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On June 22, 1965, the Court of Appeals for the Fifth Circuit entered an order requiring the Jackson, Mississippi, Municipal Separate School District to submit a plan for the total desegregation of the district, and specifically requiring that at least four grades be desegregated in the school year 1965-1966.[1] In reaching its decision, the court gave "great weight"[2] to the standards used by the Office of Education of the United States Department of Health, Education, and Welfare (HEW) to determine whether schools qualify for federal financial assistance. The court reasoned that since the objectives of both the judiciary and the executive department in requiring the desegregation of public schools are the same, there should also be a correlation between the standards each employs.[3] This conclusion raises the question of the extent to which HEW's standards are to be relied on by the courts in their independent evaluations of school desegregation plans. There would seem to be three possible alternatives: (1) use of the HEW standards merely as additional evidence, to be evaluated and weighed by the courts; (2) acceptance of the HEW standards as controlling upon the courts; or (3) acceptance of HEW's actions based on its standards as dispositive of the particular case.

* 348 F.2d 729 (5th Cir. 1965).

1. Singleton v. Jackson Municipal Separate School Dist., 348 F.2d 729 (5th Cir. 1965) (hereinafter cited as principal case). The plaintiffs were Negro parents seeking injunctive relief pending an appeal on the adequacy of a grade-a-year school desegregation plan.

2. *Id.* at 731.

3. *Ibid.*

The interaction of the Fifth Circuit and HEW is the culmination of the development, during the past twelve years, of both judicial and administrative review of school desegration plans. When the United States Supreme Court held racial discrimination in public schools unconstitutional in *Brown v. Board of Education*,[4] it remanded the cases to the federal district courts with instructions to supervise the local school boards' implementations of the principles enunciated in that decision.[5] Although the courts were at first reluctant to exercise their new responsibility,[6] the period from 1954 to 1964 was one of stumbling progress. The successive downward revisions in judicial estimates of the amount of time needed by the school boards to comply fully with *Brown* have typified the increasingly stricter standards employed by the courts in evaluating all aspects of the proposed plans.[7] Although the courts at first accepted and even suggested the "stair-step" or grade-a-year plans,[8] by 1961 such plans had fallen into disfavor;[9] "the rule [had] become: the later the start, the shorter the time allowed for transition."[10] Subsequently, some of the courts required desegregation of two grades per year while others demanded three or four.[11] By 1964, many of the courts had gained, through ten years of experimentation, sufficient competence and confidence to deal knowledgeably and effectively with recalcitrant school districts.[12]

4. 347 U.S. 483 (1954).

5. Brown v. Board of Educ., 349 U.S. 294 (1955). Although the Supreme Court recognized the right to be free from segregation in the public schools in the first *Brown* case, *supra* note 4, it requested additional argument on the appropriate means of implementing that right. The choice available to the Court was either immediate or gradual desegregation; enforcement could come through decrees formulated by the Supreme Court, by a master appointed by the Court, or by the federal district courts. 349 U.S. at 298 n.2. The decision to remand to the district courts evidenced a realization by the Supreme Court that a single plan administered in Washington would have been inappropriate, if not impossible. *Id.* at 299. See 49 Nw. U.L. REV. 557 (1954).

6. *E.g.*, Rippy v. Borders, 250 F.2d 690 (5th Cir. 1957); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

7. See generally Knowles, *School Desegregation*, 42 N.C.L. REV. 67 (1963); Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517 (1959).

8. *E.g.*, Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960); Houston Independent School Dist. v. Ross, 282 F.2d 95 (5th Cir. 1960); Kelley v. Board of Educ., 159 F. Supp. 272 (M.D. Tenn. 1958), *aff'd*, 270 F.2d 209 (6th Cir.), *cert. denied*, 361 U.S. 924 (1959).

9. *E.g.*, Jackson v. School Bd., 321 F.2d 230 (4th Cir. 1963); Bush v. Orleans Parish School Bd., 308 F.2d 491 (5th Cir. 1962); Goss v. Board of Educ., 301 F.2d 164 (6th Cir. 1962); Evans v. Ennis, 281 F.2d 385 (3d Cir.), *cert. denied*, 364 U.S. 933 (1961).

10. Lockett v. Board of Educ., 342 F.2d 225, 228 (5th Cir. 1965).

11. *E.g.*, Northcross v. Board of Educ., 333 F.2d 661 (6th Cir. 1964); Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55 (5th Cir. 1964); Gaines v. Board of Educ., 329 F.2d 823 (5th Cir. 1964); Monroe v. Board of Comm'rs, 229 F. Supp. 580 (W.D. Tenn. 1964).

12. The very nature of the judicial process results in a disparity of expertise among the various courts. First, since the courts deal only with the cases brought before them, some courts have had no exposure, and therefore no experience, during the ten-year period. Second, it is an unfortunate result of the adversary process that uninformed or poorly prepared counsel often leads to an uninformed court and an uninformed

The accelerated pace set by judicial action was supplemented by the Civil Rights Act of 1964, which evidenced a national consensus against discrimination in education.[13] Pursuant to Title VI,[14] which prohibits the expenditure of federal funds for programs administered in a racially discriminatory manner, HEW conditioned eligibility for federal aid on an assurance of compliance with the provisions of the act.[15] Elementary and secondary school boards could satisfy this requirement either by assuring HEW that they would comply with an existing final court order or, in the absence of such an order, submitting a desegregation plan acceptable to the Commissioner of Education.[16] To assist the Commissioner and the school boards in evaluating desegregation plans, HEW published in April 1965 an official policy statement in the form of *Guidelines*.[17] The *Guidelines* are both comprehensive and demanding; although the provisions allow some flexibility, the target date for total desegregation of pupils, teachers, and activities is the fall of 1967.[18]

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decision. Thus, while some courts have learned a great deal during the period of experimentation, others have not been so fortunate. Most of the courts are aware of the more obvious ploys used to delay desegregation, but only a few are sufficiently competent to detect the more subtle means of evasion.

13. 78 Stat. 246-49, 42 U.S.C. § 2000c (1964).

14. 78 Stat. 252-53, 42 U.S.C. § 2000d (1964). Section 601 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 602 states: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives or the statute authorizing the financial assistance in connection with which the action is taken. . . ."

15. 45A C.F.R. § 80.4(a) (1964): "Every application for Federal financial assistance to carry out a program to which this part applies . . . shall, as a condition to its approval . . . , contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. . . ."

16. 45A C.F.R. § 80.4(c) (1964).

17. U.S. Department of Health, Education, and Welfare, Office of Education, General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, April 1965 (hereinafter cited as Guidelines).

18. The *Guidelines* require that all plans include provisions for the desegregation of teachers and administrative personnel, for the desegregation of school transportation and other school-affiliated facilities or activities, and for conspicuous notice in the community of the school board's actions. Plans based on geographic attendance zones must include maps and statistics. Plans based on "freedom of choice" must provide for adequate opportunity to make a choice, and for adequate notice; they must also contain provisions for procedure in the event of overcrowding. While the target date for total desegregation for all plans is 1967, each school district failing to provide for total desegregation by the school year 1965-1966 must justify the delay. Those schools which are just beginning to desegregate must make a substantial good faith start, which would include at least four grades for 1965-1966 and a right for every student, whether or not his grade has been desegregated, to transfer in order to take a course for which he is qualified and which is not available in the school he is attending.

Since HEW and the judiciary are pursuing the same ultimate objective, it is not surprising that the formats of their standards are quite similar. The courts' target date for total desegregation is 1968-1969 while that of HEW is 1967-1968; both, however, require the desegregation of a minimum of four grades in 1965-1966 for those school districts which, as of the fall of 1965, have taken no steps toward desegregation.[19] Neither objects to allowing the school boards to select either freedom-of-choice plans or geographic plans based on nonracial attendance zones.[20] Other areas of similarity include an insistence on a good faith start, an emphasis on adequate notice to the community, and a concern for the possible overcrowding of the better schools.[21]

The principal case is the first case which deals directly with the relationship between the HEW standards and those developed by the courts. The Circuit Court's reference to the Office of Education as the "better qualified" and "more appropriate federal body"[22] to evaluate school plans would seem to suggest a willingness on the part of the court to rely totally on the HEW *Guidelines*, and subsequent statements of the Fifth Circuit have reinforced this suggestion. In *Price v. Denison*,[23] the court indicated that *Singleton*'s implementation of HEW's standards would be a typical approach in desegregation cases,[24] and added:

> By the 1964 Act and the action of HEW, administration is largely where it ought to be—in the hands of the Executive and its agencies with the function of the Judiciary confined to those rare cases presenting justiciable, not operational, questions.[25]

Furthermore, there is evidence that the district courts may read *Singleton* as permitting, if not requiring, complete judicial reliance not only on the HEW *Guidelines*, but also on HEW's actions. For example, in the District Court for the Western District of Mississippi, Judge Clayton held in abeyance his ruling on a motion for a preliminary injunction against the Aberdeen Municipal Separate School District pending a decision by the Commissioner of Education on the adequacy in light of the HEW *Guidelines* of the plan submitted by

19. *Compare* Lockett v. Board of Educ., 342 F.2d 228 (5th Cir. 1965), *with* GUIDELINES, pt. VE.

20. *Compare* Bradley v. School Bd., 345 F.2d 310 (4th Cir. 1965), *and* Northcross v. Board of Educ., 333 F.2d 661 (6th Cir. 1964), *with* GUIDELINES, pt. VA.

21. *Compare* Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55 (5th Cir. 1964), *and* Gaines v. Dougherty County Bd. of Educ., 334 F.2d 983 (5th Cir. 1964), *with* GUIDELINES, pts. VB4, VD.

22. Principal case at 731.

23. 348 F.2d 1010 (5th Cir. 1965). Appellants were Negro parents questioning the constitutional adequacy of Denison school district's grade-a-year plan.

24. *Id.* at 1013.

25. *Id.* at 1014.

the school board.[26] Arguments on this motion were made shortly before the opening of school in September; any delay in a decision could only add to the difficulties of implementing that decision before the fall term began. It seems highly probable that Judge Clayton's reason for delaying his decision was a belief that the forthcoming HEW ruling would be dispositive of the case.

Although the courts of the Fifth Circuit have interpreted *Singleton* as permitting judicial abdication to the executive, a more appropriate analysis of the case would be that the court was merely taking notice of HEW's *Guidelines*, as it would any findings based upon administrative expertise, and considering them in its independent evaluation of the facts of the particular case. The judicial relinquishment to the executive department of judicial responsibility for evaluating school desegregation plans is understandably appealing to the federal judges, particularly those in the southern states; it would result in less time spent in actual litigation, less judicial involvement with complex administrative problems, and less direct conflict with strong local segregationist sentiment. However, despite its superficial appeal to the judiciary, such an analysis of *Singleton* ignores the doctrine of separation of powers, the value of the judicial process, and the courts' heretofore traditional jealousy of their prerogatives.

The fourteenth amendment, as interpreted by *Brown*, is the source of the courts' authority, and hence their point of departure, for evaluating desegregation plans. On the other hand, HEW's authority is both derived from and limited by legislative fiat. Congress authorized the establishment of desegregation guidelines by HEW for the purpose of determining which local programs are eligible for federal assistance.[27] Nowhere in the legislative history of the Civil Rights Act is there any evidence of congressional intent to make HEW's standards controlling in the desegregation cases stemming from *Brown*.[28] Furthermore, the HEW regulations give both

26. United States v. Aberdeen Municipal Separate School Dist., Civil No. EC6564, N.D. Miss., Sept. 10, 1965.

27. See note 14 *supra*. Section 602 of the Civil Rights Act continues: "Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, . . . (2) by any other means authorized by law . . . ."

28. On the contrary, see Title IV of the Civil Rights Act, 78 Stat. 246-49, 42 U.S.C. § 2000c (1964). Section 407 facilitates the bringing of a desegregation suit in the federal courts by authorizing the Attorney General, upon receipt of a written complaint, and upon certifying that the complaint is meritorious, that the signers are unable to initiate and maintain legal proceedings and that the institution of the action will promote desegregation in the public schools, to bring an appropriate civil action in the name of the United States in the appropriate federal district court. If the courts are turning responsibility over to HEW, the Department of Justice now need only place a call to the Department of Health, Education, and Welfare.

past and future court orders priority over desegregation plans accepted by the Commissioner of Education,[29] thereby evidencing an administrative intent to conform administrative action to that of the judiciary rather than have the judiciary conform to administrative determinations. Thus, the district courts, by construing *Singleton* as an abdication, are given unwarranted status to the *Guidelines*, which have never even been promulgated as official administrative regulations and therefore are, in fact, only an office memorandum.

School desegregation cases are civil actions in which there exists, as a result of *Brown*, a legal basis for seeking the enforcement of constitutional rights. Interpreting *Singleton* as calling for total reliance by the courts on the standards promulgated by HEW may result in interference with the judicial process established by *Brown*, to the detriment of the real parties in interest—the Negro school children and the local school boards. Where the HEW standards are more lenient than those normally imposed by the courts, the courts' acceptance of these standards as controlling would delay the school children's enjoyment of their recognized rights. For example, although HEW's *Guidelines* call for the desegregation of at least four grades in 1965-1966, HEW has accepted desegregation plans for 1965-1966 extending to as few as two grades.[30] The *Guidelines* allow for such a departure from the general standards only in cases where exceptional circumstances can be demonstrated;[31] however, convincing an administrator of the existence of exceptional circumstances in an *ex parte* application is quite different from convincing a federal judge of a nondenial of constitutional rights in an adversary proceeding in which the plaintiff school children's grievances could be forcefully presented and where the defendant school board would bear the burden of proof.[32] Since the school children have no direct means of challenging HEW's decisions, to allow HEW's standards to be controlling would be to deny to the school children their day in court. Conversely, this view of *Singleton* places the school boards at a disadvantage when the HEW standards are higher than those of the courts. Failure to satisfy HEW's demands results in the withholding of federal funds; once the courts incorporate these standards, the

29. "In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such a plan shall be revised to conform to such final order, including any future modification of such order." 45A C.F.R. § 80.4(c) (1964). See text accompanying note 14 *supra*.

30. As of August 13, 1965, of the thirty-two voluntary plans from Mississippi which had been accepted by HEW, six extended to only two grades for 1965-1966. DEPARTMENT, OF HEALTH, EDUCATION, AND WELFARE, OFFICE OF EDUCATION, STATUS REPORT, COMPLIANCE WITH TITLE VI, 1964 CIVIL RIGHTS ACT, Aug. 13, 1965.

31. "In exceptional cases the Commissioner may, for good cause shown, accept plans which provide for desegregation of fewer or other grades or defer other provisions set out in 4a above for the 1965-1966 school year . . . ." GUIDELINES, pt. VE4a(5)(b).

32. Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

school board may also be liable to civil contempt proceedings for noncompliance with an injunctive decree.[33] Unlike the children, the school boards would be in a position to protest directly to HEW, but like the children they would be deprived of a court hearing on the question of their compliance with the *Brown* edict, which is their sole constitutional obligation. This leads to the question raised by the excerpt quoted above from *Price*,[34] where the court indicated an intention to limit itself to "justiciable" questions. The exact meaning of this limitation is unclear. If it reserves to the court's jurisdiction the types of questions just discussed, it is clearly appropriate; however, cases decided since *Price*[35] indicate that the district courts are not so construing the term "justiciable."

Another objection is based on the underlying theory of the *Brown* decisions. The Supreme Court there remanded the cases to the district courts for retention upon their dockets during the period of transition to ensure that the responsibility for desegregation would be with the school administrators, supervised on the local level by the federal district courts. However, abdication of procedural control by the courts would mean, for all practical purposes, that an agency in Washington would supplant the local courts in supervising the local school boards.[36]

Finally, *Singleton* could set a dangerous precedent if interpreted as authorizing abdication of judicial responsibility. The courts should not be permitted to justify such an abdication in the name of efficiency, uniformity, or convenience. To say that there is a national consensus is not to say that implementation of that consensus belongs in Washington rather than in the federal district courts. Apparently the Fifth Circuit views its reliance upon HEW standards as merely a question of policy;[37] however, in our system of constitutional government, which assigns to each branch distinct functions and duties, such questions of "policy" may actually be questions of law.

33. For example, in United States v. Aberdeen Municipal Separate School Dist., Civil No. EC6564, N.D. Miss., Sept. 10, 1965, Judge Clayton, after being advised of HEW's rejection of the proposed plan, issued an injunction which imposed a positive duty on the school board to comply with each of HEW's specific demands.

34. Text accompanying note 25 *supra*.

35. United States v. Aberdeen Municipal Separate School Dist., Civil No. EC6564, N.D. Miss., Sept. 10, 1965; United States v. Carroll County Bd. of Educ., Civil No. GC6541, N.D. Miss., *preliminary injunction* Sept. 2, 1965, *desegregation plan approved, as modified*, Sept. 3, 1965; Baird v. Benton County Bd. of Educ., Civil No. WC6513, N.D. Miss., Aug. 6, 1965.

36. As of Sept. 16, 1965, only 4% of the school districts for which HEW requires a plan had failed to submit a plan. U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, OFFICE OF EDUCATION, SUMMARY OF COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, SOUTHERN AND BORDER STATES, Sept. 16, 1965.

37. See principal case at 731.