the board voted to get rid of the rebel mascot, confederate flags, the Dixie fight song and other confederate symbols, but did not rename the school.¹⁷

Problems like this were typical during the implementation of many school desegregation plans. These came to be known as "second generation" issues and in addition to the problems experienced in Tyler described above, they included widespread demotion of black administrators, lack of black student participation in extracurricular activity, discriminatory discipline policies, "tracking" or grouping students by ability into virtually segregated classes, and a general lack of programs for black students. Much of my work in the Education Section involved such issues in many of the school desegregation cases brought by the Division, especially after 1973 when I was a deputy chief supervising line attorneys.

3. United States v. Watson Chapel School District

Because many of the cases of the plans were not filed with only a few months until the opening of the 1970-71 school year, plans developed during the summer of 1970 were interim in nature and did not fully desegregate the schools. Moreover, resistance of whites to assignments to formerly black schools resulted in white flight and creation of private segregated schools which limited the

¹⁷ Not until 1973 did the tension in Tyler schools ease. This was due in part to Tyler High School winning the state high school football championship, led by Earl Campbell, a famous African American player who went on to play at the University of Texas and then the Houston Texans and be elected to both the college and NFL Halls of Fame.

desegregation actually achieved in many districts. Moreover, in some cases there was total noncompliance with court orders. One of these cases involved the Watson Chapel school district, one of the Arkansas cases filed in July 1970. This became one of the more colorful cases I litigated in this period.

Watson Chapel is a small rural school district located near Pine Bluff, Arkansas. HEW submitted a proposed plan on July 31, 1970 and at an August 11th hearing the district court judge, Oren Harris, found it fully desegregated the schools, but gave the school district the opportunity to file its own plan. A completely inadequate plan was submitted and the court ordered an interim plan to be implemented on September 14th. After that, the school district refused to submit any plan and on November 17 the court ordered that the HEW plan be implemented at the start of the second semester on January 18, 1971.

The school district appealed this order. They were represented by a flamboyant and racist attorney named John Warnock. After the November 1970 order, he had encouraged parents to send their children to schools other than those to which they had been assigned and it soon became apparent that the school district was not going to implement the court-ordered plan. Thus, on January 20, two days after the second semester started, we filed a motion for civil contempt against the school district.

The motion was heard on February 5, 1971. The courtroom was packed and there was a good deal of tension at the hearing. Warnock's antics riled up the parents in the courtroom and angered the judge. On February 6 the court found the school board in contempt and required school board members to file an affidavit by February 11 committing them to implement the court ordered plan or be subject to incarceration and a \$350 daily fine. The school district appealed this order the next day and because of their extreme recalcitrance up to this time, there was some uncertainty whether they would obey this order. But on the February 11th deadline board members filed the required affidavits relieving them of the contempt fines.

However, after the hearing, Warnock continued to urge resistance to the court ordered plan and on March 29, 1971 Judge Harris ordered him to show cause why he shouldn't be held in civil contempt for his egregious behavior. After the

hearing, Warnock was found in contempt for having obstructed the orderly operation of schools by leading mass meetings and making public statements to the media with the purpose of encouraging disobedience to orders of the Court. Subsequently, Warnock appealed this decision but filed an affidavit on April 2nd saying that he would abide by the Court's orders which relieved him of contempt.

The three appeals went forward and I helped draft the appellate brief.¹⁸ On August 11, 1971 the Court of Appeals affirmed the district court's November 17, 1970 order requiring implementation of the HEW plan. Because the school board and Warnock had purged themselves of the contempt orders, the Court of Appeals found those appeals moot.

4. United States v. Texas Education Agency (Austin ISD)

The case against the Austin School district (AISD) was one of the 27 cases against Texas school districts filed in August 1970 and was the most important school desegregation case that I worked on in my time in the Section. Over the next thirteen years, there were three trials, four court of appeals decisions and two decisions by the Supreme Court. The chronology of the case in many ways reflects how school desegregation law developed in this period. Because of this, the following discussion is detailed.

Initially, because the Austin case had been filed so near the opening of the 1970-71 school year, the initial relief ordered by the district court only a few weeks after the case was filed was minimal and interim. The Austin school district submitted a plan approved by the court that was limited to desegregating the historically black high School – Anderson -- by redrawing the school's attendance zone boundaries which assigned students from white neighborhoods to Anderson. But, when school opened in the fall of 1970, no white students showed up at Anderson and four days later, the district court rescinded these assignments. This

¹⁸ *United States v. Watson Chapel School District*, 446 F.2d 933 (8th Cir. 1971). Prior to creation of the Appellate Section in 1974, trial sections also handled appeals of cases they brought in district courts.

was extremely disappointing to the Black community of Austin that had worked very hard to make the school welcome to the white students assigned to it.

The interim order further required the parties to submit final desegregation plans for the 1971-72 by December 15, 1970. At the time of this order, school busing had become an overarching issue in school desegregation litigation. In several private cases, courts had ordered plans requiring busing in 1969 and 1970. Among these was the Charlotte-Mecklenburg, North Carolina School District, a county-wide district encompassing the city of Charlotte. In early 1970, the district court had entered an order requiring extensive busing of children at both the elementary and secondary levels which was one of the most comprehensive school desegregation plans ordered at the time. On appeal to the Fourth Circuit, the Department filed an *amicus curiae* brief arguing for limitations on busing, consistent with its March 1970 policy statement. In May 1970 the Court of Appeals, in a split decision, vacated the district court, holding that the busing at the elementary level was unreasonable and too extensive. In the late summer of 1970, the Supreme Court then agreed to hear the case and stayed the Court of Appeals decision, leaving in place the district court order. *Swann v. Charlotte-Mecklenburg School District*, 399 U.S. 926 (1970). The Department filed another *amicus* brief in the Supreme Court in support of the school district's opposition to this plan, arguing that "a system of pupil assignment on the basis of contiguous geographic (residential) zones" should generally be sufficient to satisfy urban school systems' desegregation obligations."

The case was argued in October 1970 and the decision was awaited with great anticipation given the high profile of the school busing issue and the major impact the case would have on school desegregation. In the Austin case, the district court ordered four extensions of the deadline for the filing of plans, waiting for a decision in *Swann*. Then, on April 20, 1971 the Supreme Court entered a landmark decision affirming the district court's busing plan in a unanimous 9-0 opinion. *Swann v. Charlotte-Mecklenburg School District*, 402 U.S. 1 (1971). It strengthened and exceeded the remedial reach of *Green*, holding that desegregation remedies should be designed to achieve "the greatest possible degree of actual desegregation." Importantly, it explicitly permitted courts to order busing as a remedy to achieve the integration required by *Green*. At the same time, it

acknowledged that busing may involve some “awkwardness and inconvenience,” and cautioned that before busing is ordered courts must consider the times and distances of bus rides under a proposed plan to avoid placing burdens on students that will adversely affect their health or education and should also take into account whether the plan significantly impinged on the educational process.

By affirming the authority of district courts to order busing as a remedial tool, *Swann* rejected the Nixon Administration’s anti-busing policy. In many respects, the decision was the highwater mark of school desegregation. In the period after *Swann*, desegregation peaked and there were desegregation plans in almost all Southern school districts. At the same time, school busing to desegregate schools became perhaps the nation’s most divisive domestic issue. And it had a major impact on the Austin school case,

The 1971 Trial: After *Swann* was decided on April 20, 1971 the district court in the Austin case ordered parties to submit desegregation plans by May 14, 1971. Given the conflict between the Administration’s position in *Swann* and its 1970 neighborhood school policy, and the *Swann* decision which approved busing to achieve the greatest degree of desegregation practicable, there was a big question as to how the Department would respond. In the Section, we interpreted *Swann* to require busing and an expert at HEW drafted a plan which would fully desegregate Austin’s schools and require extensive busing of over 13,000 students. To my surprise, our recommendation to file this plan was approved, presumably by Attorney General John Mitchell in that this was the Administration’s first response to *Swann*. It seemed that the Department felt compelled to approve filing such a plan because of the unanimity of the Court’s decision in *Swann* and the strength of the opinion. To my knowledge, it was the first school desegregation case to be litigated after *Swann* and the Austin HEW plan was the only time the Nixon Administration proposed a crosstown busing remedy which deviated from the March 1970 policy opposing school busing. Because busing had become a national issue, Austin became a very high-profile case.

Moreover, this was the first time the Division had tried a case addressing segregation of both Mexican-Americans and black students. Until this case, all

my work had been in cases concerning *de jure* segregation of blacks. Because these dual school systems had been required by law in southern states, liability for discrimination was rarely an issue. Austin was one of five school districts sued in the 1970 Texas cases that alleged illegal segregation of both Mexican-American and black students.¹⁹ Because there was no historical state law requiring the segregation of Hispanic students in Texas, as there had been for black students, proof of liability for this segregation was a major issue. Establishing liability would require extensive evidence demonstrating intentional segregative acts of Mexican-Americans by the AISD, a standard that was the same as that required in northern school cases where segregation of blacks was not required by state law.²⁰

Prior to trial, we had gathered compelling evidence of intentional segregation. I drafted a pretrial brief that discussed this evidence in detail which included the establishment of “Mexican” schools as early as 1916, continuing through 1947, the lack of Mexican-American faculty and a series of discriminatory zone line and school construction decisions made by the school district in the 1960s.²¹

The trial lasted six days from June 14-21. While most of the trial focused on evidence of intentional segregation of Mexican-Americans, the controversial HEW busing plan we had submitted in May was of greater interest to the press and the public. In light of the high profile of the case, the trial was very stressful. I had been out of law school less than three years and this was only my second full trial. Moreover, the combination of the defense counsel and the judge made it even more daunting. Defense counsel was Donald Thomas, the

¹⁹ The other Texas districts sued for such segregation were Lubbock, Midland, Odessa, and San Angelo, all cases that I subsequently worked on. See, *United States v. Texas Education Agency (Midland ISD)*, 519 F.2d 60 (5th Cir. 1975) and *United States v. Texas Education Agency (Lubbock ISD)*, 600 F.2d 518 (5th Cir. 1979). The Ector County case is discussed in more detail below.

²⁰ At that time, the Division had experience litigating this issue in northern school cases in South Holland, IL, Pasadena, CA and Indianapolis, IN.

²¹ At that time, John Osborne, a journalist for the New Republic, reviewed the Austin case in his “NixonWatch” column indicating to my gratification that he was persuaded by the brief that Austin had intentionally segregated Mexican-American students.

personal attorney of Lyndon Johnson. Johnson was in retirement at that time, living on his ranch in the Texas hill country. Thomas was at the ranch quite often and I found myself calling the LBJ ranch on a few occasions to talk to Thomas. The judge on the case was Jack Roberts, a conservative LBJ appointee and old crony of his. Especially concerning was seeing Thomas exiting Roberts' chambers on a couple occasions during the trial where I suspect they were privately discussing the case. During trial the judge permitted Thomas free rein to interrupt me and essentially provide his version of the facts over my continued objection.²²

In view of these circumstances, it was not surprising that Judge Roberts quickly ruled for the school district on June 28. While the court recognized that Mexican-Americans constituted a separate ethnic group, he held that we had failed to prove that their segregation was caused by intentional actions, essentially ignoring our evidence. With respect to the segregation of black students, the court held that vestiges of the *de jure* dual system continued to exist and ordered the parties to submit new remedial proposals by July 16, 1971, but added the plans should "avoid" proposing the use of Anderson, the historically black high school, as a senior or junior high.

On July 19, 1971, the district court rejected HEW recommendations and adopted, with minor modifications, the school district plan which required the closing of both historically black secondary schools -- Anderson High School, and Kealing Junior High School. All 2200 black secondary students from these schools were bused to white schools and teachers transferred to other district schools. This came less than a year after Judge Roberts' earlier rescission of the 1970 order assigning white students to Anderson. The black community was extremely upset. The burden of desegregation of secondary students was now solely on the shoulders of the Black community located in East Austin, and these closures had a devastating negative impact on the East Austin community, the same impact that the closing of Scott had in Tyler. Such closings were a pattern in

²² The local newspaper covered the trial on a daily basis and in one story noted that "Rich is a young attorney who actually looks younger than his 29 years."

desegregation plans in the South that undermined support in Black communities for desegregation.

The First Appeal: After the urgency that *Alexander v. Holmes* placed on expediting school desegregation cases, the Fifth Circuit had imposed an expedited schedule for appeals in school cases that required any appeal to be noticed no later than 15 days after a district court order. This required that a major decision in the Austin case be made quickly. Although the Administration had approved the HEW busing plan in May, the widespread opposition to school busing and the national publicity surrounding the case raised a serious question as to whether the Division would appeal the case and continue support of the HEW busing plan.

The question was answered on August 3. We received approval to notice an appeal, but when filed it was accompanied with a highly publicized public statement released by President Nixon. The release stated that the Attorney General had decided an appeal was necessary because of the erroneous liability finding of no discrimination against Mexican-Americans, but that the Administration was disavowing its support for the HEW busing plan.²³ Indeed, in 1972, Nixon went further than the 1970 statement and adopted anti-busing as a central reelection issue. As part of this strategy, the Administration drafted and proposed legislation in 1972 which, although never adopted, was designed to protect neighborhood schools and severely curtail busing for the purpose of racial balance.²⁴

After the August 3 notice of appeal, I worked on the government's brief which not surprisingly became the subject of intense high-level review. Indeed,

²³ The Nixon tapes reveal how strong his opposition to busing was after the Austin decision: "I want to take a flat-out position against busing, period.... I am against busing! I am for neighborhood schools!" (October 8, 1971)

²⁴ At that time in 1972 there was another semi-revolt by 95 Division attorneys who wrote Congress opposing this proposal. I and most attorneys in the Education Section did not sign this letter because, although we opposed the proposed legislation, we felt opposition would be counter-productive to our continued desegregation efforts.

changes were made up until a few hours before it was filed after a call from the Attorney General to the Section. The bulk of the brief set forth in detail our evidence of intentional desegregation of Mexican American students and argued that the district court erred in its no liability holding. But it was how the brief addressed remedy that was controversial. Although the brief opposed the plan adopted by the district court, it then went on to withdraw its support of the HEW plan presented at trial. It then proposed a novel remedial approach for the segregated Mexican-American schools which had never been taken before by the Department or any court. The proposal was that the district court on remand should examine the proof of discrimination at each segregated school and only where there was a finding that the segregation of the school was the result of intentional discriminatory should desegregation be required. After filing the brief, I referred to this as the Austin “school-by-school” remedial approach. While not as stark as the retreat in the *Holmes* case in 1969, this remedial position was severely criticized as another retreat in the Department’s desegregation policies. In response, the NAACP Legal Defense Fund and the Mexican American Legal Defense Fund immediately moved to intervene in the appeal, alleging that the Department no longer adequately represented the interests of Black and Mexican American students. The Court of Appeals approved the intervention motion and thereafter the two minority groups participated in both this appeal and future district court and appellate proceedings.

Later that fall, argument was held before a three-judge panel and the government’s argument was presented by Assistant Attorney General David Norman. After the argument, the Court of Appeals decided that the case, along with a similar case involving the Corpus Christi, Texas school district, should be considered together, *en banc*, by all 14 judges on the Fifth Circuit, likely because the two cases were the first school desegregation cases considered by the Fifth Circuit after *Swann*. The pace of the case then slowed and the *en banc* court didn’t issue its opinion until August 2, 1972, a year after the appeal was noticed.²⁵ The decision resulted in a major split between court of appeals judges resulting in six separate opinions. While there was agreement on reversing the

²⁵ 467 F.2d 848 (5th Cir. 1972) (*en banc*). The same day the court also decided the Corpus Christi case – *Cisneros v. Corpus Christi ISD*, 467 F.2d 142 (5th Cir. 1972) (*en banc*).

district court decision finding no liability for segregation of Mexican-American students, discussion of remedy was set forth in the several separate decisions which left a question as to how the district court was to proceed on remand.

The initial opinion was written by Judge John Minor Wisdom, whose past opinions were central to shaping the civil rights laws of the 1950's and 60s in the Deep South. Indeed, he had authored the crucial *Jefferson County* decision in 1966. His Austin opinion was joined by five other judges and read like a majority decision. He set forth in detail the evidence concerning discrimination against Mexican Americans that we had submitted and held that the district court had erred in finding that the AISD had not intentionally segregated Mexican American students. 467 F.2d at 861-869. In his careful review of the evidence, Judge Wisdom noted that his ultimate decision against the AISD was based in part on finding that "(t)he natural and foreseeable consequence of (its) actions was segregation of Mexican-Americans". 467 F.2d at 863. The opinion then turned to remedial issues and first rejected the district court plan, specifically overruling the closing of Anderson and Kealing, finding that the AISD had made no showing that the closings were for nonracial reasons and that fear of white flight if white students were assigned to these schools was not an acceptable reason for the closings. He then went on to reject our novel remedial school-by-school approach for segregated Mexican-American schools, writing that "one is not sure what the Department means. It has never asserted this position before" and it is "an inscrutable new concept totally at odds with the teachings of *Brown* and its progeny — and with all previous cases in which the Department of Justice has appeared." 467 F.2d at 874.

Judge Wisdom's opinion was followed by a special concurring opinion for eight judges written by Judge Griffin Bell. It concurred with Judge Wisdom's decision finding intentional segregation of Mexican-Americans. But, it disagreed on remedy and adopted the position set forth in our brief that the district court must "identify the school or schools which are segregated as a result of such discrimination" noting that "there may be segregated schools which are the result of unconstitutional statutes or of official action [and] there may be other one race schools which are the product of neutral, non-discriminatory forces." See 467 F.2d at 884.

This opinion was followed by a second opinion by Judge Wisdom dissenting from that Judge Bell's remedial holding. His criticism of the majority decision on remedy was scathing, and even more critical than his initial opinion of what he termed the Department's "about-face." He wrote that "ever since *Brown* the Department has taken the position that school segregation is system-wide in nature and must be remedied by system-wide measures. Infection at one school infects all schools." Further, he said, the Department had "dreamed up a new defense for school boards in desegregation cases, that is, that there need not be system-wide desegregation of Mexican-Americans. And if this argument applies to Mexican-Americans, will it not in the future also apply to blacks? In short, the Department's school by school argument undermines all of the desegregation cases since *Brown* by eroding the principle that the dual system must go, lock, stock, and barrel." He concluded by stating that this decision "is the first backward step for a Court that has labored mightily to follow faithfully the mandates of the Supreme Court and of Congress in the field of civil rights." 467 F.2d at 888. More than any other criticism of the Department's position in the Austin appeal, Judge Wisdom's decision was the strongest condemnation of the Nixon Administration's retreat on school desegregation remedies.

Judge Bell's opinion was joined by seven other judges and appeared to be the majority opinion. But Judge Roberts expressed confusion on how he was to proceed on remand and the interveners and the AISD filed motions for clarification with the court of appeals. On January 3, 1973 the motion was denied without a majority opinion.²⁶ Judge Wisdom again wrote a strong dissent to this denial, joined by four other judges, finding that the refusal to say what the opinion means "undermines the judicial process in this circuit." In addition, he raised an important unanswered question raised by the school-by-school approach for Mexican-American segregation, asking "when there is discriminatory state action in school systems in fact but not by express statute, are we under one constitution for the South and another for the rest of the country?" 470 F.2d at 1002.

²⁶ See 470 F.2d 1001 (5th Cir. 1973) (en banc).

The 1973 Trial: On remand, we set out to strengthen our case concerning Mexican-American segregation to meet the standard for remedy set by Judge Bell's majority decision. Judge Roberts conducted a twelve-day trial in May, 1973 and we were able to get agreement to an extensive set of stipulated facts that included in depth research concerning the number of Mexican-American students at each school going back to the 1920s before such records were maintained by the AISD. In the end, we were able to present more extensive evidence than that in the 1971 trial. As for remedy, Judge Roberts had ordered the parties to submit proposed plans before trial. But we stayed silent. Our evidence demonstrated systemwide discrimination of Mexican-Americans and Blacks and any remedial plan to address systemwide discrimination would have had to include some busing, a position inconsistent with remedial position we had assumed after the first trial.

Shortly after trial was concluded, but before Judge Roberts issued his remand decision, the Supreme Court decided *Keyes v. Denver School District No. 1*, 413 U.S. 189 (1973) on June 21, 1973 setting forth the legal standard for proving intentional segregation in school districts that had not historically required segregation by law which was the case for Mexican-Americans in Austin. The lower courts in *Keyes* had held that deliberate racial segregation of schools in one part of the district did not prove intentional segregation policy throughout the district and that plaintiffs must prove de jure segregation for each area of the district that they sought to have desegregated. This was very similar to the position we had taken in Austin I. In *Keyes* the Department submitted an *amicus* brief in the Supreme Court, arguing in support of the Denver school district that the lower court holding be affirmed. But the Supreme Court reversed and held that if intentional acts of segregation were shown to have taken place in a significant portion of the school district, school authorities could not argue that plaintiffs had proved only isolated and individual segregative actions. Rather, the burden was on school districts to show that other segregated schools within the system were not also motivated by intentional segregation. If they did not meet this burden, systemwide "all-out" desegregation would be required. 413 U.S. at 209.

Shortly after that, on August 1, 1973, Judge Roberts issued his remand opinion in which he applied his understanding of *Keyes* to the Mexican-American segregation in Austin. Ignoring the Fifth Circuit's detailed analysis of intentional discrimination against Mexican-Americans set forth in *Austin I* and the extensive additional evidence submitted at the 1973 trial, he concluded that the AISD had met their *Keyes* burden, and for the second time, held that there was not sufficient evidence of an intent to segregate Mexican Americans. To compound this error, his remedial order for segregation of black students also rejected the *Austin I* decision that held that the closing of the two black secondary schools – Anderson and Kealing – was racially based, and the plan he approved again closed them.

The Second, Third and Fourth Appeals: After having presented extensive evidence of intentional segregation in two trials, Judge Roberts' 1973 decision was very disappointing, especially in light of the strong decision in *Austin I* setting forth extensive findings of the intentional segregation of Mexican Americans. Both we and the interveners appealed Judge Roberts' 1973 decision. I again worked on the appellate brief. But, at this point, progress in the case slowed down even more when inexplicably the Fifth Circuit did not decide the 1973 appeal for almost three years.

Finally, on May 13, 1976 the Court of Appeals issued its decision, written again by Judge Wisdom. It reviewed the district court's finding of no intentional discrimination of Mexican-Americans again, and reversed for the second time the district court's decision. 532 F.2d 380 (5th Cir. 1976) (*Austin II*). The opinion interpreted the *Keyes* decision, emphasizing that *Austin I* was consistent with *Keyes*, and "must be viewed as incorporating in school segregation law the ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions." 532 F.2d at 388. Judge Wisdom again set forth in detail the evidence supporting a finding of intentional segregation against Mexican Americans, repeating much of the evidence in *Austin I* and concluding that it met the *Keyes* standard for proving systemwide segregative intent of Mexican-Americans. See 532 F.2d at 389-92.

In the remedial part of the decision, Judge Wisdom ignored the school-by-school approach set forth in the *Austin I* majority opinion and, approved the

systemwide desegregation plan submitted by interveners at the 1973 trial, but remanded the case to determine the least costly way to implement this plan. He suggested that the district court consider appointing a master to draft a comprehensive tri-ethnic desegregation plan. He also again rejected the closing of Anderson and Kealing.²⁷

The school district then petitioned the Supreme Court to review this decision. While this petition was pending and less than a month after the Court of Appeals decision in *Austin II*, the Supreme Court decided *Washington v. Davis* on June 7, 1976. In this employment discrimination case, the Court held that under the Constitution, intentional discrimination must ultimately be traced to a racially discriminatory purpose. The Court cited *Keyes* decision as adhering to this basic equal protection principle in school desegregation cases. 426 U.S. 229, 240 (1976).

Six months after the *Washington v. Davis* decision on December 6, 1976, the Supreme Court decided the AISD's appeal in *Austin Independent School District v. United States*. In our brief responding to the AISD Supreme Court appeal, we contended that the judgment in *Austin II* was correct in holding that the AISD engaged in pervasive acts of discrimination against Mexican-Americans, but again expressed doubts about the scope of the remedy approved. The Supreme Court, without writing a majority opinion, vacated *Austin II* and remanded the case to the court of appeals "for reconsideration in light of *Washington v. Davis*." 429 U.S. 990 (1976). Since *Austin II* had relied on *Keyes* in finding purposeful discrimination, as did the Supreme Court in *Davis*, it was not clear what they viewed as error. It may be that a concurring opinion by Justice Powell, joined only by Chief Justice Burger and Justice Rehnquist, explains the decision. Powell strongly suggested that the court of appeals decisions in *Austin I* and *II* may have erred in finding segregative intent far more pervasive than the evidence justified and ordering a desegregation plan far exceeding in scope any identifiable

²⁷ The remand required the reopening of Kealing Junior High School but approved the conversion of Anderson High School into Austin Community College that the AISD had made after the 1973 trial.

constitutional violations. 429 U.S. at 991-95. This analysis was similar to the school-by-school analysis we had proposed in our *Austin I* brief in 1971.²⁸

It wasn't until almost a year later on November 21, 1977 that the court of appeals issued its remand decision. Before this decision and months after the *Washington v Davis* decision, the Supreme Court had decided *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) which provided a clearer explanation of the evidentiary guidelines for proving intentional discrimination. Judge Wisdom examined the evidence of intent, this time applying the *Arlington Heights* guidelines, and concluded "for the third time" that "the evidence overwhelmingly supports the conclusion that the AISD engaged in acts showing a pervasive intent to segregate Mexican-Americans." 564 F2d 162, 170-74 (5th Cir. 1977) (*Austin III*).

Before *Austin III* was decided, another intervening Supreme Court decision, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) was decided on June 27, 1977. This decision set forth a new remedial standard for school desegregation cases.²⁹ This standard was similar to Justice Powell's concurring opinion in the 1976 *Austin* decision and directed district courts to "determine how much incremental segregative effect the constitutional violations had compared to what the level of segregation would have been in the absence of such violations. The remedy must be designed redress only that difference, and only if there was systemwide discrimination could there be a systemwide remedy." 433 U.S. at 420. Accordingly, after finding intentional segregation of Mexican-Americans for the third time, Judge Wisdom remanded the case to the district court to apply this standard in formulating a remedy. Judge Wisdom recognized that an assessment of the incremental segregative impact of a school board's discriminatory actions "was not an easy task" and emphasized the importance of language in the 1971 *Swann*

²⁸ Justices Brennan and Marshall dissented from the decision.

²⁹ By the time the *Dayton* case was argued in April 1977, the Carter Administration had just begun. In the *amicus* brief filed in that case, the Division adopted a more aggressive position that did not repeat the school-by-school approach devised in *Austin I*. The brief conceded that the violation found by the district court in *Dayton* did not support the remedial order but urged the Court to affirm the systemwide busing order on the basis of additional evidence in the record.

decision that “[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.” 564 F.2d at 175.

The appeals didn’t end then. The school district filed a petition for rehearing *banc* and not until another year later on September 7, 1978 was this petition denied. 579 F.2d 910 (5th Cir. 1978) (Austin IV). In denying the petition, Judge Wisdom again authored the opinion in the case, noting for the fourth time the overwhelming evidence of intentional discrimination to segregate Mexican-Americans 579 F.2d at 915, n.8, holding that “the AISD must desegregate Mexican-American school children by putting them in schools with Anglos as well as with blacks.”

The school district again sought Supreme Court review of this decision, but ten months later on July 2, 1979 cert was denied. 443 U.S. 915 (1979). Finally, six years after Judge Roberts 1973 decision, the case was remanded for him to determine the incremental segregative effect of the AISD discriminatory actions and whether systemwide relief was required. This decision was entered on the same date that the Supreme Court decided two other cases – *Columbus School District v. Penick*, 443 U.S. 449 (1979) and *Dayton School District v. Brinkman*, 443 U.S. 526 (1979) (Dayton II). In both these cases, the Court wrote in-depth opinions affirming lower court holdings that the violations were systemwide, requiring systemwide relief which included extensive busing.

The Third and Final Trial: With the completion of this long series of appellate decisions, Judge Roberts scheduled a trial two weeks after the Supreme Court denied review. Thus, more than six years after the second trial in 1973, a third Austin trial was held in July 1979 to determine whether there was systemwide discrimination requiring systemwide relief. Much of the evidence set forth in the four decisions by Judge Wisdom established that residential segregation in Austin was caused by historical discriminatory actions of the city and the school district. Surprisingly, this evidence was bolstered by a school district witness who had done an in-depth study of residential and school segregation in Austin which

demonstrated the significant segregative effect of the school and housing discrimination and strongly supported our case, not that of the AISD.³⁰

After this trial, I worked especially hard on the post-trial brief, but with not much expectation that we could win over Judge Roberts who had previously ruled against us two times. But, to my pleasant surprise, in November 1979 he issued a strong opinion finding system-wide discrimination with regard to both blacks and Mexican-Americans and ordered the development of a systemwide desegregation plan. After more than nine years of litigating this case and four court of appeals decisions setting forth how the AISD had discriminated against Mexican-Americans, we had finally prevailed before Judge Roberts. The decisions in *Columbus* and *Dayton II* requiring systemwide relief very likely influenced this favorable decision.

After Judge Roberts' decision, the parties entered into negotiations over an appropriate remedy. At this point in time, the school district capitulated and a systemwide desegregation plan was negotiated with the interveners and the Division that required extensive busing.³¹ The agreement was reached toward the end of the Carter Administration which had abandoned the anti-busing policy adopted in 1970 which continued through the Nixon and Ford Administrations.³²

On January 2, 1980 Judge Roberts approved a consent decree requiring implementation of this negotiated plan. Under the decree, pursuant to the standard approach to final desegregation orders in the Fifth Circuit, the court retained jurisdiction over the case for three years and upon the expiration of the three-year period, and further, subsequent to notice and the opportunity to the United States and the interveners to object, AISD would be declared a unitary school system and

³⁰ The name of the study was *Housing Patterns Study: Segregation and Discrimination in Austin, Texas* written by the school district witness, John Henneberger. He subsequently became a prominent low-income housing and civil rights advocate in Texas. He continues this work today and many years after this trial when I was at the Lawyers' Committee, I worked with John on disaster recovery issues.

³¹ Part of the negotiated plan required construction of a new Kealing Junior High.

³² President Carter was personally opposed to busing, but he made it clear that his appointees were to follow the law, not his personal preferences.

the case dismissed.³³ After ten years of litigation, full desegregation of the Austin schools was finally achieved and I was of course very gratified after so many years working on the case.

Post 1980 Developments: When the plan was implemented in the fall of 1980, predictably there were many anti-busing rallies that drew large white crowds and white flight from schools significantly increased. In the Black community, there was strong resentment to the opposition in the white communities because with the closing of Anderson and Kealing in 1971, it had borne the entire burden of busing for the previous nine years.

My last appearance in the Austin case was in 1983 when pursuant to the 1980 consent decree, the AISD filed a motion seeking to be declared unitary and dismissal of the case. The AISD had maintained compliance with the 1980 consent decree and we did not object. While the plaintiff-intervenors initially objected, they later withdrew their objection and agreed to a consent decree entered on June 14, 1983 that declared the AISD unitary and dismissed the case, but included a stipulation attached to the decree that granted the plaintiff-intervenors the right to object and a hearing if AISD changed the student assignment plan in a way which discriminated. This right to object was to last for three years to 1986 or until construction of Kealing was completed, whichever occurred first. Construction of Kealing was completed in September 1986. I transferred to the Housing Section shortly thereafter in January 1987 and was no longer working on the case, but given my long involvement continued to follow developments in the case closely.

By this time, almost twenty years after *Green*, significant desegregation had been achieved in most southern school districts. But it was also a time when a commitment to desegregation essentially had been abandoned by the Reagan Administration. The Division was no longer aggressively seeking further desegregation and, indeed, was promoting an end to court supervision of desegregation. As a result, an increasing number of school districts were

³³ See *Lee v. Macon County Board of Education*, 584 F.2d 78, 81 (5th Cir. 1978); *Youngblood v. Board of Public Instruction*, 448 F.2d 770, 771 (5th Cir.1971).

asserting that their compliance with desegregation decrees warranted findings that they had achieved unitary status and release from their court orders. A prime example was the Houston school case which I worked on in the 1970s and is discussed in more detail below. In 1983, the Fifth Circuit affirmed a finding by the district court that Houston Independent School District was unitary, in spite of the fact that the student populations of nearly ten percent of the schools in the system had been 90% or more black since 1960. 699 F.2d 218, 226 (5th Cir. 1983). In reaching this conclusion, court held that the appropriate measure of unitariness was "whether the past has been eradicated so far as it remains in the power of school officials and courts to do so[.]" *Id.* at 227. This "practicability" test recognized that in some circumstances, some segregation will remain, but "immutable geographic factors and post-desegregation demographic changes that prevent the homogenization of all student bodies do not bar judicial recognition that the school system is unitary." *Id.* at 225.

The AISD had already been declared unitary in 1983 and then went a step further when in April 1987 it adopted a major revision of the 1980 plan which resegregated the elementary schools. At the elementary level, the new plan eliminated mandatory busing and returned to neighborhood school zones similar to those in effect prior to the 1980 consent decree. As a result, 16 schools which had been desegregated under the 1980 plan became over 90% minority. Consistent with the Reagan Administration's anti-busing policy and efforts to close desegregation cases, the Section did not object to this plan. The intervenors, however, did and on July 2, 1987 filed a motion to enjoin implementation of that plan, arguing that it violated the 1980 plan by resegregating the schools which discriminated on the basis of race and national origin.

On July 24, 1987, the district court ruled that the 1983 agreed order had resulted in dismissal of the case and interveners would have to file a new case to challenge the new plan and also had to prove it was intentionally discriminatory. On August 7, 1987 the intervenors filed such a case -- styled *Price v. Austin ISD* -- and sought a preliminary injunction enjoining implementation of the new plan. The preliminary injunction motion was denied on August 29, 1987. The interveners appealed both of the district court orders and the two cases were

consolidated on appeal. Reflecting its pursuit of terminating desegregation orders, the Division filed a brief supporting the AISD.

This appeal came at a time that courts were addressing what impact a finding of unitariness had on a school district's adoption of a new plan that resegregated schools. At about the same time, school districts in Norfolk, Virginia and Oklahoma City, Oklahoma, had adopted plans that resegregated the elementary schools similar to the plan in Austin. These plans were challenged by plaintiffs in the two longstanding cases and the district courts approved them. And like the Austin case, the Division supported both school districts, arguing as amicus that once a finding of unitariness is entered, all authority over the affairs of a school district is returned to its board, and all prior court orders, including any remedial busing order, are terminated.

On appeal the Fourth Circuit and Tenth Circuit reached different conclusions. In the Norfolk case, the Fourth Circuit affirmed the district court, holding that a finding of unitariness meant a school district had completely remedied all vestiges of past discrimination and that plaintiffs had the burden of proving that the new pupil assignment plan had been adopted with an intent to discriminate on the basis of race. *Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521 (4th Cir. 1986). But, in the Oklahoma City case, the Tenth Circuit reversed the district court, holding that a declaration of unitariness did not foreclose the district court's continued supervision of the desegregation plan. The court emphasized that the purpose of court-ordered school desegregation was to achieve and maintain a unitary school system and that a desegregation decree could not be lifted or modified absent a showing by the school board of a "grievous wrong evoked by new and unforeseen conditions." *Dowell v. Board of Education*, 890 F.2d 1483, 1490 (10th Cir. 1989). . It also held that "compliance alone cannot become the basis for modifying or dissolving an injunction," *Id.* at 1491.

In the Austin case, the Fifth Circuit affirmed the district court decision on December 15, 1987. 834 F.2d 1171 (5th Cir. 1987). It adopted the same reasoning as *Riddick*, holding that the 1983 consent decree finding the AISD unitary and dismissing the case released the school district from any further federal judicial

oversight.³⁴ In short, the court determined that the 1983 finding of unitariness essentially wiped clean AISD's long history of past discrimination after only six years of implementing the final plan. In addition, the court affirmed the denial of the preliminary injunction in *Price* holding that plaintiffs had not shown a likelihood of success in proving that the new plan was intentionally discriminatory.³⁵

After the court of appeals decision in *Overton*, *Price* was tried on the merits in November 1989. The Division was not a party and did not participate. On January 19, 1990 the district court rejected the intervenors' claim, holding that the AISD had not adopted the 1987 plan with the intent to discriminate against blacks or Mexican-Americans and that valid educational concerns were served by the neighborhood plan's adoption and implementation. *Price*, 729 F. Supp. 533, 549 (W.D. Tex. 1990). In making this finding, the court did not even mention the extensive evidence of the AISD's long history of intentional segregative actions set forth in detail in the four court of appeals decisions by Judge Wisdom. Nor did it recognize the stark connection between the segregation that existed in 1979 and 1987.

The interveners appealed this decision, but in January 1991, before the court of appeals decided *Price*, the Supreme Court decided *Board of Education v. Dowell*, 498 U.S. 237 (1991). The Supreme Court in a 5-3 decision reversed the 1989 Tenth Circuit decision discussed above, and resolved the Circuit split concerning the meaning of unitariness by essentially adopting the standard set in *Riddick* and *Overton*. It held that the unitary status of a school district depended on good-faith compliance, as well as whether the vestiges of segregation had been eliminated "to the extent practicable." There was no recognition that this reliance was at odds with *Green* and *Swann* which indicated that the courts must focus on the effectiveness of a desegregation plan and that good faith was not enough.

³⁵ The case was now styled *United States v. Overton*. *Overton* represented the intervenor class and this change reflected the new posture of the Division which was now aligned with the AISD in opposition to the interveners.

Dowell meant that a finding of unitariness was justified when a school district had complied with the desegregation order in good faith even though for only a short period of time. Further, because a finding of unitariness wiped the past discrimination slate clean, a successful challenge to a new plan would require plaintiffs to prove that it was adopted with segregative intent. The Department participated as amicus curiae in *Dowell* and, consistent with its ongoing efforts to end desegregation cases, supported the school district.

Nine months after the *Dowell* decision on October 17, 1991, the Fifth Circuit decided *Price*. 945 F.2d 1307 (5th Cir. 1991). It affirmed the district court decision finding the AISD had achieved unitary status pursuant to the 1983 stipulated order. In affirming this decision, the Court of Appeals relied on the good faith, practicability test set forth in the 1983 Houston decision in its examination of whether the AISD had achieved unitariness and further found that this test had been implicitly approved by the Supreme Court in *Dowell*. It then went on to affirm the district court's decision that interveners had failed to prove that the new 1987 plan was adopted with intentionally segregative intent. Unlike the district court, the court of appeals decision did include a cursory discussion of the long history of discrimination found in Judge Wisdom's decisions in the 1970s. But, it gave this evidence little weight, reasoning that the discrimination had occurred before the 1983 unitariness finding which the Court viewed as curing all past discrimination. Like its absence in the district court proceedings, the Division did not participate in this appeal.

It was disappointing to watch the developments in *Dowell* and *Price* undo ten years of work in the 1970s to desegregate Austin's schools. What particularly stood out to me was that Judge Wisdom, who was on the panel in *Price*, felt constrained to concur in the decision. As discussed above, he was one of the judges most responsible for desegregation of schools in the South and the judge who had written the four strong Austin court of appeal opinions in the 1970s finding intentional segregation of Mexican-Americans in Austin and requiring system-wide desegregation of schools. But, in *Price* he concurred with the majority decision approving the resegregation of Austin's elementary schools. In his short decision, it appeared that he based this concurrence on the 1983 Houston decision which he viewed as giving increased discretion to district judges because

of the unique “practicability characteristics” of individual school districts. But, his reluctance to concur is evident from his emphasis on the severe resegregation in Austin resulting from the new plan which he noted “does not appear to have resulted from demographic change.” 945 F.2d at 1322. In the end his concurrence signaled how significantly the legal landscape of school desegregation law was changing and reflected a new more conservative jurisprudence.

The *Dowell* decision seriously undermined the powerful principles articulated in *Green* and *Swann* and offered no explanation, or even acknowledgment, of how the decision transformed the *Green* and *Swann* mandates to eliminate the all vestiges of segregation into a temporary requirement that school boards must comply only briefly with their desegregation order before they would be released from the orders. It was a major turning point in efforts to maintain desegregation and opened the door to the dismantling of hundreds of desegregation orders in the South entered in the 1960s and 70s. The percentage of black students in majority white schools in the region had almost tripled from 1967 to 1972 – from 13.9 % to 36.4%. Even after the attack on desegregation orders that began in the Reagan Administration in the 1980s, the percentage was still at 39.2 in 1991, the year *Dowell* was decided. But by 2011, the percentage had fallen to 23.2%. This was almost the same percentage of black students in majority white schools in 1968, the year the *Green* decision first required school districts to dismantle dual segregated systems “root and branch.”

By giving a green light to the termination of school desegregation orders, *Dowell* accelerated the demise of school desegregation that had started in the 1980s. This retreat has continued to the present and was made worse by the Supreme Court’s 2007 decision in *Parents Involved v. Seattle School District*, 551 U.S. 707 (2007), which limited voluntary efforts of school districts to adopt desegregation plans which took race into account.

5. United States v. State of Texas

Shortly after the first Austin trial in June 1971, I was assigned to *United States v. State of Texas*, a groundbreaking statewide school desegregation case modeled after *Lee v. Macon*. As noted earlier, Judge Justice presided over this case

and it was through my work on this case that I got to know him well and admire his extensive body of work and deep dedication to civil rights. The case was filed in March 1970 in the district court in Tyler, initially seeking to desegregate nine all-Black school districts in East Texas. In June an amended complaint sought broader statewide relief in addition to the desegregation of the nine all black districts. Trial was held in September 1970, and on November 24, 1970 the district court ruled for the United States and ordered the nine all black school districts be desegregated. More importantly, Judge Justice held that the policies and practices of the State in administering the public schools in Texas had resulted in contributing to the continuation of racially segregated public education in the State and ordered the State defendants to submit a plan to affirmatively ensure desegregation throughout the state³⁶

On April 20, 1971 the court entered a broad and comprehensive remedial order that addressed both of these issues. Statewide relief required the Texas Education Agency (TEA) to oversee school desegregation efforts of over 1,000 local school districts in the State and take action if violations were found.³⁷ It included a requirement that the TEA examine school districts in the State in which there were schools that were over 66% minority to ensure the districts were in compliance with desegregation law. It also required monitoring of inter-district transfers of students and consolidation of school districts that would have the effect of impeding desegregation, faculty assignment, school transportation, extracurricular activities, and curriculum and compensatory education. Even though there was no evidence presented at the 1970 trial concerning discrimination against Mexican-American students (which were a larger minority than black students in Texas), the order included a requirement that TEA prepare a study and file a report concerning the educational needs of minority students, including special education programs which would assist Mexican-American students who were non or limited English speaking.

Both the 1970 decision and 1971 order were appealed by the State. Even though the scope of this case was extremely broad, the Court of Appeals

³⁶ 321 F. Supp. 1043 (E.D. Tex.1970)

³⁷ 330 F. Supp. 235 (E.D. Tex.1971)

surprisingly affirmed both without opinion only four months later on July 9, 1971. The decision did include some modifications to the remedial order and explicitly limited coverage of the statewide order to school districts not involved in existing school desegregation cases, which at that time covered most of the big cities in Texas and over one third of the state's student population.³⁸

My work on this case continued periodically over the next 15 years until I transferred to the Housing Section in 1987. In this period, several matters arose addressing enforcement of the order by the TEA. Some of these proceedings involved issues concerning segregation black students.³⁹ But the most important *United States v. State of Texas* matters that I worked on concerned issues related to segregation of and language programs for Mexican-American. Below I discuss them.

United States v. State of Texas (San Felipe Del Rio CISD): This matter arose in the summer of 1971 shortly after the first Austin trial. It involved school districts in Del Rio, Texas which is on the Mexican border more than 500 miles from Tyler. Pursuant to its responsibilities under the statewide order, the TEA had found that transfers of white students who lived on the Laughlin Air Force Base located in the heavily Mexican American San Felipe school district to the majority white Del Rio district had increased the segregation of Mexican American students in San Felipe and violated the transfer provision of the statewide order. In response, the Del Rio school district filed a motion in the Tyler court objecting to this action and seeking consolidation of the two districts.

The trial took place on August 13, 1971 and shortly after the trial, the court found that Mexican American students in the area covered by both the San Felipe and Del Rio districts had been subjected to unequal treatment and that they were

³⁸ 447 F.2d 441 (5th Cir. 1971)

³⁹ See *United States v. State of Texas* (Highland Park ISD), 356 Fed Supp 469 (E.D. Tex 1972) (approving objection to a TEA order disapproving the request of 87 white students to transfer from the Dallas ISD to the all-white Highland Park ISD); *United States v. State of Texas (Wilmer-Hutchins ISD)*. 508 F 2d 98 (5th Cir. 1975) (affirming a preliminary injunction enjoining the segregative splitting of the Wilmer-Hutchins ISD).

segregated as a result of discriminatory state action.⁴⁰ The remedial order required consolidation of the two districts, but went beyond a desegregation remedy and also required the development of a comprehensive bilingual-bicultural program to address the needs of limited English speaking Mexican American students.

We then worked with the school district and submitted an agreed bilingual education plan to the court. But at the hearing to consider this plan held on November 3, 1971, Judge Justice rejected it because the San Felipe representatives had not been included in its development. In its place Judge Justice entered an order on December 4, 1971 requiring implementation of an extensive bilingual plan formulated by him.⁴¹ At that time, this was one of the first, if not the first, bilingual education plans entered by a court and by far the most extensive.

The school district appealed and in August 1972 the district court decision was unanimously affirmed.⁴² What was unusual about this affirmance is that it was entered without opinion – similar to the April 1971 order discussed above) - pursuant to a local rule which permitted such summary action if the decision was supported by the evidence and would not have “precedential value.” It is surprising that the court of appeals found that the district court decision would not have significant precedent given that the remedial plan drawn by Judge Justice was the first of its kind. The Court of Appeals did note the difficulty of the Tyler court supervising implementation of this plan in a school district 500 miles away and ordered the transfer of the case to the District Court for the Western District of Texas for further proceedings.⁴³

⁴⁰ One of the highlights of this trial was the attorney who volunteered to represent the San Felipe school district – Warren Burnett. At that time, he was considered one of the best trial lawyers in Texas. It was an education watching him cross-examine some of the Del Rio witnesses and even Judge Justice indicated his admiration.

⁴¹ 342 F. Supp. 24 (E.D. Tex. 1971).

⁴² 466 F. 2d 518 (5th Cir. 1972)

⁴³ In the Western District, the case was assigned to an anti-desegregation judge who dismissed the case without a hearing in 1973, a decision that we appealed and was reversed in 1975. See 509 F.2d 192 (5th Cir. 1975).

United States v. State of Texas (Gregory-Portland ISD): This matter arose out of an action by the TEA pursuant to its responsibilities under the statewide order to ensure desegregation of racially and ethnically segregated school districts. In 1973 the TEA found that Mexican-American students in the Gregory-Portland ISD, a small school district near Corpus Christi, Texas, were segregated in violation of the statewide order. Like San Felipe-Del Rio, Gregory-Portland was a majority Mexican-American (58%) school district with only a handful of black students. The district was made up of five schools in two small towns about 4 miles apart. The elementary school in Gregory was over 90% Mexican American while two in Portland were over 80% white.

Initially, Gregory-Portland sued the agency in a separate suit in the Southern District of Texas (where the school district was located) challenging TEA's action. The district court found for Gregory Portland in 1976 and enjoined TEA from taking further enforcement efforts. At that point, we intervened to appeal this decision and the court of appeals vacated the lower court decision, holding that the case arose because of enforcement of the Texas statewide case and interfered with the order in that case. 576 F2d 81 (5th Cir. 1978). Gregory-Portland sought review in the Supreme Court that was denied in 1979.⁴⁴ The case was then transferred to Judge Justice and trial was held in May 1980. I supervised the trial but did not appear.

At trial, we were aligned with TEA in defense of their 1973 determination. Significant evidence was introduced demonstrating intentional segregation of Mexican American students in Gregory-Portland and was similar to that of several other Texas cases in which courts had found *de jure* segregation – including the maintenance of “Mexican” schools in the past, an historical state law prohibiting use of the Spanish language in schools, school construction decisions that perpetuated segregation, and assignment of faculty to schools reflecting segregative intent. In addition, the attorney for the TEA introduced a sweeping stipulation of facts (over 456 separate stipulations) admitting to a long history of

⁴⁴ 440 U. S. 946 (1979)

intentional discrimination against Mexican-American students in Texas directly traceable to intentional actions of state education officials.⁴⁵

On August 6, 1980 Judge Justice entered an in-depth opinion finding *de jure* segregation of Mexican-American students in the Gregory-Portland schools. Initially, the opinion set forth in detail the long history of discrimination against Mexican-Americans in Texas, relying in large part on the stipulations submitted by TEA and concluding that this established a pattern of statewide *de jure* segregation. This discussion was followed by a discussion of the evidence concerning actions by Gregory-Portland noted above which demonstrated the school district's intentional discrimination against Mexican American children.⁴⁶ Judge Justice ordered implementation of a desegregation plan for the elementary schools submitted by TEA requiring the busing of over 60% of elementary students. At the end of the decision, Judge Justice went out of his way to laud TEA for its "commendable candor in admitting the existence of unconstitutional statewide discrimination against Mexican-Americans and in joining the battle to eliminate this malign bias from all but the history books." 498 F. Supp. 1356 (E.D. Tex. 1980)

The decision was appealed by Gregory-Portland. While normally, the Appellate Section handled all appeals in the Division, I was designated to handle this one apparently because the United States was the appellee. I had participated in the drafting of several appellate briefs in the past, but this was the only time I presented an oral argument. The case was briefed and argued just prior to the

⁴⁵ These stipulations had been agreed to by a TEA attorney in September 1979 in a case arising under Judge Justice's statewide order seeking a statewide bilingual education plan. This case is discussed in detail below and describes the central role of these stipulations in that case.

⁴⁶ There was very strong precedent for this finding in many other Texas school desegregation cases. After the decisions finding *de jure* segregation of Mexican Americans in Austin, there were several other similar Texas cases finding illegal segregation which had been decided by the Court of Appeals. See *United States v. Texas Education Agency (Midland ISD)*, 519 F.2d 60 (5th Cir. 1975) and *United States v. Texas Education Agency (Lubbock ISD)*, 600 F.2d 518 (5th Cir. 1979). See also, *Cisneros v. Corpus Christi ISD*, 467 F.2d 142 (5th Cir. 1972) (*en banc*). *Zamora v. New Braunfels Independent School District*, 519 F.2d 1084 (5th Cir. 1975); *Morales v. Shannon (Uvalde)*, 516 F.2d 411 (5th Cir. 1975)

change in administrations from Carter to Reagan so there was no change in our support of Judge Justice's decision. But, to my disappointment, the appeal ended badly.

By the time of Judge Justice's decision in this case, the depth of resentment and bitterness toward him from school communities throughout Texas had grown and was reflected in several newspaper editorials and politician statements attacking him. Moreover, despite the laudatory note in Judge Justice's opinion, the state did not defend its actions on appeal. Almost a year after the TEA attorney agreed to the broad stipulations admitting statewide discrimination against Mexican-Americans, the Texas AG's office amazingly was unaware of these admissions. But, shortly after Gregory-Portland district court decision, their attorney brought the stipulation to the attention of the Texas Attorney General, Mark White, who was then intending to run for governor. When he learned of these stipulations, he was incredulous and ordered his staff to find ways to withdraw them. Most of the efforts to do this were made in the state-wide bilingual case discussed below. But in light of this development, it was not surprising that the state decided not to defend Judge Justice's Gregory-Portland decision on appeal.

Another factor in the negative outcome of this case was the three-judge panel hearing the appeal. Two of the judges had been appointed by Nixon and reflected a more conservative approach to school desegregation cases that was developing at that time in the Fifth Circuit. For many years through the 60s and most of the 70s, the Fifth Circuit was crucial in positive school desegregation jurisprudence. But, after unanimous *Green* and *Swann* decisions and the important *Keyes* decision setting the standard of proof for attacking segregation not required by state law, judicial support for desegregation started to wane.⁴⁷ By the 1980s the Fifth Circuit had a number of new conservative Nixon appointees and its historical pro school desegregation jurisprudence was reduced.

⁴⁷ This first became apparent in the 1974 Supreme Court 5-4 decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), reversing a lower court inter-district desegregation order.

The Court of Appeals decision in the Gregory-Portland case, entered on August 20, 1981, was an example of this. In a 3-0 decision, the Court reversed Judge Justice in a blistering opinion by Judge Thomas Gee. The decision was a major blow to the progress that had been made in *United States v. State of Texas* and the first significant rebuff of Judge Justice by the Fifth Circuit. The decision gave little weight to the state stipulations, finding they did not bind Gregory Portland. It then extensively reviewed of the record of discriminatory actions found by Judge Justice and rejected his findings point by point, concluding that the segregation was the “product of indifferent historic and demographic forces,” not intentional segregative actions. 654 F.2d 989, 1005 (5th Cir. 1981). Its analysis of his findings was at odds with the analysis of similar evidence in Austin and cases noted above. It also signaled what was to come in *United States v. State of Texas*.

United States v. State of Texas (Bilingual): This matter involved that part of Judge Justice’s original statewide order concerning educational programs for Mexican American students who were non or limited English speaking. Pursuant to the initial 1971 order, the state had produced a report and had passed a modest bilingual education law in 1973 which required limited bilingual programs in grades 1-3. In 1974 the Supreme Court had decided *Lau v. Nichols*, 414 U.S. 563 (1974) which upheld HEW regulations adopted pursuant to Title VI of the 1964 Civil Rights Act requiring school districts to take affirmative steps to rectify the language deficiencies which excluded national origin minority group children from effective participation in the district’s educational program. Judge Justice’s decision in the *San Felipe-Del Rio* case requiring a comprehensive bilingual education plan had received little attention, but the *Lau* decision did and increased the efforts of civil rights organizations pursuing bilingual programs, especially in Texas.

In 1975, the Mexican-American Legal and Educational Defense Fund (MALDEF), which had intervened in *United States v. State of Texas* in 1972, filed a motion in the case seeking an order requiring the State to provide English-deficient Mexican-American students with much broader bilingual programs than required by the 1973 law. We filed a similar motion, but not until 1978 when the Division’s enforcement policy was more aggressive during the Carter Administration.

MALDEF took the lead in this litigation. In preparation for trial, they prepared 456 stipulations of fact setting forth an in-depth description of actions taken by the State and local school districts against Mexican-Americans in Texas which were extraordinary in their breadth and the extent to which they established a long history of discrimination of segregating Mexican-American students and treating their language and cultural heritage with intolerance and disrespect. To our surprise, the attorney for the State, who was young and new to the State Attorney General's office, agreed to most of these stipulations at the pre-trial conference in November 1979. In essence, TEA was conceding a long history of educational neglect of and discrimination against, Mexican-American students in Texas.

An eight-day trial was held in December 1979. In the State's opening argument, their attorney explicitly agreed to the stipulations, stating "the State of Texas does not have a happy record over the past." Judge Justice was surprised by the stipulations and their scope and carefully questioned the attorneys as to whether they understood and accepted them. We all answered in the affirmative.⁴⁸ In addition to the stipulations, extensive expert testimony was presented demonstrating the shortcomings of the 1973 state bilingual education law and the preferred method of educating limited English-speaking students.

After trial, all parties filed post-trial briefs in May 1980. MALDEF and we filed lengthy briefs arguing that the evidence established (1) pervasive statewide discrimination against Mexican-Americans which although not mandated by state law was the equivalent of *de jure* segregation of blacks; and (2) the severe educational problems of Mexican-American students resulting from this discrimination, especially on reading ability, very high dropout rates and low college attendance of Mexican-Americans. Having essentially conceded liability in the stipulations, the primary argument in the State's brief was that the 1973 plan had adequately cured the discrimination agreed to in the stipulations and thus no further relief was required.

⁴⁸ I appeared for this part of the case, but my primary role was supervising other attorneys trying the case and reviewing briefs that we subsequently filed.

As noted above in discussion of the Gregory-Portland case, the State had not become aware of the liability concessions in the stipulations until shortly after the Gregory-Portland district court decision in August 1980, three months after the post-trial briefs in this case. When these stipulations were made public, there was widespread criticism of the state in the press. The State's first effort to withdraw these stipulations was in a motion filed on September 15, 1980 arguing that in agreeing to the stipulations the State's young trial attorney had agreed only that plaintiffs' witnesses would testify to the information in them, not to their truth. Judge Justice forcefully denied this motion on December 31, 1980, noting that the State's attorney had acknowledged their truth at the outset of the trial and in their post-trial brief, and had relied on them in defending the State's action in the Gregory-Portland case.

Shortly after denying this motion, Judge Justice entered his opinion on January 12, 1981. 506 F. Supp. 405 (E.D. Tex. 1981). Relying primarily on the stipulations, he found in more detail than in his Gregory-Portland decision, unconstitutional and pervasive statewide discrimination against Mexican-American causing "crippling educational deficiencies afflicting the main body of Mexican-Americans in Texas." He then very carefully reviewed the existing 1973 state bilingual law and found it was a "wholly inadequate" remedy for "eradicating the disabling effects of pervasive historical discrimination suffered by Mexican-Americans in the field of education." He also found a violation of the 1974 Equal Educational Opportunities Act, one part of which required educational agencies to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

To remedy these violations, he set forth in detail the elements of an appropriate remedial bilingual plan and ordered the parties to meet and formulate such a plan. The parties met but were unable to agree on a plan and on March 2, 1981 MALDEF and the we submitted separate but similar proposals that followed his Judge Justice's directions requiring bilingual education. The State's submission gave notice to the Judge that a special bilingual task force had been formed by the state legislature to consider the issue and asked him to await their actions. But Judge Justice would not wait and on April 17, 1981 entered an order

requiring a sweeping plan based on the principles in his January 12th opinion. After this order, the State noticed an appeal and public criticism of Judge Justice increased further.

The State legislature task force went ahead and completed their work and on June 12, 1981 a new bilingual law was passed. The requirements of the law overlapped the remedial order to a great extent, but limited bilingual education to the elementary grades, and a less stringent approach known as English as a Second Language for instruction in the secondary grades. Following the passage of this law, the State unleashed a strong attack on the Judge Justice's opinion and order in a series of motions filed on July 6, 1981. These motions argued that (1) the stipulations were improperly filed; (2) that the case had been mooted by the new state bilingual legislation; and (3) that the order should be stayed pending the State's appeal. Judge Justice quickly responded and denied these motions in another lengthy opinion on July 30, 1981. 523 F. Supp. 703 (E.D. Tex. 1981). The State appealed this decision as well and less than a month later on August 21, 1981, the day after the Court of Appeals reversed Judge Justice's Gregory-Portland decision, it stayed Judge Justice's April 17th remedial order.

By the time of the appeal, the Reagan Administration had assumed Division leadership and in our appellate brief changed our previous position supporting Judge Justice's January and April 1981 decisions. The brief argued that the Court erred in not considering the 1981 State law and urged the Court of Appeals to remand the case for consideration of that law. This brief was an early example of the Reagan Administration reversing earlier positions taken in school litigation, a change that was occurring in much of the Division's civil rights work.⁴⁹

The Court of Appeals decision wasn't entered until July 12, 1982, over a year after Judge Justice's decisions. The same judge who had written the Gregory-Portland reversal, Thomas Gee, authored the 3-0 opinion, and again reversed Judge Justice. 680 F.2d 356 (5th Cir. 1982). Like his Gregory-Portland decision, Judge Gee was highly critical of Judge Justice, especially his statewide approach supervising broad aspects of Texas' educational system and policy. He went to

⁴⁹ Further discussion of some of these changes is found below.

great lengths in criticizing the Texas attorney who had entered into the stipulations and then reached the very questionable conclusion that the stipulations did not demonstrate a long history of invidious discrimination against Mexican-Americans nor provide factual support for the court's finding of historical statewide segregation of and discrimination against Mexican-Americans. While he agreed with Judge Justice that the 1973 state bilingual law was deficient, he found that the 1981 Act tracked the court's eventual remedial order quite closely and held that it was error for Judge Justice not to consider the new 1981 law. Finally, and importantly for the future of the statewide case, the court held that because of the absence of evidence of statewide discrimination, there was little if any justification for attempting to deal with bilingual plans of individual districts on a statewide basis, and that any issues concerning such plans should be litigated in the district court where the school district was located.

This decision along with the Gregory-Portland court of appeals decision were major setbacks to Judge Justice's efforts to enforce his 1971 statewide order and put in question its continued viability. After this, TEA's enforcement of the 1971 order was lax as it anticipated that the Fifth Circuit would rule for it in any future appeals. Indeed, after these two reversals, Judge Justice's decisions in matters arising out of TEA enforcement of *United States v. State of Texas* were consistently reversed by the Court of Appeals. One of these cases was the last matter that I worked on in the case. In 1985 the intervenors filed a motion for preliminary injunction alleging that a test required by the State for college students seeking admission to a teacher preparation program discriminated against black and Mexican-American students. By this time the Reagan Administration's very conservative approach to civil rights litigation was well established. When the motion was heard, we took the position that we were participating only as an *amicus curiae* and argued that the statewide order did not apply to discrimination in admissions to teacher preparation programs. Judge Justice rejected that argument, found evidence of racial intent, and ordered a preliminary injunction enjoining further use of the test. 628 F. Supp. 304 (E.D. Tex. 1985). The State immediately appealed and on appeal our brief supported the State and strongly condemned Judge Justice's decision. The Court of Appeals again reversed Judge Justice. 793 F.2d 636 (5th Cir. 1986).

After I left the Education Section and no longer worked on the case, there were several other reversals of Judge Justice decisions in the case. See *United States v. State of Texas (Goodrich ISD)*, 158 F.3d 299 (5th Cir. 1998); *United States v. State of Texas (Hearne ISD)*, 457 F.3d 472 (5th Cir. 2006); *Samnorwood ISD v. Texas Education Agency*, 533 F.3d 258 (5th Cir. 2008). After the decisions in the Gregory-Portland and Bilingual cases, the Court of Appeals -- which had quickly affirmed his initial 1971 decision in the case and the broad bilingual order in the San Felipe-Del Rio matter raising virtually no questions about the statewide approach -- had now made a sharp turn against Judge Justice's use of the case to address statewide discrimination against blacks and Mexican-Americans and thereafter it had minimal impact.

6. Houston, Texas School Case

I began working on the Houston school desegregation case in the mid 1970s. It was the fifth largest school district in the country, enrolling over 200,000 students. The case, *Ross v. Houston I.S.D.*, had been brought in 1956 shortly after *Brown* and lasted nearly 30 years. The Department of Justice intervened as a plaintiff in 1967. The primary desegregation plan was ordered by the Court of Appeals in 1970 before I worked on the case. The plan required the pairing of many elementary schools which resulted in pairing black and heavily Hispanic elementary schools because at that time Hispanic students were not recognized as a separate ethnic group and were considered white for purposes of desegregation. After such recognition was made explicit in the Austin and Corpus Christi appellate decisions in 1972 and *Keyes* in 1973, the Houston school district (HISD) recognized them as a separate ethnic group.

The pairing plan accomplished little desegregation and, as was typical of desegregation efforts in large urban areas, this plan led to extensive white flight. When the 1970 plan went into effect the student body was 53.1% white, 33.5% black, and 13.4% Hispanic. By 1978-79, the percentages had changed to 30.8% white, 45% black, and 24.2% Hispanic. Many white families affected by the plan moved out of the district or enrolled their children in private schools. Moreover, in addition to white opposition to busing, many black, and Hispanic parents opposed the plan because of the pairing of two minority groups. The failure of the 1970

plan to achieve any meaningful integration over a five-year period prompted the HISD to consider a new approach to desegregation.

In 1974 it formed a Tri-ethnic Committee to develop a new plan and, we along with many community groups, were consulted. The result was a new desegregation proposal that eliminated the elementary school pairing plan and adopted a magnet school program designed to promote voluntary desegregation. This was one of the first magnet school plans adopted by a school district and when implemented demonstrated that voluntary desegregation could promote desegregation. It created 62 magnet schools implemented over a three-year period from 1975-1978 which enrolled 7500 students -- 2600 whites, 3400 blacks, and 1500 Hispanics. But because of the size of the district and the extensive minority enrollment, significant segregation remained. This was when I first started working on the case and given the failure of the 1970 plan and the extensive white flight, neither we nor the minority group plaintiffs opposed the plan and it was approved by the district court on July 11, 1975.

In 1976 an area of the city known as Westheimer, a 90% white neighborhood in Houston, sought to split off from the HISD and create a new school district. Such a split off plainly violated two 1972 Supreme Court decisions which prohibited attempts to carve out a new school district from an existing district that was in the process of dismantling a dual school system if it hindered or impeded the process of school desegregation.⁵⁰ Westheimer would have been a 90% white district were it permitted to split off and would have increased segregation in the remaining part of the HISD and promoted more white flight.

The HISD and we immediately filed motions to enjoin this split-off, making us partners with the school district we had originally sued. A hearing on these motions was held in November 1976 and shortly after the hearing, the judge in the case, James Noel, ruled against us and the HISD. Both we and the HISD filed notices of appeal. What stood out for me in this proceeding were the actions of

⁵⁰ See *Wright v. Council of City of Emporia*, 407 U.S. 451, 92 S. Ct. 2196, 33 L. Ed. 2d 51 (1972); *United States v. Scotland Neck City Board of Education*, 407 U.S. 484, 92 S. Ct. 2214, 33 L. Ed. 2d 75 (1972).

Judge Noel. Of all the judges I ever appeared before, he was probably the most hostile to desegregation and directed a lot of that hostility at me personally. His hostility to desegregation was made especially evident when after his decision information surfaced that he had personally seen to it that his son's transfer to a neighboring heavily white suburban school district to escape the HISD desegregation plan was approved. Based on this information, the HISD sought a writ of mandamus ordering Judge Noel to disqualify himself from sitting further in this matter. Noel denied this in a long opinion justifying his action on his son's alleged acne condition which he claimed required a transfer to another school district, a decision the HISD attorneys and I jokingly referred as the "acne opinion." HISD appealed this decision as well.

The motion to require Judge Noel's recusal was highly publicized and while the case was on appeal, the chief judge of the district court felt compelled to reassign the case to a new judge, Finis Cowan, a Carter appointed judge who was sympathetic to compliance with school desegregation requirements. On September 8, 1977, shortly after that reassignment, the court of appeals reversed the Judge Noel's decision and remanded the case to Judge Cowan to determine whether the Westheimer split-off should be enjoined. See 559 F.2d 937 (5th Cir. 1977). Because the case had already been transferred to a new judge, the Court of Appeals found the appeal of the acne opinion moot.

On remand, Judge Cowan promptly held a trial in November 1977 and on December 19, 1977 entered a lengthy opinion enjoining the split-off, finding that that the proposed Westheimer school district would seriously and materially impede, hinder and delay the HISD desegregation process. 457 F. Supp. 18 (S.D. Tex. 1977). On appeal by Westheimer, the Court of Appeals affirmed this decision with one minor modification. 583 F.2d 712 (5th Cir 578). There was also another part of Judge Cowan's decision not directly related to the Westheimer split-off discussing the "extremely serious problem" of white flight that the HISD faced because it was surrounded by predominantly white school districts. He found this similar to white flight in "perhaps" every urban school district in the country. 457 F. Supp. at 25.

In discussing this issue Judge Cowan noted the landmark Supreme Court case decided three years earlier, *Milliken v. Bradley*, 418 U.S. 717 (1974). In that case the Supreme Court had reversed a lower court order requiring inter-district desegregation in Detroit with surrounding white suburban districts, holding that for a court to consider an inter-district desegregation plan, “it must be shown that racially that discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation.” 418 U.S. at 744-45. This is a very difficult standard to meet, making the *Milliken* the first Supreme Court decision to significantly hinder the desegregation of heavily black cities in the north. But, interestingly, Judge Cowan focused on decisions which had overcome this high standard of proof required by *Milliken* and approved inter-district desegregation plans, mentioning Detroit, Atlanta, Wilmington, St. Louis, and Indianapolis, all of which had cases approving interdistrict inter-district desegregation with white suburbs.⁵¹

This was my last work on the Houston case. But its subsequent history is worth discussing because of its influence on the direction of school desegregation law. First, in June 1978 Judge Cowan followed his Westheimer decision discussing the interdistrict cases with an order setting forth an in-depth review of the HISD desegregation efforts and found the HISD had not achieved unitary status. He ordered it to file a preliminary plan designed to reach unitary status. His interest in an inter-district remedy was evident in one part of the order which required consideration of possible inter-district cooperation between HISD and predominantly white suburban school districts, including an order that the Division to file a brief collecting all recent authorities relating to inter-district relief. Such a brief was filed in August 1978.

⁵¹ See, 457 F. Supp. 18, 25-26 citing several such cases decided after *Milliken* -- *Evans v. Buchanan*, D.C., 555 F.2d 373 (3rd Cir. 1977) involving Wilmington, Delaware Independent School District; *United States v. Board of School Commissioners of the City of Indianapolis*, 541 F.2d 1211 (7 Cir. 1976), involving the Indianapolis school district in a case litigated by the Division; *United States v. State of Missouri*, 515 F.2d 1365 (8th Cir. 1974) (City of St. Louis); *Newburg Area Council, Inc. v. Board of Education of Louisville, Kentucky*, 489 F.2d 925 (6th Cir. 1973)..

The HISD's response in June 1979 was a motion to be declared unitary and be dismissed from further judicial oversight. While the motion was pending, Judge Cowan ordered the Texas Education Agency (TEA) to develop an inter-district plan in September 1979, but shortly after that, retired from the bench. Judge Robert O'Connor, replaced Judge Cowan on the case and proceeded to hold a hearing on the HISD motion in late 1979. Before Judge O'Connor decided the motion, TEA proposed a modest voluntary inter-district plan in March 1980, a plan which the HISD approved and implemented in the 1980-81 school year. Then, in May 1980, close to two years after formally briefing the issue, the Division filed a motion to add over 20 suburban Houston districts and alleged inter-district discrimination requiring an inter-district remedy, one of the only times such relief was sought by the Division. The plaintiff intervenors followed with a similar motion. But, in June 1980 Judge O'Connor denied these motions as untimely and motions to reconsider were filed by both plaintiff parties.

It was not until a year later on June 17, 1981 that Judge O'Connor denied these motions seeking reconsideration and found that the HISD had achieved unitary status. The plaintiffs appealed, but by this time the Reagan Administration was in office and did not appeal, an early example of what became an ongoing effort to terminate school desegregation orders. In 1983 the Court of Appeals affirmed the 1981 decision, concluding that the district court did not err in finding it had achieved unitary status. 699 F.2d 218 (5th Cir. 1983). Although a significant number of one race schools remained,⁵² the Court of Appeals emphasized that the HISD was a district with the "unique difficulties" of a large urban school district with a rapidly expanding minority population, surrounded several predominantly white suburban school districts and facing severe white flight that resulted in the lack of a feasible alternative plan for desegregating the HISD. As the Court of Appeals held, some segregation can remain where "immutable geographic factors and post-desegregation demographic changes prevent the homogenation of all

⁵² The student population in twenty-two of the 226 schools in the system had been 90% or more black continuously since 1960, and there were now thirty-three more schools whose student population is 90% or more black.

student bodies and do not bar judicial recognition that the school system is unitary." 699 F2d at 225.

As noted in the discussion of the Austin case above, this decision created a "practicability" test, whereby if a school district is found to have practicably done all that it could to remedy the segregation, it could be declared unitary even though numerous all minority schools remained. Thereafter this became the standard for determining whether a school district had achieved unitary status and was implicitly approved by the Supreme Court in *Dowell* in 1991.

7. Odessa Texas Case:

Odessa is located in Ector County in west Texas about 25 miles from Midland, the birthplace of George W. Bush. The case against Ector County ISD was one of the 27 Texas cases filed in the summer of 1970. An interim order had been entered in August 1970 which did not include a final student reassignment plan and the case had languished until 1981 when the Mexican American Legal Defense Fund (MALDEF) intervened on behalf of an organization of Latino and African American parents and sought full desegregation of the schools.

I was assigned to assist in the trial of the case which took place in October 1981. Segregation in Odessa was severe and we supported MALDEF's allegations of intentional segregation of Mexican-Americans. Minority students resided in south Odessa and attended Ector High School which in 1980-81 was 96% minority -- 60% Hispanic and 36% Black. The other two high schools were overwhelmingly white -- Permian 99% and Odessa 93%. We presented strong evidence of intentional segregation of the Ector County schools and in April 1982 the district court held that the school district actions and inactions had been intentionally discriminatory and that the Ector County ISD not only had failed to meet its duty to dismantle its longstanding dual school system, but actually increased the segregation of both Blacks and Mexican-Americans. When the case was appealed the Court of Appeals noted the "particularly egregious pattern of intentional segregation" and found the district court decision as one which "can only be described as a model." 722 F2d 1182 (5th Cir. 1983).

But serious problems arose during the remedial phase of the case. On July 29, 1982, we entered into a stipulation with Ector County ISD agreeing to a desegregation plan. At the elementary level, an in-depth magnet school program designed to promote voluntary desegregation was adopted. Magnet school plans were acceptable to the Reagan Administration because they relied on voluntary choices of students. Indeed, after this case, magnet school plans were promoted by the Division as it opposed any mandatory busing plan. Even though such plans generally achieved less desegregation, I had seen the success of the magnet schools in Houston. That success and the subsequent success of the Ector County magnet school plan at the elementary level, led me to believe that although this approach achieved less statistical desegregation, it could be a successful desegregation tool which would not engender the level of resistance and white flight that mandatory busing plans had.

At the secondary level, however, few people in Odessa were happy with the court ordered plan. The minority intervenors especially were upset by the part of the plan which required the closing of the formerly minority Ector High School and Blackshear Junior High – which, like so many plans ordered by courts, placed the burden of desegregation on minority students. Similar to the closing of minority high schools in Tyler and Austin, the intervenors had lost “their” high school which was a severe blow to their community. The role of high schools in community building was crucial to the culture of Odessa. As one southside Hispanic resident said at the time, “once you close Ector High School, you close the heart of the community.”

In the white community, the most hotly debated aspect of the high school plan had nothing to do with academic potential and everything to do with athletic potential. High school football was of central importance in Texas, especially in Odessa and the school board focused primarily on which high school, Permian or Odessa, would ultimately get the greater number of black students from Ector High School, and thereby the greater number of black football players. The answer depended on how southside Odessa was divvied up between the two schools and the line was oddly drawn, not for the cause of desegregation, but to ensure that

Permian received a greater number of black running backs than Odessa. As the lone minority member of the Board said, "it was gerrymandering over football."

In the 1980s, Permian was a state football power in football-crazed Texas. It was made famous in a best-selling book -- "Friday Night Lights" -- published in 1990. The book was written after the author spent a year in Odessa following the Permian football team in 1988 and paints a depressing picture of Odessa in which the football team was the most important thing in the whole town. It portrays the racial situation in Odessa and suggests that the only real progress toward racial integration in Odessa took place on the football field but nowhere else. It was subsequently made into a movie and, then, a very popular TV show, but neither focused on racism like the book.

8. Supreme Court Cases

In the early 80s, three important school cases were decided by the Supreme Court. I worked on two of them and it was limited to supervision of the Division's participation in district court trials and the drafting of post-trial briefs in the district court. These two cases eventually were decided by Supreme Court decisions. One of the two -- *Doe v. Plyler* -- was probably the most impactful case that I worked on while in the Education Section.

***Doe v. Plyler* and *In Re Alien Children*:** These two cases arose out of a 1975 Texas law that denied enrollment in public schools to undocumented Mexican-American students. Pursuant to this law, the Tyler ISD implemented a policy beginning in the 1977-78 school year that excluded undocumented Mexican-American students from attending Tyler schools of children who were not "legally admitted" to the country by withholding any state funds for their education, resulting in their exclusion from Tyler ISD schools

Shortly after this new policy was announced, *Doe v. Plyler* was filed on September 6, 1977 by MALDEF on behalf of the undocumented students. The case was assigned to Judge Justice, making this the third case that I worked on when he was a district court judge. He immediately saw its importance and set a

hearing for September 9 on MALDEF's motion for a preliminary injunction seeking to enjoin the policy. Judge Justice also gave notice to the Department of Justice seeking our participation and I attended the initial hearing. Judge Justice granted the preliminary injunction motion on September 12. An issue of special concern to both the plaintiffs and the court was the threat that the Department would take action against the plaintiffs for violation of federal immigration laws. When I returned to Washington, the Division took steps to obtain a commitment from Department officials responsible for immigration law enforcement that they would not take such action.

Thereafter, we were granted permission to participate as an active *amicus curiae* party at the trial. The case was tried by another Education Section attorney in December 1977. I helped draft of our post-trial brief in which we took the position that Texas statute violated the 14th Amendment guarantee of equal protection of the laws.⁵³ Nine months later, on September 14, 1978, Judge Justice entered his opinion concluding that the state statute was unconstitutional. 458 F. Supp. 569 (E.D. Tex. 1978). Importantly, the court held for the first time that undocumented immigrants were entitled to the protections of the Fourteenth Amendment's equal protection clause. With respect to the constitutional question, Judge Justice extensively analyzed (1) whether the denial of education of undocumented children threatened a fundamental constitutional right, and (2) whether undocumented children were a suspect class protected by the 14th Amendment. Under constitutional law, if either of these were found, the law would be subject to strict scrutiny and upheld only if it was precisely tailored to further a compelling government interest. Judge Justice concluded that while the law might require strict scrutiny, he didn't need to address those issues because he found the law didn't even meet the more lenient rational basis standard applied to equal protection analysis. The Tyler ISD appealed the decision

In Re Alien Children was a case challenging the same law and was filed in Corpus Christi two years after *Doe* in September 1979. By that time *Doe* had already been decided and was on appeal. In *In Re Alien Children* the Judicial

⁵³ Plaintiffs had also argued that the law was invalid under the federal preemption doctrine, but we didn't make that argument.

Panel on Multidistrict Litigation consolidated seven cases filed in other Texas federal district courts in the Southern District. We intervened in support of plaintiffs in this case and Education Section attorneys who I was supervising participated in an extensive month-long trial conducted in February and March, 1980. While I did not participate in the trial of the case, I was fully engaged in preparing our post-trial brief in which, as we had in *Doe v. Plyler*, argued that the Texas law was subject to strict scrutiny and unconstitutional. In July, 1980, the district court in this case entered an in-depth opinion and order holding that the law violated the Equal Protection Clause. This opinion went further than Judge Justice's opinion in *Doe*, finding that the absolute deprivation of education of undocumented children resulting from this law triggered strict judicial scrutiny. *In re Alien Children Education Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980).

In Re Alien Children was also appealed and we filed briefs in support of the plaintiffs in both cases. On October 20, 1980 the Court of Appeals upheld the District Court's decision in *Doe v. Plyler* affirming the district court's finding that the law did not meet the rational basis standard of the Equal Protection, but rejecting the finding that the Texas statute was preempted by federal law. 628 F.2d 448 (5th Cir. 1980). Subsequently, the appeal in *In Re Alien Children* was summarily affirmed on February 23, 1981 on the basis of the *Doe* opinion. Both cases were appealed to the Supreme Court by the State. By the time briefs were due to be filed in the Supreme Court, the Reagan Administration had begun. Unlike our position in the district court and court of appeals, we did not support plaintiffs in our Supreme Court brief. Instead, the brief took the position that the United States had no interest in the case because the issue was viewed as important only to the State, not the federal government. Given the federal government's role in enforcing immigration laws, this seemed misplaced.

The Supreme Court heard the case in December 1981, now styled as *Plyler v. Doe*, and on June 15, 1982, the Court affirmed the Fifth Circuit's decisions in a 5-4 decision. Like the lower courts, the court concluded that undocumented children were entitled to the protections of the Equal Protection Clause. And like the Fifth Circuit decision, the majority held they could not be treated as a suspect class, nor that education was a fundamental right. Rather, again like the Fifth Circuit and Judge Justice, the Court determined that the law did not meet the more

lenient rational basis standard because it “imposed a lifetime hardship on a discrete class of children not accountable for their disabling status” and “by denying these children a basic education, [denied] their ability to live within the structure of our civic institutions, and foreclosed any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.” 457 U.S. 202, 223 (1982).

The Supreme Court decision was a landmark victory for undocumented persons. The Court essentially viewed the policy of denying undocumented children an education as making no sense. As the Supreme Court stated, “it is difficult to understand precisely what the State hoped to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.” 457 U.S. at 230. Presently,, the Trump Administration has adopted stringent anti-immigrant policies designed to stem illegal crossings at the southern border. The only thing stopping these efforts from being extended to keeping undocumented children out of school was *Plyler v. Doe*.

Washinton v. Seattle School: This was the other case that I worked on in the district court that eventually resulted in a Supreme Court decision. In 1978, the Seattle School District voluntarily enacted a desegregation plan for its schools which made extensive use of mandatory busing. Later in 1978, a statewide initiative was passed terminating the use of mandatory busing for purposes of racial integration in the public schools of the State. Shortly after the initiative was passed, the Seattle School District, together with two other districts, brought suit against the State defending their plan and challenging the constitutionality of the initiative on the basis of the Equal Protection Clause. We, along with several other parties, intervened on behalf of the district. I supervised our participation in the case in the district court and after an extensive trial, helped draft our post-trial brief. On June 15, 1979 the district court held the initiative unconstitutional on the ground that it permitted busing for non-racial reasons but forbade it for racial reasons. 473 F. Supp. 996 (W.D. Wash.1979). On appeal, the Court of Appeals affirmed on December 30, 1980. 633 F.2d 1338 (9th Cir. 1980).

The case was then appealed to the Supreme Court. As noted above, at the outset of the Reagan Administration, a strict anti-busing policy was imposed and

this case provided an excellent vehicle for espousing this policy. Rather than withdrawing from the case as it had in *Doe v. Plyler*, the Department completely abandoned the position it had taken in the lower courts, urged the Supreme Court to hear the case, and then argued in support of the constitutionality of the anti-busing initiative. Our brief gave no explanation for this switch in position other than it had concluded our earlier position was wrong. In another 5-4 decision, the Supreme Court proceeded to rule against the State and the Department and affirmed the lower court decisions. 458 U.S. 457 (1982). The Court took note of our switch in position and explicitly rejected our new arguments, but did not comment on whether the switch was appropriate.

More recently, in *Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 551 U.S. 701 (2007) the Supreme Court went in a different direction and struck down voluntary desegregation plans that took race into account. Desegregation plans voluntarily adopted by the Seattle and Louisville, Ky. school districts were designed to desegregate their schools and took race into account in implementing the plan. The district and Court of Appeals approved these plans. But, the Supreme Court found these plans unconstitutional holding that because the school districts had taken race into account, they were required to show they had given serious, good faith consideration to workable race-neutral alternatives other than the use of explicit racial classifications, but had failed to do so. In short, the Supreme Court rejected the consideration of race in desegregation plans even when they were designed to promote desegregation, the goal of *Brown* and many subsequent cases. It was in this case that Chief Justice Roberts stated “. . . the way “to achieve a system of determining admission to the public schools on a nonracial basis,” [citing *Brown*], is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” 551 U.S. at 748. More than the 1992 decision in *Dowell*, this decision was the most serious road block to efforts to achieve the permanent desegregation of schools.

Bob Jones University v. United States: Not long after the Seattle case was decided, the Reagan Administration made an even more controversial switch in the Department’s prior position in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Bob Jones University was a religious college that had imposed a

strict prohibition against interracial dating and marriage based on its religious beliefs. The IRS revoked the University's tax-exempt status because its racial policies violated the clearly defined public policy condemning racial discrimination and, the government policy against subsidizing racial discrimination in education, public or private. Bob Jones brought suit challenging this determination and was successful in the district court. But on appeal the court of appeals reversed and upheld the IRS policy. 639 F.2d 147 (4th Cir. 1980).

Up until this point, the IRS position had been vigorously defended by the Department's Tax Division. But when the Reagan Administration took over in 1981, the new leadership of the Civil Rights Division took control of the case and reversed its prior position, arguing that the IRS lacked authority to withdraw Bob Jones' religious exemption. This switch of position was extraordinary because, as the court noted, "Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education." 461 U.S. at 593. Further, "the Executive Branch has consistently placed its support behind eradication of racial discrimination starting even before the *Brown* decision when President Truman issued Executive Orders prohibiting racial discrimination in federal employment decisions." *Id.* at 594. Especially egregious was that the Civil Rights Division was the only entity in the federal government to support the anti-discrimination policy of Bob Jones. The Tax Division, the IRS and virtually all other government agencies who weighed in disagreed with it.

The extent of disagreement with this change of position was evident when the Acting Solicitor General, a longtime career attorney greatly, admired in the Department, explicitly stated his disagreement with this position in the Department's Supreme Court brief. Moreover, with this switch of position, there was no party defending the Department's prior position and the Supreme Court had to resort to a rarely used action of appointing an *amicus curiae* to defend the decision of the court of appeals and the Department's prior position.

In May, 1983 in an 8-1 decision, the Supreme Court soundly rejected the Department's position, holding that "it would be wholly incompatible with the concepts underlying tax exemption to grant tax-exempt status to racially

discriminatory private educational entities. Whatever may be the rationale for such private schools' policies, racial discrimination in education is contrary to public policy.” 461 U.S. 574, 575 (1983). The Court did not explicitly comment on the Department’s position, but made clear that its position was wrong: “The Government has a fundamental, overriding interest in eradicating racial discrimination in education -- discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.” *Id.* at 604

The switch in position in the Bob Jones case was a very low point for me and many others in the Division. Opposition from civil rights groups was particularly fierce. While there had been much criticism of the civil rights enforcement and the southern strategy of the Nixon Administration, opposition to the new policies of the Reagan Administration was deeper. Jack Greenberg, the legendary head of the NAACP Legal and Education Fund who had played a major role in civil rights enforcement since the 1954 *Brown* decision through seven national administrations, testified before Congress that this was the first time that the federal government and the Civil Rights Division were adamantly and without meaningful exception opposed to the civil rights aspirations of minorities. Attorneys in the Division shared this view and many left the Department during the Reagan Administration. I decided to stay because of my love of my job and my feeling that it was important to use my experience to seek the best outcome in our cases and to maintain the Division’s institutional memory.

9. Other Work During the Reagan Administration

During the Reagan Administration, some of my work was on three of the cases discussed above, i.e. *United States v. State of Texas*, *Austin* and *Ector County*. But, because of the Reagan Administration’s reduced enforcement posture in school desegregation cases, there was a stark reduction of meaningful work in those years. Two exceptions were cases filed at the tail-end of the Carter Administration.

Most important was a case that I didn't work on against the City of Yonkers and its school board. It attacked both school and housing segregation in one lawsuit, the only case of its kind ever brought by the Division and one of the Section's most important cases ever. It was brought in December 1980 after the 1980 election but shortly before the Reagan Administration was in office. Once in office, the new Administration undertook an in-depth review of the case, raising concern in the Section that the case would be dropped. However, it was allowed to proceed and when separate housing and education sections were re-established, the case was litigated by attorneys from both sections and resulted in one of the Division's most significant victories. After a trial of close to 100 days in 1983 and 1984, the district court found the city and school board liable for both school and housing discrimination in an extensive 278-page opinion. *United States v. Yonkers Bd. of Ed. Et al.* 624 F. Supp. 1276 (S.D.N.Y. 1985). Following entry of a remedial school desegregation order, the Court of Appeals affirmed and the Supreme Court denied cert. 837 F2d 1181 (2d Cir 1987), *cert. den.* 486 U.S 1055 (1988).

In 1988, the City entered into a consent decree addressing housing segregation. But, when it came time to implement the agreement, the City resisted and was held in contempt of court. The case was highly publicized during the chaos surrounding these events. Thereafter, the case continued to be litigated until 2007 when agreement to a final housing plan was finally reached. The case was made famous many years later in 2015 in a TV miniseries entitled "Show Me A Hero" which portrayed the dramatic events growing out of the defendants' non-compliance with the housing desegregation order.

I did not work on the Yonkers case, but did extensive work on another major case brought on January 9, 1981, just eleven days before the end of the Carter Administration – *United States v. Charleston School Board*. It too was reviewed by the new Reagan Administration, and, like Yonkers, the case was permitted to continue after the review. Until I left the Section in 1987, considerable time was spent in discovery and settlement negotiations in this case. It wasn't until after I had transferred to the Housing Section that a lengthy district court trial was held from October 1987 through September 1988. Unlike Yonkers, the district court ruled against the United States and plaintiff interveners in a 1990 decision. 738 F.

Supp. 1513 (D.S.C. 1990). We and interveners appealed but the Court of Appeals affirmed the district court in 1992. 960 F.2d 1227 (4th Cir. 1992).

Ironically, one of the last cases I worked on in the Section was the same case in which I made my first court appearance in 1969 – the Mobile school case. It had been initiated in 1963 and when I was assigned to it in 1985 the school district remained very segregated – more segregated than it was when it implemented a post-*Swann* consent decree in 1971 which required extensive busing. When I was assigned the case in 1985, little progress had been made because of the school district's failure to implement fully and in good faith the requirements of the 1971 plan. There had been extensive white flight and opposition to the busing plan from both the black and white communities. It had been through numerous appeals and unsuccessful efforts to work out an agreed plan. In 1985, the district court was considering whether the school district had achieved unitariness. I supervised a brief for the Division filed in September 1985 arguing that the school system was not unitary, which included criticism of the school district plan in which black students were transported to racially identifiable black schools purportedly to promote desegregation. The brief emphasized that the plan had been in place for 14 years but had resulted in more racial isolation than existed when the plan was first approved in 1971.

Judge Brevard Hand had been handling the case since 1971 and had consistently ruled in favor of the school board. But in March 1986 he found that the district's student assignment plan had not achieved unitariness and again pushed the parties to negotiate an agreed plan. I attended a two-day negotiating session in July 1986 which was my last work on the case. Pursuant to the Reagan Administration's policy on school desegregation remedies, we advocated for ending crosstown busing and establishing an extensive magnet school plan. Negotiations continued on the plan after that, including participation by Assistant Attorney General Reynolds -- who personally promoted a magnet school plan. Finally, in 1989 an agreement was reached by all parties on a plan that adopted this approach.

One footnote to this case is what happened recently when Jeff Sessions was nominated to be Attorney General by the Trump Administration in 2017. Civil

rights groups opposed this nomination based on his anti-civil rights record. He tried to deflect this criticism by claiming that he personally handled several civil rights cases – one of which was the Mobile school case -- when he was United States Attorney in Mobile during the Reagan Administration. When this was brought to my attention, as well as the attention of two other former Division attorneys who had worked on voting cases Sessions listed, we made it known that we had never worked with him. This led to a factchecker article in the Washington Post refuting his claim of working on these cases. I noted I had never even met Sessions. Subsequently, on January 3, 2017, the three of us wrote an op ed for the Post setting the record straight. At a subsequent Congressional hearing Sessions was forced to concede he did not know me.

VI. CONCLUDING THOUGHTS

My work in the Civil Rights Division started at a time when very little progress had been made in fulfilling the mandate of *Brown* decided fourteen years earlier. But it also was just after the 1968 Supreme Court's unanimous decision in *Green*, the decision which was the major turning point in school desegregation and led to a major increase in litigation and progress. *Green* was followed by two other unanimous Supreme Court decisions in *Alexander v. Holmes* in 1969 and *Swann v. Charlotte-Mecklenburg* in 1971 and the pace of desegregation litigation peaked in the period between 1970 and 1973. The progress in school desegregation in this period was extraordinary and the South became the most integrated region of the country for several decades. To be part of this effort was one of the highlights in my career.

But this progress was not sustained. While the Nixon Administration played a positive role in 1970, its commitment to school desegregation from the very start was begrudging and a significant change from the vigorous efforts during the Kennedy and Johnson Administrations. This was especially true after the 1971 *Swann* decision and the progress that had been achieved to that point slowed. When the Carter Administration assumed office in 1977, civil rights enforcement was reinvigorated and there was a renewed commitment to school desegregation.

But any momentum from those years ended abruptly when the Reagan Administration assumed office in 1981. Total opposition to any remedy requiring busing and a policy to identify desegregation orders to be terminated signaled the end of federal government support of school desegregation. At the same time, there was an erosion in the support from the federal judiciary eventually leading to the Supreme Court's *Dowell* decision in 1991 authorizing the widespread termination of court ordered desegregation plans. *Dowell* was a turning point, going in the opposite direction of *Green* and the beginning of a major reduction in school desegregation. This trend has continued to the present and was made even worse by the 2007 decision in *Parents Involved* which hindered efforts to promote desegregation through voluntary magnet school and school choice plans. By one measure, when the level of desegregation peaked in the 1970s and 80s, 44% of black southern students were in majority-white schools. By 2011, that number had declined to 23%, a drop by nearly half, and the decline has accelerated more in recent years.⁵⁴

After the great progress at the start of my time in the Section, these developments have been very disappointing. While civil rights advocates continue to work on equal education issues, the loss of a commitment to school desegregation by the federal government and the barriers created by Supreme Court decisions were important factors in the decline in the pursuit of school desegregation. But, for me the overarching factor was the continuing resistance to desegregation in white communities. Often there was widespread noncompliance with court orders requiring significant resources of the Section to address this. Most damaging was the overwhelming refusal of whites to accept compulsory assignment to formerly black schools. This resulted in significant white flight to suburban districts especially in urban districts that were subject to orders requiring busing. Similarly, in both urban and rural districts there was a major increase in segregated private schools.

White resistance also led to a growing disillusionment with school desegregation that emerged in black communities after years of litigation.

⁵⁴ Orfield, "Brown at 60: Great Progress, a Long Retreat and an Uncertain Future," p. 9 (The Civil Rights Project, May 15, 2014)

Desegregation orders often resulted in the demotion and firing of black teachers and administrators. Widespread closing of formerly black schools placed the burden of desegregation disproportionately on black students. These closings were especially detrimental to the cohesiveness and support provided by historical black communities.

In the end, disappointment in the decline of school desegregation does not overshadow the importance of the elimination of de jure school segregation accomplished after *Brown*. It set in motion the civil rights movement of the 1960s and was important in subsequent decisions eliminating other forms of segregation and racial discrimination. The South is very different today than it was when I started. This was evident to me when I worked in Mississippi addressing housing issues after Hurricane Katrina in 2005 when I was with the Lawyers' Committee for Civil Rights. While discrimination was and still is a major problem in Mississippi, significant progress had been made in race relations compared to when I was in Hattiesburg in 1970.

Today school desegregation is no longer a major issue and has not been for many years. The days of court ordered mandatory reassignment of students are over and the desegregation efforts that are pursued focus on voluntary plans involving magnet schools and carefully designed school choice. Several have been quite successful in producing meaningful, if not total, desegregation. In retrospect, I have come to believe that had there been more commitment to this approach in the years districts were first desegregating, progress first achieved may have been more lasting.

Joseph Rich
Washington, DC
jdrich1942@gmail.com