

Notes and Comments

The Courts, HEW, and Southern School Desegregation*

Introduction

When *Brown v. Board of Education*¹ was first delivered few, least of all the Supreme Court, saw the administrative problems that lay ahead. It was assumed most school districts would promptly dismantle their segregated school systems. For those that needed encouragement the district courts, it was believed, could in their role as equity courts give whatever help was needed.

The second *Brown v. Board of Education*² case outlined briefly the approach anticipated. Realizing the impossibility of supervising the transition itself, the Supreme Court declined to issue any decree and instead remanded each case to the appropriate federal or state court, instructing it to write the required order. The Supreme Court left no doubt that the local courts should go into every aspect of

problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis³

The Supreme Court thus anticipated that each district court, utilizing the wide powers available to it as an equity court, would declare itself a temporary school board and rule on all details of the desegregation process.

The rarefied air on which the easy assumptions of *Brown II* floated, however, proved unrealistic and serious threats to the orderly enforce-

* This student Comment was awarded the Benjamin Scharps Prize for 1967, given for the most outstanding piece of faculty-designated student work.

1. 347 U.S. 483 (1954).

2. 349 U.S. 294 (1955) [hereinafter cited as *Brown II*].

3. *Id.* at 300-01.

ment of the law were encountered. After a decade only 2.3 per cent of Southern Negro children were attending desegregated schools.⁴

Congress responded by passing the Civil Rights Act of 1964⁵ in the hope that administrative efforts might succeed where the courts had failed. Title VI provides in part that

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.⁶

Every federal agency is instructed to act to implement this pronouncement. If discriminatory practices continue, the government agency may under Section 602 order "the termination of or refusal to grant or to continue assistance under such program or activity . . ."⁷ Title VI, in short, required the Department of Health, Education and Welfare (HEW) to assume responsibility for seeing that every school in the United States was desegregated. It was given as a sanction the right to terminate federal aid to any school district that failed to cooperate.

The Act thus meant that henceforth there would be two governmental bodies charged with the common task of enforcing the 14th Amendment ban against segregation in public schools. This Comment will examine the nature of the accommodation that has developed between the courts and HEW.⁸

I. The Office of Education's Attitude Toward the Courts

A. *The Exception for Court Orders*

For the Office of Education the presence of courts posed the obvious and immediate question whether the government should accept a court order as adequate proof that a school district was desegregating and therefore eligible for federal aid, or whether it should insist that such districts conform to any standard the agency itself might formulate.

4. N.Y. Times, May 23, 1966, at 16, col. 4.

5. Pub. L. 88-352; 78 Stat. 241 (1964).

6. Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d.

7. Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1.

8. Because such is the inquiry, this paper is not an attempt to assess generally the great contribution Title VI has obviously made to school desegregation in the South. Nor is the paper intended to be a general description of the substantive and procedural standards developed by the Office of Education, their judicial origins and the administrative problems they have created. While these are equally important questions, they are at least in part separate ones. For articles discussing such issues see Note, *School Desegregation and the Office of Education Guidelines*, 55 GEO. L.J. 325 (1966); Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967).

The regulations drafted by HEW pursuant to Title VI state clearly the government's solution to the problem:

The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order⁹

Nothing on the face of Title VI itself required the government to make such an exception. There is only the most inconclusive legislative history to suggest, furthermore, that Congress meant the exception to be read into the statute. Some senators thought all court orders would satisfy the compliance requirement under Title VI; some thought that the agencies would administer the Act in good faith and accept any court orders which were reasonable; some thought court orders were irrelevant to Title VI.¹⁰ The Senate debate does suggest, though, that the Justice Department committed the government to an interpretation of the bill that would require acceptance of court orders and that the bill was passed by the Senate with knowledge of that prior commitment.¹¹

Several lower federal court opinions have implied that the Constitution itself requires such a regulation. In *Lee v. Macon County Board of Education* the court stated that HEW could not cut off funds from a school district subject to a court order:

[J]udicial approval of a plan of desegregation . . . establishes eligibility for federal aid. In such instances, the Executive officials, acting through the Department of Health, Education, and Wel-

9. 45 C.F.R. § 80.4(c)(1) (1967).

10. Senator Pastore was asked from the floor whether funds would be cut off despite the fact that the school district was under a court order requiring "4, 5, 6 or 8 years to complete desegregation." His answer was "I shall not say for 5 or 6 years. That is too long a time. I do not see why we have to wait 5 or 6 years to desegregate." 110 CONG. REC. 14,436 (1964). There are further vague allusions to the belief that court orders would be respected and to the hope that the debate would create legislative history on the question. 110 CONG. REC. 14,437-39 (1964). Such statements were characterized by an opponent of the bill as simply expressing the hope "that the bill we are about to pass will not be enforced." 110 CONG. REC. 14,439 (1964) (remarks of Senator Gore).

11. Senator Humphrey, in charge of the bill in the Senate, stated during debate: "I have studied the question raised . . . for long hours and have consulted many officials of our government. It is my view that Title VI would not be used for action terminating, reducing, or refusing assistance in such a case as has been mentioned because of dissatisfaction with the terms of the applicable court order or the speed with which it directs desegregation procedure." 110 CONG. REC. 14,436 (1964). Humphrey's statement appears in large part to represent simply a report on the Justice Department's initial interpretation of the pending legislation rather than a statement of legislative intent itself.

fare or any other branch of the government, may not, by terminating funds, in effect disapprove a court-adopted plan.¹²

This statement amounts only to dictum, since the question actually before the court was whether alleged non-compliance with a court order justified the termination of funds by HEW.

The court assumes that Title VI and the standards promulgated under it may incorporate only constitutional requirements. To the extent this is a valid assumption, juxtaposition of the agency's view of what the Constitution requires on top of a judicial determination of the same question certainly would appear to violate the ban on executive review of judicial decisions first enunciated in *Hayburn's Case*.¹³

The court's assumption that Title VI only empowers HEW to require what the Constitution does is not beyond debate. While HEW equates Title VI standards with those imposed by the Constitution, at least in the absence of a clear ruling by an appellate court, there is the possibility that HEW will argue that this is done only as a matter of policy rather than statutory necessity.¹⁴ Consequently, the exception for court orders could also be viewed as a matter of administrative discretion rather than of legislative or constitutional fiat.¹⁵

A situation in which the courts and the Office of Education would both demand that a school district take certain specific steps to desegregate raised the possibility in the minds of some officials that a school

12. *Lee v. Macon County Bd. of Educ.*, 270 F. Supp. 859, 865 (M.D. Ala. 1967). The opinion also cites *Alabama NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346, 352 (M.D. Ala. 1967): "As courts attempt to cooperate with executive and legislative policies, so, too, the Department must respect a court order for the desegregation of a school or school system."

13. 2 U.S. (2 Dall.) 409 (1792).

14. Certainly Congress could have utilized the power of the purse to require that recipients of aid do more than is required by the Constitution. At least some officials argue privately that since the wording in Title VI is broader than the 14th Amendment there would be no statutory bar to imposing stiffer requirements. "Desegregation" is defined in Title IV of the Act, 42 U.S.C. § 2000c-6(a), to exclude specifically "the transportation of pupils . . . from one school to another or one school district to another in order to achieve such racial balance . . ." but this is not seen by many in HEW as controlling on Title VI. Nevertheless, as a practical matter few in HEW feel it advisable at the moment to argue publicly that Title VI could be used as authority for imposing stiffer standards on the public than are required by the Constitution.

15. Civil rights leaders lobbied at the time against an exception for court orders. *N.Y. Times*, March 14, 1966, at 25, col. 1. Since then the NAACP and the United States Commission on Civil Rights have attacked the practice of excepting court orders and have called upon HEW to repeal the requirement. NAACP LEGAL DEFENSE AND EDUCATION FUND & AMERICAN FRIENDS SERVICE COMMITTEE, MEMO TO GARDNER: REPORT ON THE IMPLEMENTATION OF TITLE VI OF 1964 IN REGARD TO SCHOOL DESEGREGATION 11 (1965); SOUTHERN REGIONAL COUNCIL, SCHOOL DESEGREGATION 1966: THE SLOW UNDOING 4 (1967). Judge Tuttle of the Fifth Circuit stated from the bench during recent oral argument of a school desegregation case that he could find no justification for the exception the government made for a court order. Statement of Derrick Bell, Deputy Director, Office of Civil Rights, HEW, August 10, 1966.

district might have found itself forced to choose between losing federal money or taking steps which could put it in contempt of court for failure to observe a court order.

The ability of the Justice Department under Title IV or Title IX to initiate or intervene in suits desegregating schools also creates fears that the Justice Department might agree in such suits to a plan which the Office of Education would then hold to be inadequate for purposes of Title VI.¹⁶ The result might be unseemly public discord between the policy at the Justice Department and at HEW to the embarrassment of the whole executive branch.

The exception is also justified by a general feeling that as a mere administrative agency HEW should not "get into the business of second-guessing courts" by insisting on standards different from those adopted by a court in a particular instance.¹⁷ Certainly implicit in this statement is an awareness of the political consequences of attempting to impose on a local school district requirements that go beyond those on which the local courts have insisted. It also implies a judgment as to the relative force a court order or an administrative requirement has in the minds of a recalcitrant school district and suggests that HEW was well aware of the danger to its prestige and credibility should it publicly contradict a court, even though the court order on appeal might be revised to eliminate the conflict in HEW's favor.

The wisdom of the exception, for whatever reason it was adopted, continues to be debated within the Office of Education. One proposal is to reinterpret "court order" to mean only those court orders in accordance with present judicial standards. Another more straightforward proposal is to amend the regulations. In 1966 when HEW had under active consideration asking the President to sign the revised guidelines eventually issued December 31, 1966,¹⁸ the possibility was

16. Section 407 of the Act provides that upon receipt of a complaint the Justice Department shall institute suit if "the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation of public education" 42 U.S.C. 2000c-6 (1964).

Section 902 provides: "Whenever an action has commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, or national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance." 42 U.S.C. 2000h-2 (1964).

17. James M. Quigley, Assistant Secretary HEW, quoted in *N.Y. Times*, May 9, 1965, at 40, col. 1. See also *SOUTHERN EDUCATION REPORT* May-June, 1966, at 6.

18. The guidelines contain a statement of HEW's desegregation standards. Revised

discussed of amending the regulations at the same time to eliminate blanket acceptance of all court orders. However, when the idea of issuing the guidelines as regulations was dropped for the present, the proposal to amend section 80.4(C)(1) so as to eliminate acceptance of all court orders was also abandoned at least temporarily. Official HEW policy remains that the Office of Education will not directly pass on the substantive quality of any court order.

HEW can examine the court order, however, and where appropriate standards are found lacking it may ask the Justice Department to petition the court under Title IX of the Civil Rights Act of 1964 to revise the court ordered plan. Furthermore, the Office of Education still retains considerable power in administering and interpreting the regulation. The government insists that even a school district subject to a court order both assure HEW of its intent to comply with the order and file on a regular basis reports describing the progress of desegregation in the schools.¹⁹ The Office of Education considers itself still free to deny aid to a school district if it determines after a hearing that the school district is not observing the court order, although this procedure has been questioned by at least one court.²⁰

HEW's policy towards court orders is complicated by the rather confusing requirement that the order be a *final* one. The word can not mean that the order be one "which ends the litigation and leaves noth-

Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964, 45 C.F.R. § 181 (1967). Though not actually issued as a regulation they are treated as having the force of one. See p. 362 & note 95 *infra*. The guidelines were only very slightly amended when reissued in December, 1966. See N.Y. Times, Jan. 1, 1967, at 43, col. 1. The original 1965 guidelines may be found reprinted as an appendix to *Price v. Denison Independent School Dist. Bd. of Educ.*, 348 F.2d 1010, 1015 (5th Cir. 1965).

19. 45 C.F.R. § 80.4(c)(1); 45 C.F.R. § 80.6(b) (1967). HEW only began in the fall of 1967 to require reports on a regular basis from school districts subject to a court order. Telephone interview with Edwin Yourman, Assistant General Counsel HEW for Education, Sept. 14, 1967.

20. Statement of Harold Howe, U.S. Commissioner of Education, in *Hearings Before the Special Subcomm. on Civil Rights of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 106-07, 109 (1966) [hereinafter cited as *House Judiciary Hearings*].

The District Court in *Lee v. Macon County Bd. of Educ.*, 270 F. Supp. 859 (M.D. Ala. 1967), rejected HEW's right to do so. At least in reference to the 99 Alabama school districts cited in *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967), the court held that HEW could only bring a violation of the court order to the attention of the court and could only cut off funds after the court had found the school district out of compliance with the court order. The court reasons that to allow HEW to react to a violation of a court order before the court did would be an undue abdication of judicial authority to enforce observance of its own orders. If the court does act at any time and actually holds the school district in compliance with its order, the government says it would then defer to the judgment of the court regardless of any prior administrative action. Statement of David Seeley, former Director Equal Educational Opportunity Program (EEOP), in *House Judiciary Hearings* 110.

ing for the court to do but execute the judgment," nor can it refer to the general rule that "a retained power of revision over an order ordinarily destroys its finality."²¹ It is the rare desegregation order in which the court does not retain jurisdiction, often for years, pending full implementation of the decree. At any time the typical order may be reviewed and further relief granted. On the other hand, HEW obviously does not mean to accept an order which is final simply in the sense that it is appealable.

The requirement may in practice be intended only to reemphasize that the order must be permanent and comprehensive; for the Office of Education accepted a preliminary injunction "as a final court order" when such preliminary injunction put into effect in two Alabama school districts a comprehensive, though very weak plan of desegregation.²² In contrast the agency refused to adopt a decree which only required the admission of certain named individuals and an interim order that provided for a complete desegregation plan but which was made applicable only for the next term due to the court's wish to further review the situation before issuing a permanent decree.²³

The exception for court orders can produce curious results in cases in which the courts simply incorporate as their court decrees the Office of Education guidelines.²⁴ Technically such orders may have to be viewed as a court-ordered plan of desegregation with the result that changes in Office of Education requirements would not be binding on

21. 6 J. MOORE, *FEDERAL PRACTICE* ¶ 54.12 [1] at 116 (2d ed. 1966); *Catlin v. United States*, 324 U.S. 229, 233 (1945).

22. *United States v. Choctaw County Bd. of Educ.*, 259 F. Supp. 408 (S.D. Ala. 1966); *Harris v. Crenshaw County Bd. of Educ.*, 259 F. Supp. 167 (M.D. Ala. 1966).

23. See *Price v. Denison Independent Dist. Bd. of Educ.*, 348 F.2d 1010, 1015-16, (5th Cir. 1965); Letter from David Seeley, former Director EEOP to attorney for Indianola, Mississippi, Municipal School District, Nov. 9, 1966.

HEW also interpreted the exception in its regulations for court orders as applying only to those school districts which are formally named as defendants in the suit. In *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967), the Macon County School Board, the Governor, and state educational officials were the defendants. The other individual school districts, though listed in the court's order, were not actually party to the suit. Accordingly, HEW sought to withhold funds from Lanett City, one of the school districts subject to the court order, because it viewed as unsatisfactory the plan submitted pursuant to the court order. The court in response joined several HEW officials to the suit as defendants and forbade them to terminate federal aid to the school district. *Lee v. Macon County Bd. of Educ.*, 270 F. Supp. 859 (M.D. Ala. 1967). HEW officials emphasize that the incident does not represent a change in HEW's policy of accepting all final court orders. Interview with Edwin Yourman, Assistant General Counsel of HEW for Education, July 31, 1967.

24. In *Zinnerman v. Board of Pub. Instruction*, Civil No. 64-264 (M.D. Ala. Jan. 24, 1966), 11 *RACE REL. L. REP.* 155 (1966), the court decree merely ordered observance of the guidelines. It followed stipulation by the parties that a freedom of choice plan approved by the government would be followed and such would be sufficient to meet plaintiff's objection.

the school district unless and until the court revises its order to reflect the changes made by the government. In such cases the exception for court orders results in added procedural formalities unjustified by any of the reasons which motivated HEW to make the exception for court orders in the first place.

Some courts have sought to avoid this by framing an order simply directing the school officials to comply with all present or future Office of Education requirements.²⁵ The practical effect of the order is to make the school district submit to Office of Education requirements rather than those set by the court.²⁶

B. *Other Areas of Administrative Reliance on the Courts*

While Title VI perhaps did not require the government to accept court orders in lieu of an Office of Education desegregation plan, there are other instances in which the statute left HEW considerably less freedom in deciding whether deference to and reliance on the courts was appropriate.

One such instance appears on the face of the statute. Section 603 in effect provides for appeal of final orders terminating funds under Section 10 of the Administrative Procedure Act.²⁷ The right of appeal, however, has apparently never been used by a school district which has lost federal aid. The cost of litigation and the probable weakness of

25. *Macklin v. County Bd. of Educ.*, Civil No. 4392 (M.D. Tenn. April 16, 1966), 11 RACE REL. L. REP. 805.

26. In other cases the problem may be compounded by an ambiguous decree which does not make clear whether the court order requires observance only of the guidelines as they read at the time the decree comes down or whether the school district must observe any future changes as well. In *Moses v. Washington Parish School Bd.*, Civil No. 15973 (E.D. La. Oct. 13, 1965), 11 RACE REL. L. REP. 171, 173 (1966), the court ordered the school district to meet all requirements of the General Statement of Policies under Title VI of the Civil Rights Act of 1964. At least one court has faced the problem squarely in an effort to avoid either ambiguity or circularity. Asked to enjoin the construction of new schools by a school district operating under a freedom of choice plan approved by the Office of Education, the court specifically states that its refusal to enjoin the construction and its approval of the plan adopted by the board should not be construed as placing the district in the status of those meeting their desegregation obligations under a desegregation order of a federal court, within the meaning of the guidelines, 45 C.F.R. § 191.2 (1967). *Kelley v. Altheimer Pub. School Dist. No. 22*, Civil No. PB-66-C-10 (E.D. Ark. June 3, 1966), 11 RACE REL. L. REP. 1187, 1194, *rev'd* 378 F.2d 483 (8th Cir. 1967).

27. Section 603 provides:

In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any state or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5 [Section 10 of the Administrative Procedure Act] and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section. 42 U.S.C. § 2000d-2 (1964).

The regulations at 45 C.F.R. § 80.11 (1967) recognize the right to such review.

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the school district's desegregation record have curtailed such efforts, especially since an appeal might only hasten a court-ordered desegregation plan.

Of greater practical significance is HEW's dependence on the courts to chart the outer limits of Title VI and to enforce non-discrimination in those areas Title VI is not broad enough to cover. At least under present HEW policy, the Office of Education's ability to attack discrimination will only grow and evolve as the constitutional requirements themselves do, for the government is only attempting to impose the same conditions required by the 14th Amendment.²⁸ The result of course is that future changes in HEW standards to permit attacks on the worst examples of racial imbalance or the elimination of freedom of choice as a legitimate desegregation plan will only occur if courts hold such phenomena and practices unconstitutional. Until the courts strike down the free choice plan, the Office of Education will not move, and once the courts so hold, the Office of Education has no choice but to act accordingly.²⁹

Aside from the reliance by the Office of Education on courts to enunciate substantive standards, difficulties implicit in the nature of sanctions provided by Title VI make further recourse to the courts imperative. Because Title VI gives the Office of Education directly only the power to terminate federal aid, the government must rely on the courts to actually achieve desegregation in those school districts where federal money is refused. Originally HEW officials hoped that the Justice Department could bring suits quickly enough against holdouts to prevent any school district from actually losing funds.³⁰

In June 1965 the Justice Department announced its readiness to help by launching a massive attack on all who refused federal aid rather than comply with Office of Education requirements.³¹ By August 15, 1967, only twenty-five school districts originally subject to final termination proceedings had come back into compliance as a result of court orders

28. The Justice Department, for instance, in the brief submitted for plaintiff and as *amicus curiae* in *Alabama, NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346 (M.D. Ala. 1967), argues on page 20 of the unprinted draft that "none of the standards of the revised statement of policy require school boards to take action not positively required by the 14th Amendment and therefore by 601" (emphasis added).

29. Interview with Edwin Yourman, Assistant General Counsel of HEW for Education, Nov. 26, 1966. See also *Washington Post*, Aug. 8, 1967, at 5, col. 1.

30. James M. Quigley, Assistant Secretary of HEW, was quoted as saying "A Board might decide not to apply for federal aid on Monday night, then on Tuesday they have a law suit and on Friday get an order to desegregate." *N.Y. Times*, May 9, 1965, at 40, col. 1.

31. *N.Y. Times*, June 20, 1965, at 1, col. 1.

obtained subsequent to HEW's action. Fifty-five school districts remain ineligible for federal aid.³² Obviously, then, the Justice Department has not been able to date to avoid completely the necessity to deny school districts federal aid. Even when a court order is secured there is inevitably a time lag during which the school district is without federal aid.

In addition to allowing the administering agency to achieve compliance by terminating or refusing aid to recipients who refuse to comply with desegregation requirements, Title VI also empowers the agency to proceed "by any other means authorized by law."³³ This represents an effort to provide an alternative to the severe step of denying all federal aid. One such alternative, which would entail reliance on the courts, is suggested by the standard paragraph in the form all recipients must sign which states that the appropriate assurance of compliance

is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contract, property, discounts or other Federal financial assistance. . . . The applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in the assurance and that the United States or the State agency . . . jointly or severally shall have the right to seek enforcement of this assurance.³⁴

HEW included this wording with the specific intent of making assurances enforceable in a court action asking for specific performance. The agency has not extensively explored the possibility of such an alternative yet, however. High HEW officials have only expressed an intent to use such legal alternatives in the future "as the program proceeds."³⁵ The one actual effort to date to use the provision ended inconclusively.³⁶

32. Seven other school districts voluntarily submitted satisfactory desegregation plans after becoming subject to a final termination order. In all 329 school districts have met their requirements under Title VI by submitting satisfactory court orders. Of these 329 court orders, 137 were secured before the passage of Title VI. Another 99 represent Alabama school districts subject to the statewide injunction issued in *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967). This leaves 93 school districts subject to court orders individually obtained since 1965. Telephone interview with Joshua Zatman, Acting Chief of the Information Branch of the Office for Civil Rights, HEW, Aug. 17, 1967.

33. 42 U.S.C. § 2000d-1 (1964).

34. HEW Form 441-B, 45 C.F.R. § 181, Attachment 1 (1967).

35. Statement of F. Peter Libassi, Director, Office of Civil Rights, HEW, in *House Judiciary Hearings* 131. In many cases specific performance would not be feasible since most of the money would have been spent and the ability to impose specific performance

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Courts must also be depended on to reach practices which do not relate directly to the pupil and which therefore are not subject to any requirements the Office of Education can impose under Title VI. For instance, a school board may violate the 14th Amendment by paying Negro teachers less than white teachers of comparable qualifications or by firing a teacher because he is Negro. The guidelines require each school district to pledge not to fire, demote, or fail to promote teachers because they are Negroes.³⁷ Section 604 of the Act prohibits, however, the executive branch from applying Title VI to employment practices. Therefore, the Office of Education claims only the right to regulate faculty hiring practices as a necessary means of achieving a desegregated student body. Before action can be taken under Title VI the students must be shown to be affected by the discriminatory treatment of faculty members. It is necessary to show a nexus between such acts and a continuation by the community of thinking in terms of "white schools" and "Negro schools" or to prove that in some other way the Negroes' right to equal educational opportunities is threatened. To date HEW has conceded such a showing is too difficult in most circumstances.³⁸ Officials are now considering whether it might be possible to prove that

thereby lost before a court order could be secured. However, if under the regulations a school district, upon agreeing to comply with Title VI, receives aid to build a school or otherwise create a real property interest and then continues to discriminate against Negroes in the use of such property, the denial of future funds would not cure the continued non-compliance with respect to the prior funds. 45 C.F.R. § 80.5(e) (1967). Compliance could, however, be secured through a court order securing specific performance of the prior assurance submitted to the Office of Education. It may be that it is in this context that HEW will most commonly ask the courts to issue specific performance orders enforcing its agreement with school districts.

36. The Department of Justice on March 21, 1967, filed suit in which for the first time it asked for an order enforcing the compliance assurance given by the Dale County, Alabama, School District. *N.Y. Times*, Mar. 22, 1967, at 26, col. 1. Presumably the complaint charged breach of contract and asked for specific performance. This particular case however may well have become moot as a result of *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967). Dale County was one of the school districts named in the order. Officials at the Justice Department do not expect that much more will be done in the immediate future to develop this approach.

37. 45 C.F.R. § 181.13(c) (1967).

38. When the Arkansas Teachers Association complained to the Office of Education that disparity of salaries based on race was a widespread practice in that state, the government did not invoke Title VI. As late as December, 1966, officials conceded that there had not yet been an instance where it was possible to make the necessary causal connection. Statement of David Seeley, former Director of EEOC, in *House Judiciary Hearings* 146-47. When Jack Greenberg of the NAACP Legal Defense Fund demanded that the government take action to prevent the firing of 500 Negro teachers in North Carolina during the 1965-66 school year due to the closing of Negro schools, the Office of Education stated publicly that Title VI did not give it any authority to move against such practices. *N.Y. Times*, May 25, 1965, at 1, col. 4. See also *Wall v. Stanly County Bd. of Educ.*, 378 F.2d 275 (4th Cir. 1967).

the Negro's ability to learn is hindered by a sense of inferiority created by knowledge of a discriminatory act against any Negro teacher in the school.³⁹ At the moment, however, the usefulness of Title VI to prevent such practices remains problematical.

II. The Courts' Authority to Act Subsequent to the Office of Education

Like HEW, the courts with the passage of the 1964 Civil Rights Act had to decide how best to coordinate their own efforts with those of other federal instrumentalities. The narrowest question that confronts the courts concerns their right to decide a school desegregation case on its merits where the school district is already subject to a plan specifically approved by HEW.

The courts generally agree that prior administrative action does not deny them the right to exercise their own independent judgment. *Marks v. Edenburg School District*⁴⁰ is typical of the position the great majority of the courts have taken. While the defendant did not argue that the court lacked jurisdiction to hear the case, it did cite the approval by the government of its plan and suggested that was all it need show. The court had little trouble in holding that prior administrative action was not "conclusive" on the court. It merely noted that constitutional rights are for the courts to determine and are separate from any finding the executive may make in connection with the granting of federal aid.

A conflict between guideline standards and court standards was not really an issue in the case for the school board's progress was clearly

39. *Rogers v. Paul*, 382 U.S. 198, 200 (1965), and *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 36 U.S.L.W. 3138 (Oct. 9, 1967) hold that a nexus exists between a general failure to provide desegregated facilities and the student's opportunity to receive an equal education. Officials hope to extend such rulings to individual cases of faculty discrimination. *Jefferson*, however, concedes that "Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged; Congress was interested in a general requirement essential to success of the program as a whole." 372 F.2d at 883.

As the discriminatory practices become even further removed from the students for whom the federal grant is made, the ability of the Office of Education to prevent continued discriminatory practices becomes even more remote and the need of court action even more obvious. For instance the National Defense Education Act, 20 U.S.C. 401-592 (1958), authorizes forgiveness by the government of part of the money owed it by former students who have availed themselves of government loans under the program to finance their own education. The statute authorizes forgiveness of part of the loan for every year the former student teaches after completing his education. HEW is unsure at present whether such provisions apply even if the former student is teaching on a segregated faculty or to a segregated student body.

40. 259 F. Supp. 639 (E.D. Ark. 1966).

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below that required by the government. Had the courts mistakenly adopted some policy of judicial restraint in the case of school districts desegregating under administrative orders, the practical effect would have simply been continued segregation until the Office of Education found the time to pursue the school district and obtain enforcement or a termination of funds.⁴¹

Not all cases have gone this way. *Turner v. Goolsby*⁴² ordered the admission of named individuals to schools in Taliaferro County, Georgia, but refused to consider a motion for a comprehensive desegregation order.

Desegregation of the public school system other than in the degree hereinafter discussed is a matter over which the Department of Health, Education and Welfare of the Executive Department of the federal government has already assumed jurisdiction. It appears without dispute that the school board of Taliaferro County has submitted a plan of action to that department.⁴³

The rationale of the decision reflects an extraordinary conception of the relationship between the courts and the Office of Education. There is no evidence that the plan was acceptable to the Office of Education, and indeed it could not have been since subsequently the school board sought unsuccessfully to meet the requirements of Title VI by submitting the opinion itself ordering the admission of 87 Negroes to white schools.

More importantly, since the Office of Education necessarily concerns itself with every school district in the country, to hold that HEW has preempted jurisdiction would relegate the courts to the purely appellate role of reviewing the particular treatment afforded a school district by the government. It would be a strange result indeed if plaintiffs were so barred from suing directly in federal court to secure constitutional rights. Nor does case law demand such a result.

Such school desegregation cases as *Carson v. Warlick*⁴⁴ and *Holt v. Raleigh City Board of Education*⁴⁵ deferred federal court action until action before state administrative agencies had been completed. These

41. For a discussion of the same problem as applied to hospitals receiving federal aid, see *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648 (4th Cir. 1967).

42. 255 F. Supp. 724 (S.D. Ga. 1965).

43. *Id.* at 726. Worthy of consideration is the court's solution of the teacher desegregation problem in *Price v. Denison Independent Dist. School Bd.*, 348 F.2d 1010 (5th Cir. 1965).

44. 238 F.2d 724 (4th Cir. 1956).

45. 265 F.2d 95 (4th Cir. 1959).

cases involved, however, the failure of individual plaintiffs to exhaust first state administrative remedies which were constitutional on their face and which were designed both to fulfill investigatory functions and to grant immediate relief. In cases involving Title VI the conflict is simply with another federal agency which may not be able to afford plaintiffs adequate relief. Unlike the parties to the above school desegregation cases, plaintiffs here do not have access to any administrative process in which they can play a direct role. Though they can lodge a complaint with the Office of Education they have no way of forcing action on their complaint. Even if the Office of Education acted, the government could in the end only withhold aid. The plaintiffs' right to attend a desegregated school would not be assured. Commenting on the availability of similar administrative relief by a state agency in *McNeese v. Board of Education*, Mr. Justice Douglas wrote that "when federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary."⁴⁶

III. The Problem of Disparities Between Court Orders and Office of Education Requirements

The Office of Education's exception for court orders has provided a loophole in some cases for recalcitrant school districts, enabling them to preserve their right to federal funds while pursuing desegregation plans far less stringent or effective than those they would have been subject to had they voluntarily adopted one of the desegregation plans contained in the guidelines.

In 1965, the first year, only 137 school districts filed court orders with the Office of Education that entitled them to continued federal aid.⁴⁷ There are some 5,146 school districts in the 17 Southern and Border States.⁴⁸ These court orders, however, affected a school population in the South out of all proportion to their numbers, for in large part they represented the work of the NAACP and other activists in the late '50's and early '60's who chose because of limited resources to concentrate on the larger urban school districts in the South.⁴⁹

46. 373 U.S. 668, 676 (1962).

47. N.Y. Times, Sept. 14, 1965, at 30, col. 3.

48. N.Y. Times, July 11, 1965, at 47, col. 1.

49. N.Y. Times, March 14, 1966, at 25, col. 1. A partial list of Southern cities operating under court orders includes Atlanta, New Orleans, Miami, Jackson, Montgomery, Birmingham, Nashville, Charleston, Little Rock, and Richmond. SOUTHERN REGIONAL COUNCIL, SCHOOL DESEGREGATION, 1966: THE SLOW UNDOING 30 (1967). Louisiana illustrates most dramatically what can happen. As of summer, 1965, 18 parishes in Louisiana were subject

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Many of the court orders obtained, especially the early ones, imposed less stringent requirements than those established by the Office of Education.⁵⁰ Louisiana's response to Title VI suggests how, as a consequence, some school districts turned to the courts in the hope of evading the guidelines. In 1965 the Office of Education succeeded in persuading only three of the 67 parishes in the state to adopt the voluntary plans suggested by the guidelines. Except for those that qualified for federal aid through court orders, all the remaining parishes refused to file anything with the Office of Education, preferring instead to await suit and risk termination of federal funds.⁵¹

The problem of the proper relationship between courts and the Office of Education was thus posed in an obvious and immediate form. Judge Wisdom in *Singleton v. Jackson Municipal School District*,⁵² an opinion handed down within two months of the first appearance of the guidelines, was one of the first to see the difficulty that would result should the Office of Education's standards differ from those adopted by the courts. Consequently, Wisdom altered the deadline for extending the free choice plan to all grades so as to conform with the standards established in the guidelines. As to the details of the plan, the opinion referred the parties and the district court to the guidelines.

The Fifth Circuit returned to the problem in *United States v. Jefferson County School Board of Education*.⁵³ Judge Wisdom once again refers to the problem of disparity of standards between courts and the Office of Education as only encouraging evasion of the law, cites long passages from *Singleton*, and concludes, "[w]e shall not permit the courts to be used to destroy or dilute the effectiveness of the congressional pol-

to court orders. This represented less than one-fourth of the total number of parishes in the state. However these 18 parishes accounted for more than three-quarters of the total federal aid for education to which Louisiana would have been entitled for 1964-65 if all parishes in the state had been in compliance. N.Y. Times, Aug. 23, 1965, at 19, col. 1.

50. Judge Wisdom accepted figures submitted by Justice Department lawyers as an accurate description of some 99 court-approved freedom of choice plans approved by courts in the 5th Circuit before April, 1966. They show that "44 do not desegregate all grades by 1967; 78 fail to provide specific, non-racial criteria for denying choices; 79 fail to provide any start toward faculty desegregation; only 22 provide for transfers to take courses not otherwise available; only 4 include the *Singleton* transfer rule." *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 860 n.52 (5th Cir. 1966). In all these respects they thus fall short of what the Office of Education now requires in its guidelines.

51. Telephone interview with Mrs. Catherine Welsh, Public Information Branch of the Office for Civil Rights, HEW, Nov. 14, 1967. As of October, 1967, the number of school districts subject to court orders had risen to 50. Since 1965 no school district in addition to the original three has submitted voluntary plans.

52. 348 F.2d 729 (5th Cir. 1965); see *Price v. Denison Independent School Dist. Bd. of Educ.*, 348 F.2d 1010 (5th Cir. 1965).

53. 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 36 U.S.L.W. 3138 (Oct. 9, 1967).

icy expressed in Title VI."⁵⁴ In order to prevent such evasion of Title VI, *Jefferson* promulgates a model court decree, binding on all district courts in the Fifth Circuit, that closely resembles the guidelines.

Judge Wisdom admits in *Jefferson* that the recalcitrance of the district court judges in his circuit is at least partly responsible for the problem:

In certain cases—cases we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional individual assignment—satisfy the requirements of a desegregation plan.⁵⁵

Viewed in this light the problem caused by the disparity between Office of Education standards and court orders is largely an administrative one of finding a device to insure implementation by district courts of appellate courts' standards. *Jefferson* does not simply establish as law requirements that approximate the guidelines. It also represents a novel effort to find a new way that will insure that district court judges actually implement the law. Adoption by the Court of Appeals without the benefit of a prior evidentiary hearing of a model decree which all district courts must follow in desegregating schools represents a sharp departure from the former ad hoc approach of courts in school desegregation cases. Previously court decrees were individually tailored by district courts to fit the particular circumstances of a given school district. *Brown II* specifically indicated that blanket approaches by appellate courts to desegregation problems were to be avoided. In an effort, however, to insure application of sufficiently vigorous standards *Jefferson* denies the district court judges some of the discretion *Brown II* specifically granted them and moves toward the same kind of centralized administration of desegregation through uniform decrees that the Office of Education itself uses.

Adoption of the model court decree still need not insure an end to

54. *Id.* at 859-60.

55. *Id.* at 860-61. Not all federal district judges in the South are so uncooperative. In fact, former Attorney General Nicholas Katzenbach estimated in 1965 that approximately 70% of the district judges in the South are reliably committed to the goal of achieving desegregation as expeditiously as possible. *N. Y. Times*, June 20, 1965, at 1, col. 2. It would hardly be surprising if the Fifth Circuit was found to contain more of the remaining 30% of district court judges than any other circuit. Some of the reasons for the failure of a few Southern district court judges to apply the desegregation laws fully are mentioned by Judge Wisdom in *Political Role of Federal Courts*, 21 *Sw. L.J.* 411, 420 (1967).

the problem. While the court decree and the guidelines are very similar in most respects, there are slight variations.⁵⁶ On their face none of the changes the court makes would appear to give district courts the right to avoid the main thrust of the guideline requirements, but the fact that elsewhere the court decree so closely follows the guidelines may enable school boards to convince a few district court judges that every omission or the slightest change in wording by the Court of Appeals represents an implied rejection of the guideline requirements, and that such rejection encourages or at least allows the district court to condone further evasion of the duty of the school board to desegregate completely and immediately.

Judge Wisdom might have avoided some of these possible problems by simply declaring instead that henceforth all district courts should adopt in their court decrees the Office of Education guidelines and that whenever the Office of Education changes its guidelines the courts should do likewise. As we have seen, district courts in the past have delivered analogous decrees specifying that the court ordered plan shall be any plan promulgated by the Office of Education. Judge Wisdom chose not to do so, though the *en banc* opinion affirming *Jefferson* moves toward such a solution by declaring: "courts in this circuit should give great weight to future HEW guidelines, when such guidelines are applicable to this circuit and are within lawful limits."⁵⁷ Judge Wisdom undoubtedly declined simply to incorporate all present and future guidelines because he wished to preserve the independence of the courts and to avoid giving even the appearance of blind adherence

56. The guidelines list specific examples of faculty desegregation plans that may be adopted: "some desegregation" in each school or the assignment of a "significant portion" of the white or Negro staff to schools where they are a minority or to schools where the students themselves are desegregated, 45 C.F.R. § 181.13 (1967). The Fifth Circuit decree simply cautions that "wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty" and then orders defendants to "take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many schools as possible for the 1967-68 school year" 372 F.2d at 900. While perhaps the result called for in 1967-68 is similar to what the guidelines call for, the standards are less definite. The court decree in requiring desegregation of all special education programs such as adult education does not bar use of free choice to desegregate such programs. *Id.* at 899. The guidelines do. 45 C.F.R. § 181.14(b)(4) (1967). The court decree adds an exception to the wording in the guidelines prohibiting the discriminatory denial to any students of full access to services, facilities, activities and programs. 45 C.F.R. § 181.14(a) (1967). *Jefferson* allows the continued application of "long standing non-racially based rules" relating to eligibility of transfer students to compete in athletic events. 372 F.2d at 899. The guidelines provide that prospective students new to the system be given a choice period of at least one week. 45 C.F.R. § 181.47 (1967). The court sets no minimum length of time for such choice to be exercised. 372 F.2d at 899.

57. Printed court copy of *en banc* opinion affirming *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), March 29, 1967, at 7.

to the guidelines. The approach adopted was an answer to the contention made by the school districts during oral argument that court adoption of the guidelines would amount to abdication of its judicial responsibility.⁵⁸ Refusal simply to incorporate Office of Education standards also left the court more room to evolve later stricter constitutional requirements and to interpret the requirements announced in *Jefferson* differently than does the Office of Education.

The decree is not self-executing on school districts not parties to the suit. District courts supervising the 100-odd school desegregation plans in the Fifth Circuit that predate *Jefferson* must be petitioned to revise their court orders to conform with the new appellate standards. As a result of the opinion the Justice Department and the NAACP Legal Defense and Education Fund have announced plans to reopen desegregation cases both in the Fifth Circuit and elsewhere in the South.⁵⁹ The time lag will be considerable, though. Furthermore, immediate observance of *Jefferson* by district court judges in the Fifth Circuit is not assured. *Hall v. St. Helena Parish School Board*⁶⁰ argues that district court judges need not necessarily apply *Jefferson* exactly to other school districts, for to do so would render *Jefferson* an advisory opinion in which the Court of Appeals improperly sought to tell the district court judges in advance of a hearing what to do. The court implies a distinction between constitutional standards and the model decree, holds itself bound only to follow the former, and refuses to amend the court order to conform in all respects to the *Jefferson* model decree. The opinion ignores much in *Jefferson* and rests on the mistaken notion that a free choice plan that fails to produce any desegregation can still be adequate.⁶¹

58. N. Y. Times, May 25, 1966, at 24, col. 4. The court had asked counsel for briefs on 2 specific questions: a) "to what extent consistent with judicial prerogatives and obligations, statutory and constitutional, is it permissible and desirable for a federal court (trial or appellate) to give weight to or to rely on Health, Education, and Welfare guidelines and policies in cases before the court; b) If permissible and desirable, what practical means and methods do you suggest that federal courts (trial and appellate) should follow in making Health, Education, and Welfare guidelines and policies judicially effective." *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 848 n.13 (5th Cir. 1966).

59. N.Y. Times, Jan. 3, 1967, at 14, col. 3; N.Y. Times, April 6, 1967, at 27, col. 1.

60. 268 F. Supp. 923 (E.D. La. 1967).

61. The court finds that the Negroes had had a genuine opportunity to transfer schools and that their failure to do so did not invalidate the plan. The present segregation is described as de facto and the school district held free of any duty to affirmatively secure desegregation. Judge West thereby continues to argue an issue presumably settled by the holding in *Jefferson* that in formerly segregated systems school districts must act affirmatively to secure desegregation. The judge's reluctance to accept *Jefferson* is demonstrated again in *Davis v. East Baton Rouge Parish School Bd.*, 269 F. Supp. 60 (E.D. La. 1967). This case was one of seven heard together with *Jefferson* before the Court of Appeals en banc. Judge West therefore had no choice but to apply the model decree.

Finally, the *Jefferson* opinion represents only an effort of one circuit to close the loophole created by HEW's exception for court orders. The Fourth and Sixth circuits have not yet specifically ruled on the advisability of an approach similar to the *Jefferson* opinion.⁶² The Eighth Circuit in *Clark v. Board of Education*⁶³ has specifically refused to adopt the *Jefferson* holding; Judge Gibson in effect concludes that the district courts can be relied on to thwart any such attempts by the states.

IV. Judicial Assessment of Relative Institutional Competence

Both in the substantive standards adopted and the method of administration employed the *Jefferson* opinion represents the tendency of at least one circuit to look more and more toward Washington in discharging its duty to assure plaintiffs their constitutional right to a desegregated education. The opinion indicates that this deference by the courts arises from more than a mere wish to see that court orders do not become a route in a few cases for evasion of Title VI. Judge Wisdom also argues in terms of an assessment of the supposed relative institutional competence of the two institutions. The failure of litigation in other circuits to follow a similar pattern suggests other courts see the comparison differently—perhaps, as will be explored later, for reasons more practical than conceptual.

A. *Expertise: The Question of Substantive Standards*

In cases requiring a court order directing the desegregation of a school system the judge has the option either to rely on the Office of Education or to tailor his own special plan for the districts. If his plan

However he added a strongly worded opinion attacking *Jefferson* and argued that de facto segregation in the South was still constitutional and the Court of Appeals wrong.

62. The silence of the Fourth Circuit is significant. For instance, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 369 F.2d 29 (4th Cir. 1966), the court passed on the reasonableness of the geographic zoning and the permissibility of allowing any student so assigned on the basis of geographic zoning to transfer to any other school. The court without hesitation held the lines adequately drawn and the transfer plan fair despite the fact that the revised guidelines issued after the district court opinion bar such transfer plans. 45 C.F.R. § 181.33 (1967). It notes that in most cases any reasonable alternative would not have produced any greater integration. There is no talk of the guidelines, no discussion of whether to rely on the expertise of the Office of Education. At the least, it would appear unlikely that the Fourth Circuit will soon endorse the approach of the Fifth Circuit. In the Sixth Circuit, *Monroe v. City Bd. of Comm'rs*, 380 F.2d 955 (6th Cir. 1967) has rejected *Jefferson* to the extent that that case orders Southern school districts to achieve greater racial balance than is required in Northern schools. Nothing is said of the administrative approach adopted in *Jefferson* or *Jefferson's* attitude toward the Office of Education and Title VI.

63. 374 F.2d 569 (8th Cir. 1967).

is sufficiently demanding this latter approach need not be inconsistent with efforts to prevent use of the courts as a way to avoid Title VI requirements.

Deference to HEW standards is found in all circuits but most commonly it occurs in the Fifth. Numerous cases, even before *Jefferson*, adopted the HEW plans without explanation.⁶⁴ Reliance on the HEW guidelines in such cases might result in simply an order for the parties to adopt any plan approved by the Office of Education under present, or in a few cases, future standards.⁶⁵

Technically such reliance in this last instance on the guidelines makes the school district subject to Office of Education requirements in a way Title VI never contemplated. Under such a solution the school district must follow government requirements whether it chooses to receive federal aid or not and whether the court has reviewed them or not. This therefore gives to the Office of Education powers beyond those found in the Civil Rights Act. Such court orders, in effect delegating power to the Office of Education to write and rewrite the court decree, are certainly examples of unusually complete judicial deference to an administrative agency. It is qualified only by the district court judge's power to decide at any moment to modify his decree so as not to require conformity with present or future guidelines. One dissenting judge has seen in such practices problems of constitutional dimension.⁶⁶ Since HEW professes to base its guidelines only on constitutional requirements as evolved by the courts, there is also a danger

64. The court simply writes a detailed decree closely patterned after portions of the guidelines, although no specific reference is made to the Office of Education anywhere in the opinion. Where variations occur they are likely to be in respect to faculty desegregation. *See, e.g., Carr v. Montgomery County Bd. of Educ.*, 253 F. Supp. 306 (M.D. Ala. 1966); *Harris v. Bullock County Bd. of Educ.*, 253 F. Supp. 276 (M.D. Ala. 1966). Due to *Jefferson* this approach will, of course, now be the exclusive one in the Fifth Circuit.

65. *Zinnerman v. Board of Pub. Instruction*, Civil No. 64-264 (M.D. Ala. Jan. 24, 1966), 11 RACE REL. L. REP. 155; *Moses v. Washington Parish School Bd.*, Civil No. 15973 (E.D. La. Oct. 13, 1965), 11 RACE REL. L. REP. 171 (1966) (school board subject to most HEW requirements after year transitional period); *Everett v. Lone Oak Independent School Dist.*, Civil No. CA3-1477 (N.D. Tex. May 10, 1966), 11 RACE REL. L. REP. 1261 (additional wording on faculty desegregation adopted but otherwise parties referred to guidelines); *Bryant v. Carteret County Bd. of Educ.*, Civil No. 648 (E.D.N.C. Nov. 19, 1965), 11 RACE REL. L. REP. 740 (1966); *Macklin v. County Bd. of Educ.*, Civil No. 4392 (M.D. Tenn. April 11, 1966), 11 RACE REL. L. REP. 805.

66. Judge Bell's dissenting opinion to the en banc decision affirming *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), extrapolates the decree into one that does in fact give carte blanche powers to HEW. He then argues that such surrender of judicial powers to the executive erodes the doctrine of separation of powers and concludes that this fact makes it a sad day for the district courts and for the entire judiciary.

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of complete stasis in the system should all courts decide to rely on HEW guidelines.

One justification for such practices, found in *Jefferson* and a few circuit court cases, is based on a belief in the greater expertise of the Office of Education.⁶⁷ In the *Jefferson* opinion Wisdom refers to “experts in education and school administration,”⁶⁸ mentions “their day-to-day experience with thousands of school systems,”⁶⁹ notes that “it is evident to anyone that the guidelines were carefully formulated by educational authorities,”⁷⁰ and contrasts such qualifications with judicial ignorance. “[M]ost judges,” he asserts, “do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers.”⁷¹

None of the Fifth Circuit cases addresses itself to the threshold problem of distinguishing administrative questions from those the court should still use its own judgment in deciding. Certainly “administrative” could not refer solely to the ministerial problems associated with implementing a given plan in a given school district. Wisdom must mean by “administrative” far broader questions of substance relating to the speed and manner at which a school district should move toward full desegregation. On the other hand, Wisdom makes clear in an earlier opinion, *Singleton v. Jackson Municipal Separate School District*,⁷² that not all questions concerning the rate at which a school district should desegregate are mere “administrative” problems. In reviewing the school plan formulated by the district court and the Jackson School Board as a result of the earlier holding on the case, Wisdom concedes that the guidelines establish only minimum standards and that in certain circumstances a court would be compelled in meeting its constitutional duties to issue an order different from the Office of Education directed plans. Though in this decision he proceeds to deny the government’s argument that all twelve grades be desegregated immediately,

67. See *Singleton v. Jackson Municipal Separate School Dist.*, 348 F.2d 729, 731 (5th Cir. 1965), where Wisdom writes that great deference should be paid to the guidelines because “[a]bsent legal questions, the U.S.O. of E. is better qualified than the courts and is the more appropriate federal body to weigh administrative difficulties inherent in school desegregation plans.” *Price v. Denison Independent School Dist. Bd. of Educ.*, 348 F.2d 1010 (5th Cir. 1965). The latter argues that judges are not equipped to do the job as well as HEW, while distinguishing between justiciable and operational questions.

68. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966).

69. *Id.* at 896.

70. *Id.* at 858.

71. *Id.* at 855.

72. 355 F.2d 865 (5th Cir. 1965).

and instead reaffirms the same time schedule as the guidelines employ, he does so only after reviewing the question on its merits, thereby suggesting in light of his previous concession that the motion raises legal rather than administrative issues and thus should be decided by the courts acting independently. In short, the Office of Education perhaps should decide the narrow question of whether a school must desegregate three or four grades in the first year; the courts will decide the broad question of whether all 12 grades must be desegregated the first year or not.

Not all courts have enthusiastically argued for deference to the Office of Education because of its greater expertise. The Eighth Circuit first addressed itself to the problem in *Kemp v. Beasley*.⁷³ Judge Gibson agrees that the guidelines must be "heavily relied upon." However, he adds that "we are not in complete agreement with the conclusion of the Fifth Circuit."⁷⁴ He gives two reasons. The first is based on the role of the court as traditional guardian of constitutional rights and on the court's responsibility whenever faced with the question to give full relief, which "is not dependent upon federally financed programs, but is an inherent right that is completely separate and apart from the executive function of regulating and financing schools."⁷⁵

The argument that a *deliberate* discrepancy could develop between constitutional and Office of Education standards proves little. While legislation requiring such different standards is theoretically possible the argument is simply not relevant to Title VI, for as noted above the policy of the government is to require under Title VI only what the Constitution requires.

Furthermore, none dispute that the courts must still decide "legal" in contrast to "administrative" problems. The objection that because the guidelines may be something more or less than codification of constitutional requirements, they cannot be relied on by courts charged with setting constitutional standards ignores the distinction drawn by Judge Wisdom and his intent to rely on the Office of Education only for guidance in administrative questions. Apparently for these other judges concerned with a possible disparity, all questions are legal ones, and thus constitutional ones, and the distinction the Fifth Circuit makes is to them an unreal one.

73. 352 F.2d 14 (8th Cir. 1965).

74. *Id.* at 19.

75. *Id.*

Judge Gibson also argues in *Kemp* that "by allowing acceptance of a court-approved plan in lieu of one approved by the Department of Education, the regulations recognize the need for day-by-day and case-by-case flexibility that can be supplied by the federal courts sitting in the various districts."⁷⁶ It may be doubted seriously whether the regulatory exception was inspired by the reasoning Gibson ascribes to HEW.⁷⁷ Apart, however, from whether the court correctly characterizes the government's motive, the opinion's assumption that courts can do a better job is an important dictum. In *Clark v. Board of Education* Judge Gibson reiterates his view that district courts should be allowed flexibility in adapting desegregation plans to particular circumstances.⁷⁸ In denying a petition for a rehearing of the case Gibson specifically refuses to follow the approach adopted in *Jefferson* and to accept the guidelines "as our absolute star for determining constitutional rights and duties . . ."⁷⁹ He relies partly on the belief first voiced in *Kemp* that such would violate the doctrine of separation of powers; but he then goes on to distinguish *Jefferson* as involving different factual circumstances:

The breadth and depth of the segregation problem varies in different states and in different parts of the same state. . . . As problems vary in different parts of the country, of necessity the courts' orders to effectuate a common goal will also be varied.⁸⁰

Entirely aside from the comments of the Eighth Circuit, brief examination of the actual character of the Office of Education expertise suggests the issue to be at least more complicated than Judge Wisdom suggests. The civil rights effort at the Office of Education has been in

76. *Id.*

77. As discussed above there is abundant evidence that HEW was motivated by other reasons than a faith in the superiority of local court orders when writing the blanket exception into the regulations. A desire simply to benefit from the superiority of court orders might have explained a rule making the exception discretionary but hardly one that is mandatory.

78. 369 F.2d 661 (8th Cir. 1966). While establishing applicable standards the opinion states "we do not believe the imposition of a set timetable with fixed mathematical requirements is the necessary answer at this time." *Id.* at 670. Because Gibson believes more progress can be made if the circuit court does not impose a "detailed and rigid" plan he instead allows the school board the "luxury" of being allowed to work out with the district court a plan especially tailored to its own situation. If it is advisable for a circuit court not to dictate its own plan to the district court, it is equally inadvisable to impose Office of Education standards on the district court.

79. 374 F.2d 569, 570 (8th Cir. 1967).

80. *Id.* at 571. Gibson accordingly declined to order a mandatory choice of schools by each student each year as is required by *Jefferson* and the guidelines. The opinion argues that the Eighth Circuit has advanced beyond the dual attendance zone still a problem in the Fifth Circuit and that the relatively greater amount of desegregation thereby achieved allows courts in the Eighth Circuit to give school boards greater discretion.

the past directed by a division charged with responsibility for the Equal Educational Opportunity Program (EEOP). In fiscal year 1967 Congress appropriated for HEW's entire civil rights enforcement effort \$3,385,000 and established a personnel ceiling of 278.⁸¹ As a result EEOP in fiscal year 1967 actually employed 65 professional staff members, of whom only 43 were assigned to 11 states in the deep South.⁸²

In May 1967 Secretary Gardner announced plans to reorganize HEW's entire civil rights enforcement program in response to the advisory directive attached to the House Report on the Appropriation Bill for fiscal year 1967.⁸³ When finally completed, the plan will abolish EEOP and centralize enforcement efforts for the whole department in an office directly attached to the Office of the Secretary. While congressional action makes it appear that for fiscal 1968, money will be appropriated for 88 new positions in the HEW enforcement office, few if any of the new officials will be assigned to work on school desegregation in the South.⁸⁴ Officials estimate that HEW would need 400 staff members to adequately supervise Southern school desegregation.⁸⁵

In 1965 all but 70 school districts and in 1966 all but 135 eventually submitted some plan.⁸⁶ In 1965 Vice-President Humphrey announced that EEOP could have 30 days to negotiate with the 1,432 school districts that still had not submitted acceptable forms by the middle of

81. H.R. REP. NO. 1464, 89th Cong., 2d Sess. 8 (1966). S. REP. NO. 1631, 89th Cong., 2d Sess. 71 (1966). HEW spread their requests for civil rights funds among 38 separate accounts. The House consolidated all requests in one budget and directed that the whole program be also centralized in one office. The supposed efficiencies that the reorganization would produce justified, according to the House Report, the subsequent cuts.

82. *House Judiciary Hearings* 28. During 1966 in an effort to enlarge the staff the agency hired 100 law school students for the summer. N.Y. Times, June 15, 1966, at 29, col. 1. It is questionable just how helpful to the school districts those hired in such efforts at temporary staffing could be. Commissioner Howe has said that the summer law school program was initiated "only because of the load of work that is required in investigating school districts. . . . I personally hope in another year we can get a larger proportion of people who have experience in education engaging in this kind of activity, rather than just legal background." *Hearings on Policies and Guidelines for School Desegregation before the House Comm. on Rules*, 89th Cong., 2d Sess. pt. 1, at 52 (1966) [hereinafter cited as *House Rules Hearings*]. With this in mind HEW hired for the summer of 1967 Southern educators with successful records in their own districts to investigate compliance in the more recalcitrant areas of the South. N.Y. Times May 12, 1967, at 39, col. 8.

83. N.Y. Times, May 11, 1967, at 1, col. 6. See note 81 *supra*. The necessary revisions of the regulation have already been made. 32 Fed. Reg. 14,555 (1967).

84. S. REP. NO. 469, 90th Cong., 1st Sess. 76 (1967). Many of the new staff members will be assigned to work on enforcing Title VI in other areas of HEW activity than education. Of those assigned to school desegregation indications are that the majority will be assigned to enforce Title VI in the North. Washington Post, July 8, 1967, at 1, col. 1. Officials expect the increase in the numbers working on southern school desegregation to be minor. Interview with Edwin Yourman, Assistant General Counsel of HEW for Education, July 31, 1967.

85. *House Judiciary Hearings* 119.

86. N.Y. Times, March 8, 1966, at 27, col. 1; N.Y. Times, May 23, 1966, at 16, col. 3.

Desegregation

July.⁸⁷ Almost all of these school districts required personal negotiation. In the 1966-67 school year it is estimated that the revisions in the guidelines required renegotiation in 1,800 cases.⁸⁸

Given the size and immensity of the problem HEW in Washington could obviously never give direction reflecting local difficulties in all 5,146 school districts. Originally the Office of Education had hoped that at least some of the state departments of education would take the lead in administering Title VI at the state level in order to prevent the full burden from falling solely on Washington. The Office planned to rely solely on the regulations, leaving the state to work out the details with local school boards.⁸⁹ At first the state departments of education sought to avoid their obligation by submitting "dirty" statements of compliance stipulating that the state would not insist that local school districts receiving federal money desegregate.⁹⁰ Ultimately all capitulated. However, while a few state departments of education, notably North Carolina in 1965 and Florida in 1966, have taken the lead in helping school boards desegregate, the majority have been no help.⁹¹

Unaided by the state, the local school boards proved unable to do the job on their own. Commissioner Howe has said that the Office of Education "would have been perfectly willing to leave it up to local school districts" to carry out their obligations under Title VI and the regulations. "In practice, however, local school authorities raised so many questions or made so little progress that the Office of Education found it necessary to issue guidelines establishing minimum desegregation standards."⁹²

The burden of directing each school district as it moved toward desegregation thus fell on the Office of Education alone, whether the

87. N.Y. Times, July 11, 1965, at 47, col. 1.

88. Leeson, *Guidelines—a Repeat Performance*, SOUTHERN EDUCATION REP., Oct. 1966, at 28.

89. Statement of Harold Howe, U.S. Commissioner of Education, in *House Rules Hearings* 89. The statement of compliance each state educational agency signs pledges that body to insure compliance with the federal requirements by the local school boards under its authority and requires the agency to describe the procedure it intends to follow to inform school districts of their obligation under Title VI.

90. N.Y. Times, March 3, 1965, at 26, col. 1; N.Y. Times, March 7, 1965, at 30, col. 3. In governmentalese a "dirty form" is one that is so extensively amended by the applicant as to be in all likelihood unacceptable.

91. N.Y. Times, March 7, 1965, at 30, col. 5; N.Y. Times, Aug. 29, 1965, § 4, at 11, col. 4; *House Judiciary Hearings* 122.

92. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 55 (1967), quoting from "The 1966 Desegregation Guidelines: A Situation Report," an address by Harold Howe, U.S. Commissioner of Education, delivered before the Alabama State Advisory Committee, Civil Rights Commission, Birmingham, Alabama, June 11, 1966.

agency thought it advisable or not. At first it issued only a quarter-page description of the type of plan that would be acceptable, accompanying it with a general statement warning that "no tersely stated or vague plan will be approved" and that "the real question for any district is the extent to which it wishes to risk disapproval of its plans."⁹³ However, the local school districts, confessing themselves still unable to take the initiative and draft acceptable plans, sought further aid from the Office of Education. The earlier general statement was pronounced too vague to be of any help, and the argument was made that local popular acceptance of a plan could not be secured until Washington put in concrete terms what was required.⁹⁴ The result was the guidelines, for given the centralization of the task in Washington, the government obviously had no choice but to seek to formulate advice which could be applied in all cases. It had neither the time, the staff, nor the detailed knowledge to draft specific advice for each school district that requested help. The guidelines were originally intended not to have the force of law but merely to serve as a "reasonable and understandable administrative device" to explain to school districts what was expected of them.⁹⁵ The inevitable need, however, for a quick efficient administrative device meant that they came to be relied on almost exclusively. But now they are widely viewed by educators as having the status of law.

The Office of Education thus solved its administrative problems by extensive reliance on the simplicity of uniformity. Such an approach has its price. By specifically stating the minimum acceptable standard, the Office of Education assured that the minimum would also be the maximum for most school districts. The Office of Education thereby denied itself the opportunity to require more of Maryland than of Mississippi.

By opting for a procedure that could be quickly and easily administered without detailed knowledge of a particular school district, the Office of Education also had to emphasize in the guidelines those stan-

93. N.Y. Times, March 7, 1965, at 1, col. 3; *House Judiciary Hearings* 122.

94. *House Judiciary Hearings* 124; N.Y. Times, April 30, 1965, at 1, col. 1.

95. Statement of Harold Howe, U.S. Commissioner of Education, *House Rules Hearings* 88. Despite the great reliance on the guidelines the President has never signed them. The Office of Education explains this as in part a desire not to go through the time-consuming process of securing presidential signature and in part a desire to avoid the inflexibility the guidelines would acquire once signed by the President so as to become a formal regulation. Changes could not be easily effected. *House Rules Hearings* 40. On top of administrative problems there appear to have been political reasons as well. See p. 362 *supra*.

dards which were susceptible to such an approach. The attention paid faculty desegregation has been dictated partly by the ease with which the problem may be spotted and the relative speed with which the situation may be rectified as compared with the question of the assignment of the students themselves.⁹⁶

The inclusion in the revised guidelines of stated minimum percentages of desegregation that would be accepted resulted from similar limitations. The Office of Education is too centralized and too understaffed to analyze conditions in each school district and to determine as a result the appropriate speed at which each district should move toward complete desegregation. It therefore adopted the percentages with the intent that they serve only as an administrative touchstone to measure the amount of good faith compliance being made by each school district.⁹⁷ Inevitably, however, heavy reliance on the percentages has aroused much opposition from those who see or want to see in them a requirement of racial balance.

The Office of Education still hopes to decentralize. The agency has definite plans for expanding regional offices, especially those in Houston and Atlanta.⁹⁸ The feasibility of trying once again to rely on state agencies to administer the guidelines has also been explored. Such plans might entail giving money directly to the state government to enable them to do the work now done by Washington. They might also involve using Title IV funds to finance non-governmental institutions staffed with educators able to help state and local officials.⁹⁹ The hiring of Southern educators during the summer of 1967 to investigate compliance records also marks a first tentative step towards decen-

96. Telephone interview with Edwin Yourman, Assistant General Counsel of HEW for Education, Sept. 14, 1967.

97. N.Y. Times, April 12, 1966, at 18, col. 3. Public announcement of the percentages is intended only to alert school districts as to when they may expect closer scrutiny of their plans. The Office of Education cannot rely on their percentage standards as proof of noncompliance when seeking to secure an order from a hearing examiner to terminate aid. Harold Howe, U.S. Commissioner of Education, quoted in Brief of the United States for plaintiff and as amicus curiae (unprinted draft) Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346 (M.D. Ala. 1967).

98. *House Judiciary Hearings* 151.

99. Commenting on the advantages of such a plan Howe stated:

I would say this would be a very healthy endeavor when we were able to do it; that if we could find a way to have states assume this responsibility. The kind of recognition they have of their local conditions is better than the kind of recognition we can have from a centralized position in Washington, and I would like to look for ways to do exactly that.

Statement of Harold Howe, U.S. Commissioner of Education, *House Rules Hearings* 71. Howe points especially to the programs in Florida supported by Title IV money as a notable example of the success a Title IV program can have. *House Judiciary Hearings* 151, 155.

tralizing the enforcement process so that it is run by local officials working in the South.

These are conscious efforts to conform the administration of Title VI with the normal pattern of federal participation in education which, to the greatest extent possible, leaves the direction of programs to officials at the local level. They reflect an awareness that, regardless of the possible size of the staff, efforts to direct the details of school desegregation from Washington will always suffer from the disadvantage of centralization and all such attempts will only repeat present practices whereby, according to Howe's own admission, the agency "sends into school districts from Washington people who are unfamiliar with those school districts, who indeed may not fully realize some of their problems."¹⁰⁰

In the light of these facts courts which in framing their orders heavily rely on the guidelines as presently administered may well be overestimating the expertise of the Office of Education. Judge Gibson and the other judges who do not totally reject the value of the agency's experience but who stress the advantage of leaving courts considerable freedom to frame orders specially tailored for a school district have a valid point.

Certainly, in the two problem areas which promise to cause the most difficulty in future years, district court judges would appear to have certain advantages over the Office of Education. Teacher desegregation raises the very difficult problem of tailoring plans to the actual availability of competent Negro teachers. The solution will vary tremendously from district to district depending on the particular circumstances. In *Wright v. County School Board*,¹⁰¹ for example, the school board originally sought to satisfy its requirements by adopting the 1965 Office of Education guidelines, securing Office of Education acceptance, and then arguing before the court that the school district need go no further. Judge Butzner in a decision handed down on January 27, 1966, recognized the "great weight" plans approved by the Office of Education should be given, but ordered more stringent faculty desegregation provisions. In May, 1966, the board submitted a second plan which largely incorporated the new revised guidelines which the Office of Education had issued since the first court order. Once again

100. Statement of Harold Howe, U.S. Commissioner of Education, *House Judiciary Hearings* 154.

101. 252 F. Supp. 378 (E.D. Va. 1966).

Judge Butzner held that the particular school district could do better.¹⁰² The Judge finally approved in June 1966 a plan which goes beyond present guideline requirements by establishing a specific timetable for complete desegregation of the faculty and by establishing specific procedures for implementing the plan.¹⁰³

Geographic rezoning may become more widely used in the future.¹⁰⁴ If it does, the Office of Education will be at a disadvantage. Review of a proposed geographic zoning plan requires a detailed, personal knowledge of practically every road in the district. Uniform zoning plans can not be imposed the same way that the Office of Education under the free choice plan attempts to detail the appropriate requirements and procedure without any specific knowledge of the particular district.¹⁰⁵

On the other hand, as Judge Gibson conceded in *Clark v. Board of Education*, conditions in the Fifth Circuit may dictate relatively greater deference to Office of Education expertise. Because of the wide disparity in district court decisions in the Fifth Circuit, heavy involvement of the Court of Appeals was probably inevitable. As a circuit court, and one with an especially heavy caseload of school desegregation cases, the Fifth Circuit realized that it could not perform as a district court, appropriately tailoring each plan to each situation. Unable to function itself as a baseline court in school desegregation cases, and unable to rely completely on the lower courts, the court in the *Jefferson*

102. *Wright v. County School Bd.*, Civil No. 4263 (E.D. Va., May 13, 1966), 11 RACE REL. L. REP. 1319.

103. *Wright v. County School Bd.*, Civil No. 4263 (E.D. Va., June 20, 1966), 11 RACE REL. L. REP. 1319.

104. Only twelve per cent of all the plans accepted by the Office of Education in 1965 relied solely on geographic zoning. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 65 n.118 (1967). In places where free choice plans are found not to have worked, however, the guidelines indicate that use of geographic rezoning is likely to be required. School districts are voluntarily shifting to geographic plans because of the inconvenience of free choice plans. *House Judiciary Hearings* 35. One court has declared that "[i]n the long run it is hardly possible that schools will be administered on any such haphazard basis." *Singleton v. Jackson Municipal Separate School Dist.*, 355 F.2d 865, 871 (5th Cir. 1966). The *Jefferson* opinion refers to the "serious shortcomings" of such plans. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 838. See also *Clark v. Board of Educ.*, 369 F.2d 661 (8th Cir. 1966); *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965). The Civil Rights Commission has criticized the willingness of the Office of Education to accept a free choice plan in every instance. *Washington Post*, Aug. 8, 1967, at 1, col. 4. HEW has given all school districts a deadline of 1969 to complete desegregation. This may further contribute to the number switching to geographic rezoning plans. *Washington Post*, Nov. 9, 1967, at M3, col. 1.

105. Seeley has admitted to Congress that geographic rezoning plans cause special difficulties and that EEOP has not been able to monitor such plans as well as free choice plans. There are, he explained, "very complicated review problems to determine whether the lines were drawn for racial reasons or whether they were based on other factors." Statement of David Seeley, former Director EEOP, *House Judiciary Hearings* 140. Officials concede that a change to only geographic zoning "would be extremely difficult in every respect." *Id.* 125.

opinion is simply recognizing that it must relinquish efforts to function as a normal appellate court and instead act more like an administrative agency. Having found it necessary to impose standards from above, the court quite naturally looked for guidance to another centralized governmental body which has already evolved ways to handle very similar administrative problems.

Even in the Fifth Circuit, however, the comparison is not a perfect one. *Jefferson* for all its deference towards Office of Education expertise and all its desire to frame a decree as close to the guidelines as possible still attempts in a few places to exploit the greater ability of a district court to administer a plan flexibly and on an ad hoc basis. For the moment at least all the details of the faculty desegregation problem are left to the district court which "should be able to add specifics to meet the particular situation the case presents."¹⁰⁶ Furthermore, there is no mention in the model decree of any specific percentages of desegregation that a school district must achieve by any given time; its requirement is simply that by 1967-68 all grades be desegregated.

B. *Procedural Inadequacies: The Problem of Enforcement*

Closely related to the theme of expertise are judicial lamentations of inability to cope with school desegregation problems because of the inevitable limitations of the judicial process. *Davis v. Board of School Commissioners*,¹⁰⁷ also a Fifth Circuit opinion, first sounded this chord. The decision, reviewing a district court opinion handed down March 31, 1965, marked the fourth appearance of the same case before the appellate court. Judge Tuttle points out that this means that the time lag between the district court order and appellate argument makes it likely that the district court order will on review be found to be at variance with present Circuit standards, standards that have inevitably evolved during the time elapsed before appeal. Judge Tuttle further notes that because standards are thus continually evolving, the appellate courts must continually be interpreting and reinterpreting the law applicable to the cases it reviews. While referring to the "utter impracticability" of courts moving with the speed necessary in such a rapidly changing area he implies that the Office of Education can.

It is not inevitable that every judicial system suffer from such a

106. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 893 (5th Cir. 1966).

107. 364 F.2d 896 (5th Cir. 1966).

Sisyphus complex. The circuit court could once a year deliver an opinion containing revised standards for the district courts and the district courts could amend all desegregation decrees under their jurisdiction to assure conformity with new standards. The *Jefferson* opinion may foreshadow just such a system, for presumably Office of Education standards will change from time to time, thereby making a similar change in the model court decree likely. The real problem is not the difficulty of informing district courts of the applicable standards, but of assuring implementation of them once they are announced. The district courts are apt to lag behind even when applicable standards are clear. The *Davis* case itself, which Judge Tuttle cites as an example of the "utter impracticability" of continued reliance exclusively on the courts, is really an example of the difficulty the Court of Appeals has had in simply securing compliance by the local district courts with current standards. The district court's order was inadequate under any imaginable standard.¹⁰⁸

Judge Tuttle's argument is not actually a genuine institutional-competence argument resting on an assertion that inherent limitations in the judicial system mean an inevitable delay to justice. Rather it stands primarily for the proposition that with recalcitrant district court judges, the imposition of a circuit court's will on the operational level may be a very time consuming process indeed.

The theme of the procedural limitations of the judiciary reappears in *Jefferson*. Early in the opinion Wisdom announces: "A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. *The Courts acting alone have failed.*"¹⁰⁹

Elaborating on the theme of judicial inadequacy, Wisdom refers to "the slow progress inherent in the judicial adversary process," citing a committee report that had emphasized the burden court suits place

108. The free choice plan was not to be fully completed until 1969-1970, a period of 7 years. Negroes previously enrolled in one school had a right to transfer to other schools only if the plan had reached their grade. Otherwise no transfers were allowed for any reason. No provision at all was made for teacher desegregation; new students entering the new system for the first time could apply to transfer out of their area school but only to schools formerly attended exclusively by those of applicant's race; initial assignments continued to be in fact on a racial basis through use of zoning which was not ostensibly done on the basis of race but resulted in practice in almost complete segregation. The circuit court ordered numerous changes so as to conform the court order in most respects to the guidelines.

109. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966) (emphasis added).

on Negro plaintiffs.¹¹⁰ He points to the inability of courts to give advisory opinions; the tendency of the problems to be outside the immediate judicial scope of a particular case; the inappropriateness of the only means courts have to enforce their orders, contempt proceedings.¹¹¹ He also reiterates Judge Tuttle's worries about the inevitable time lag between the Court of Appeals' decision and application by the District Court.¹¹²

Courts have never considered the bar against advisory opinions and the canons of judicial restraint to be rigid when constitutional considerations demand flexibility. The all-inclusive nature of the *Jefferson* opinion itself demonstrates that to a resourceful court such doctrines need not impede the judiciary from addressing itself with adequate breadth to the problems before it. The argument has even less force on the district court level. A court of equity has vast powers in framing its decree to "go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances."¹¹³

The argument that contempt powers are inappropriate as means of enforcing desegregation is difficult to understand. Wisdom's theory is that a court should not impose such severe sanctions on those who have accepted the thankless and difficult task of running schools in areas where popular feeling is strongly against desegregation and where state laws designed to avoid desegregation further handicap local efforts to obey the Constitution. The existence of laws that prevent local school officials from complying with a court order would seem a fact within a court's discretion to consider when deciding whether to cite the defendant for contempt. Furthermore, a court faced with such a problem could attack the problem directly by reviewing the constitutionality of the state law. The Office of Education faced with a similar problem may well be powerless.

Judges Wisdom, Tuttle, and Brown are reported to have emphasized from the bench during rehearing of the *Jefferson* case that school desegregation also imposes too heavy a case load on the judges, making very clear at the same time that they would like if possible to divert some of the litigation to the Office of Education.¹¹⁴ If the judges' atti-

110. *Id.* at 853.

111. *Id.* at 855.

112. *Id.* at 860.

113. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

114. *Washington Post*, March 11, 1967, at 2, col. 6.

tude towards the Office of Education is actually inspired by a legitimate fear of overwork and therefore inability to devote sufficient time to each case, the solution is not to pretend that the administrative agency can do a better job but to state the problem clearly and hope for larger judicial appropriations. In fact the Court of Appeals for the Fifth Circuit was expanded from nine to twelve members in 1966, partly so that the judges could handle with care the large number of desegregation cases.¹¹⁵

Evidence suggests that despite any institutional limitations courts are still as well-equipped procedurally as the Office of Education to enforce the desegregation of a particular school district once that school district has come before the court.

Applying sanctions in the form of termination of aid can be a long cumbersome process indeed. HEW regulations prescribe an elaborate procedure that must be followed.¹¹⁶ At the hearing itself the government can not rely simply on a school district's failure to observe guideline requirements but must affirmatively prove that the officials are not making a good faith effort to desegregate as rapidly as possible. Many school districts have not contested the proceedings, but a concerted effort to thwart the administrative process by all school districts taking full advantage of all their procedural rights would at least delay the effectiveness of the enforcement proceedings, given the smallness of the Office of Education litigation staff.¹¹⁷ There is no comparison with the speed with which a court may grant a temporary injunction or

115. Washington Post, March 11, 1967, at 2, col. 4. Congress actually voted to make the Fifth Circuit a 13-man court, making it the largest by four. Wisdom, *Political Role of Federal Courts*, 21 Sw. L.J. 411, 413 (1967).

116. 45 C.F.R. § 80-81 (1967), *as amended*, 32 Fed. Reg. 14,555 (1967). The steps required include: 1) efforts to secure voluntary compliance and finding by responsible Department official of inability to secure compliance by voluntary means, 2) notice of opportunity for a hearing, 3) answer by school district and request for a hearing, 4) service by the government on the school district of a "Request for Admission of Fact and Genuineness of Documents," 5) submission of written briefs and hearing for the reception of evidence, 6) hearing examiner's recommendation, 7) filing of exceptions to the recommendations and answer to the exceptions, 8) oral hearing before reviewing authority at the discretion of the reviewing authority, 9) holding of reviewing authority, 10) request for review by Secretary, 11) review by Secretary as a matter of discretion where special and important reasons for such exist, 12) submission of the order to the appropriate congressional committee. The School Board has 20 days to answer the original notice and request a hearing, 30 days to appeal the hearing examiner's holding and file supporting briefs, 15 days to appeal the holding of the reviewing authority. An additional 30 days must elapse after the Secretary makes his final determination and submits it to Congress, before the order becomes effective.

117. Under the procedures the state of Alabama by vigorously contesting its case managed to delay for 16 months a Secretary's final order cutting off welfare payments. Subsequent court appeals have further delayed actual termination of aid.

move to enforce its own order if not complied with.¹¹⁸ Even after the administrative process is completed and steps are taken to enforce Title VI by ending federal aid, desegregation itself has still not been enforced.

The Office of Education turned to a process known as deferral of new funds in an effort to overcome the procedural handicaps built into Title VI. Despite some misgivings, HEW took the position that it could, before initiating termination proceedings, merely defer the making of commitments for new activities. Because the new Elementary and Secondary Education Act meant that HEW was making many commitments for new activities and because the Commissioner could easily invoke the deferral process after simply securing informal approval from the Secretary of HEW and from the Justice Department, the procedure proved helpful.¹¹⁹ In the future, however, this device may become of limited usefulness. In the fall of 1966 the Fountain amendment was passed.¹²⁰ This amendment as originally drafted denied HEW all right to defer funds. As finally passed it implies congressional approval of the practice where none before existed, but it limits to 60 days the length funds may be deferred without the issuance of a hearing examiner's recommendation of termination of funds. Furthermore, many of those participating under the Elementary and Secondary Education Act of 1965 are now receiving money only to continue activities begun in prior years. As a result grants for new activities, and thus the ability to avoid the procedural limitations attached to Title VI, are becoming increasingly less common.¹²¹

The Office of Education's efforts to assure observance of the programs adopted by school officials are also hampered by other institutional shortcomings. With only a limited staff it is obvious that HEW may

118. The Attorney General's letter of December 1965 in fact predicted that in some instances sanctions might be more speedily imposed on noncomplying school districts if the available administrative process was not relied on, but rather efforts were immediately concentrated on securing a court order. Letter of the Attorney General, Dec. 27, 1965, *House Judiciary Hearings* 173-77.

119. In the initial period of compliance efforts during the spring of 1965 some Southern leaders believed that the whole enforcement process was too cumbersome ever to be effective and that, consequently, no significant loss of funds need ever result from non-compliance. The practice of deferral destroyed the argument of some Southerners that Title VI was too encumbered with procedural safeguards ever to be an effective weapon against continued school segregation. *N.Y. Times*, Mar. 7, 1965, at 30, col. 5.

120. Elementary & Secondary Education Amendments of 1966, Pub. L. No. 89-750 § 182, 80 Stat. 1209. For a discussion of some of the legal questions the deferral process can raise, see Note, *School Desegregation and the Office of Education Guidelines*, 55 *Geo. L.J.* 325, 342-44 (1966).

121. It has been estimated that now only ten to twenty per cent of a typical school district's federal allotment is deferrable. *House Judiciary Hearings* 65.

never learn of any but the most notorious violations of the guidelines until too late. For instance, the government has not been able to check harassment and intimidation of Negroes seeking to register at a formerly white school.¹²² While HEW may well not have done all it could, a truly successful campaign to halt such practices would require a staff far larger than Congress seems likely to approve in the near future.

The Office of Education presently relies heavily on the circumstantial evidence provided by the actual number of transfers accomplished. Even this monitoring process, however, occurs too long after the fact to have any immediate effect on progress in the school district. By the time reports are received from all the school districts and the complicated factual evaluations made, it is often too late for the Office of Education to require the school board to offer another free choice period for the same school term.

A court, in contrast, can receive a report from the school district on the results of the free choice period and react in time to order immediate remedial measures before the opening of school. Furthermore, because he is close to the problem, because he can rely on the self-interest of the parties to the suit, and because he can have immediate recourse to the injunctive powers, a district court judge stands a better chance of learning about and stopping irregularities before any harm is done.¹²³

Neither courts nor administrative agencies such as the Office of Education have solved the problems of assuring swift, effective enforcement of steps ordered in the name of justice. While Judge Wisdom and Judge Tuttle argue with some merit that courts are procedurally ill-equipped for the task of enforcing the law in a particular school district, their opinions do not fully substantiate their position and fail

122. The Civil Rights Commission, the White House Conference on Civil Rights, and the NAACP have all accused the Office of Education of failing to take what steps it could to halt examples of what has been called "the low grade terror" still present in the South. See U.S. COMMISSION ON CIVIL RIGHTS, TITLE VI—ONE YEAR AFTER (1965); WHITE HOUSE CONFERENCE ON CIVIL RIGHTS, TO FULFILL THESE RIGHTS 84-85 (1965); NAACP LEGAL DEFENSE AND EDUCATION FUND & AMERICAN FRIENDS SERVICE COMMITTEE, MEMO TO GARDNER: REPORT ON THE IMPLEMENTATION OF TITLE VI OF 1964 IN REGARD TO SCHOOL DESEGREGATION 52 (1965); SOUTHERN REGIONAL COUNCIL, SCHOOL DESEGREGATION 1966—THE SLOW UNDOING 33 (1967).

123. The procedure did not operate at top speed in *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967). There the decree specifically relied on the Justice Department to bring to the court's immediate attention any failure to implement fully the decree. *Id.* at 486. The Justice Department in fact secured a hearing to complain that certain school districts had failed to provide adequately for faculty desegregation. The court ruled that steps to correct any noncompliance could not be ordered until the beginning of the next school term. *Lee v. Macon County Bd. of Educ.*, Civil No. 604-E (M.D. Ala., Oct. 12, 1967).

to take into account the difficulties these same problems cause the Office of Education.

V. The Office of Education, the Courts and the Transfer of Power

Some Fifth Circuit judges are reported to have privately remarked that they would prefer HEW to take over the school desegregation field. The judges' remarks suggest that this wish may spring only in part from a genuine belief in the greater ability of the Office of Education to direct the desegregation program. Partly this attitude may also spring from a desire not to become involved too deeply in local matters from fear of the consequences to judicial prestige of too close involvement with such a controversial and politically explosive question. Their remarks suggest that there is even a possibility that some judges wish to escape further involvement partly because they have lost much of their intellectual, although certainly not their human interest in the problem.¹²⁴

The quick readiness of Fifth Circuit opinions to acknowledge the superiority of the Office of Education should therefore perhaps not be taken entirely at face value. The private remarks of some of the judges suggest that the choice of words is not explained entirely by a desire to weigh impartially the relative institutional competence of the courts and HEW. Rather they are motivated also by the hope that they will have the practical effect of relieving the judges of a burden they wish for various reasons to escape.

Adoption by the court of the guidelines will certainly reduce the caseload of the judges by discouraging use of the courts as a way of evading the guidelines. More importantly, the unstinted praise for the Office of Education is not motivated solely by a desire to establish the academic point that in the court's view HEW is a better instrument than the courts to enforce desegregation. It is intended to increase the prestige of HEW in the South, with the hope that as a consequence they can operate more effectively and without the need for as great involvement on the part of the courts.

This judicial tactic of strenuously praising the work of the Office of Education with the hope that it will indirectly result in a smaller case-

¹²⁴. Statement of Derrick Bell, Deputy Director, Office of Civil Rights, HEW, August 10, 1966. *See also* Washington Post, Mar. 11, 1967, at 2, col. 4.

load for the court is perhaps most noticeable in *Jefferson*. Judge Wisdom argues that Title VI represents the will of Congress that the executive branch should secure prompt school desegregation and that courts should support such legislative efforts however possible. The opinion illustrates well what may be called the attempted transfer of power from one institution to another.

It is helpful in understanding just what Judge Wisdom is trying to do in *Jefferson* to review the factual background of the case. The new revised guidelines were issued in March, 1966. There followed in the South what *The New York Times* called a "fresh wave of resistance" to the guidelines.¹²⁵

The collection of assurances from school boards that they would observe the new guidelines lagged seriously.¹²⁶ Though opposition came from every state, Alabama perhaps produced the most. It not only refused at that time to cooperate with the Office of Education in administering Title VI in the state but actively sought to frustrate any efforts by the federal government to win compliance. The campaign of opposition ultimately culminated in passage by the state legislature of an act barring school districts from negotiating with the Office of Education and nullifying all prior assurances of compliance filed with Washington.¹²⁷

It was with the hope of putting down this renewed opposition to the Offices of Education that the Justice Department at the end of April, 1966, petitioned the court to adopt a model court decree closely resembling the guidelines. During oral argument the school districts, with more realism than subtlety, charged that the Justice Department's request was simply an effort to get the Office of Education "off the hook."¹²⁸ The Congress of Racial Equality as *amicus curiae* also made

125. *N.Y. Times*, April 10, 1966, at 38, col. 1. Senator Ervin (Dem.—N.C.) charged that the guidelines were illegal as seeking to end racial imbalance. *N.Y. Times*, April 10, 1966, at 38, col. 4. Others attacked the faculty desegregation provisions. *N.Y. Times*, April 16, 1966, at 13, col. 3. Further opposition was aroused by the feeling that the Office of Education was pushing for more integration in the South than in the North. *N.Y. Times*, April 12, 1966, at 18, col. 4.

126. The deadline had to be extended from April 15, 1966, to May 6 when fewer than one-fourth of the required assurances from the South were received by the original deadline. *N.Y. Times*, April 16, 1966, at 13, col. 3. By May 22 there were still twice as many school districts which had failed to file any plan than the previous year and many of these filed "dirty" forms. *N.Y. Times*, May 23, 1966, at 16, col. 3.

127. No. 252, [1966] Ala. Laws Spec. Sess. 372. The Act was held unconstitutional. *Alabama NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346 (M.D. Ala. 1967). *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967), describes the whole history of the state government's role.

128. *N.Y. Times*, May 26, 1966, at 35, col. 4.

the argument that court adoption would make it easier for local school officials to obey the law in the face of popular opposition.¹²⁹

It would be strange indeed if in light of this background *Jefferson* was intended simply to close the loophole the court orders had afforded the school districts named in the suit. Wisdom uses this problem to justify his conclusion that the court standards for the particular school districts must not be lower than HEW standards.¹³⁰ In addition, however, such a solution to the disparity problem provided a hook on which to hang a general review and endorsement of the guidelines, since before endorsing the guidelines in the name of uniformity the court must establish first whether they are within the demands of the Constitution and Title VI. By this route Judge Wisdom makes review of the guidelines an integral part of the case and thus saves his general support of them from being pure dictum.

While thus using the disparity problem as a means of placing the guidelines in issue, the endorsement is justified in far broader terms than necessary to the problem actually before the court. Wisdom declares: "We read Title VI as a congressional mandate for change—change in pace and method of enforcing desegregation,"¹³¹ and concludes that "[w]hen Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy."¹³² The courts should do, he argues, everything they can to make the efforts of the administrative agency as effective as possible, and endorsement of its standards is one method. He thus adopts and greatly expands a theme first raised in *Price v. Denison Independent School District Board of Education*, when Judge Brown argued that the Civil Rights Act "declares the strong legislative policy against racial discrimination in public education. . . ."¹³³

129. *Id.*

130. Judge Wisdom reasons in the following words:

Our decisions determine not only (1) the standards schools must comply with under *Brown* but also (2) the standards these schools must comply with to qualify for federal financial assistance. Schools automatically qualify for federal aid whenever a final court order desegregating the school has been entered in the litigation and the school authorities agree to comply with the order. Because of the second consequence of our decisions and because of our duty to cooperate with Congress and with the executive in enforcing Congressional objectives, strong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation.

United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847-48 (5th Cir. 1966), *cert. denied*, 36 U.S.L.W. 3138 (Oct. 9, 1967).

131. *Id.* at 852.

132. *Id.* at 856.

133. 384 F.2d 1010, 1012 (5th Cir. 1965).

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For precedent Wisdom cites NLRB cases he finds analogous.¹³⁴ The analogy to the labor cases must be considered loose at best. In those cases the administrative agencies were regulatory ones specifically designed to develop standards to implement a new statute, with court participation confined generally to limited-scope review of agency holdings. The question of what constitutes racial discrimination under the equal protection clause has necessarily been an area dominated by courts. The Office of Education has not read Title VI as changing this and authorizing them to develop precedent as does such an agency as the NLRB. To avoid even appearing to establish standards independent of the court, HEW wrote into its regulation the exception for court orders.

It appears that Judge Wisdom is on stronger though less precise grounds when he cites the general congressional intent behind the statute to implement a national decision to pursue vigorously desegregation efforts through an administrative agency. By interpreting Title VI as a congressional mandate the opinion's approach manages both to put the full judicial weight behind Office of Education efforts and to create the impression that the court in doing so is simply bowing to the legislative will.

Even this reliance on congressional intent generally could not be intended as the sole justification of the court's adoption of the guidelines, since such reasoning implies that Congress has the power to amend the Constitution. The thrust of the argument is that passage of Title VI must affect the court's view as to the speed at which desegregation must proceed to be consistent with the 14th Amendment. Wisdom implies that until "effective congressional statutory recognition of school desegregation as the law of the land"¹³⁵ courts could not set more vigorous standards. The suggestion that courts can not move to enforce constitutional rights until Congress acts is certainly novel.

On the purely verbal level, at least, the problem is avoided by the court's holding that the guidelines "agree with decisions of this circuit and of the similarly situated Fourth and Eighth Circuits."¹³⁶ Thus, Congress is held not to be dictating constitutional standards to the court at all. However, such a solution if taken at face value negates

134. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 857 (5th Cir. 1966).

135. *Id.* at 855.

136. *Id.* at 886. Wisdom also describes the guidelines as "strikingly similar to the standards the Supreme Court and this Court have established." *Id.* at 858.

all the previous talk about the necessity of the courts cooperating with Congress by adopting equally vigorous standards.

In effect *Jefferson* is a benediction by the courts of the Office of Education's efforts and an anointing of the guidelines with the holy oil of judicial approval. The inherent weaknesses of the Office of Education, as well as any real or imagined weaknesses in the judicial system, explain the exaggerated respect the court accords the administrative agency. The discussion of relative institutional competence is motivated as much by judicial awareness of its own strengths and its desire to use it to support the administrative process as by a desire to convince the public that the court is subject to inherent limitations which justify its effort to be free of all desegregation cases.

The felt need in *Jefferson* for the court, in effect, to rescue the Office of Education politically is evidence that courts can compel respect from Southern opponents of desegregation in a way the latter, as a federal bureaucracy, never can. The explanation for this must in part result from a genuine preference by school officials for the local district courts, a familiar institution, over a remote, impersonal and seemingly inscrutable federal agency. The Senate debates demonstrated this and the reactions of local school districts since 1964 confirm it.¹³⁷

The mere fact that the Office of Education is associated with the federal government hurts the agency's effectiveness. Inevitably HEW must act in such a way as to make it appear that the federal government in Washington is telling a local district how to run its school. Politically this is an unfortunate image anywhere that "states' rights" slogans generate support. It is doubly unfortunate when the subject is education, one with which the federal government has traditionally sought to avoid interfering.

The Office of Education must also cope with direct political interference from Congressmen. As the Office of Education exercises control over school districts through the power of the purse, so Congress has the ability to use the power of the purse to influence that agency. It may limit enforcement funds as it did in 1966 and attach to the appropriation report the statement that the funds are not to be used "to

137. Typical of the feeling were the remarks made by Senator Albert Gore, (Dem.—Tenn.): "[M]y people would prefer to submit to a [f]ederal judge whom they know, and who has some knowledge of the circumstances that prevail, their plan for school desegregation, for approval or disapproval." 110 CONG. REC. 14,439 (1964). To Gore following the orders of a federal district judge is better than being ruled by "some crusader from afar" or from any source with which the local people are not as well acquainted. 110 CONG. REC. 14,434 (1964).

go about the country harassing people," wording which left no doubt as to the meaning to be attached to the budget cut or the possibility of even greater ones in the future.¹³⁸ Congress may alter procedures as it did by passing the Fountain Amendment or attempt to undercut the Office of Education's prestige by holding hearings to criticize Mr. Howe for "arbitrary," "unreasonable" and "irresponsible" acts.¹³⁹

The political disadvantages the Office of Education suffers from would not be unique to a federal agency or especially damaging were it not for the fact that the whole effort to desegregate schools in the South requires direct cooperation from a segment of its population which is painfully susceptible to political pressures. Most Southern state superintendents of education and most state boards of education are politically elected.¹⁴⁰ While the practice on the local level varies tremendously throughout the South, it is fair to say that in many school districts as well the board of education members are popularly elected. Elected officials are reluctant to take any action that might be interpreted as voluntarily agreeing to desegregate. A court order is useful in that it leaves the official no choice and a perfect excuse. Compliance with Office of Education guidelines in contrast means taking action when such is required only by the more subtle and indirect coercion of the power of the purse.¹⁴¹

The Office of Education's ability to hurdle these political barriers to effective operation in the South is problematical. To date its most effective device for rallying public support behind voluntary compliance has been the adoption of the deferral process; but widespread use of the process may no longer be practical. The plan to place the enforcement program directly in the Office of the Secretary may perhaps help to give spokesmen for the program added political weight in Congress. The government is also exploring other possible ways to try to alleviate the situation.¹⁴² In the meantime the problem remains.

138. S. REP. No. 1631, 89th Cong., 2d Sess. 73 (1966).

139. *House Rules Hearings* 98.

140. *N.Y. Times*, Mar. 7, 1965, at 30, col. 5.

141. Typical of the problem is the attitude of the State Board of Education in Louisiana. *The New York Times* quoted Governor John McKeithen as saying it would be "political suicide" for any elected state school board member to vote for desegregation. *N.Y. Times*, Mar. 7, 1965, at 30, col. 4. The Southern Regional Council has concluded succinctly that "[a] superintendent wishing to comply with the law is a lonely individual in the South. His predicament is made more painful by the fact that he is often under direct pressure from his constituents." SOUTHERN REGIONAL COUNCIL, *SCHOOL DESEGREGATION 1966: THE SLOW UNDOING* 35-36 (1967).

142. HEW, for instance, has experimented with actually holding compliance hearings in the state where the school district is located. To date such hearings have been conducted in Jackson, Miss., Columbia, S. C., and Atlanta, Ga. The hope is that such hear-

The Office of Education's position is further weakened by its reluctance to fully exploit such sources of political power presently available to it as the President. While the President has not hesitated to publicly support the guidelines when under political attack,¹⁴³ HEW decided not to ask the President to sign them as a regulation for fear of unduly risking the President's political prestige.¹⁴⁴ HEW feared that if the guidelines met successful opposition the President might be politically embarrassed by any modification forced on the Office of Education by political pressure from the South. As a consequence, Southern politicians have argued that the standards represent only the work of an "irresponsible" federal bureaucracy rather than the will of a politically responsible official. The decision has not only weakened the government's case politically but continues to raise legal questions whether the use of unsigned guidelines violates Title VI, a point Southerners have been quick to exploit.

Given the relative inability of the Office of Education to generate effective political strength, either by itself or with the help of the President, it is not surprising that the agency turned to the courts for help. It may be that *Jefferson* will be at least partially successful in overcoming some of the opposition to the Office of Education in the South.

A complex relationship between different institutions emerges. Local school officials seek to avoid responsibility for having to observe guideline standards by arguing that the courts require it. Arguing that merely the Office of Education requires it is not as effective. Similarly the Office of Education seeks to strengthen its position in the South by arguing that they have both the general support of the courts and now, after *Jefferson*, their specific endorsement. At the same time they avoid any possibility of a politically damaging confrontation with the courts by writing an exception in their regulations for court orders. The courts wish to limit their involvement with the problem for sev-

ings will inform the public and emphasize the necessity of compliance and the consequences of a refusal to do so. As the process of decentralization continues and as the details can be worked out, it is hoped local hearings may become more common. Telephone interview with Edwin Yourman, Assistant General Counsel of HEW for Education, Sept. 12, 1967.

143. See, e.g., N.Y. Times, Sept. 30, 1966, at 1, col. 4; President's news conference, N.Y. Times, Oct. 7, 1966, at 2, col. 4; Reply of the President to Senator Russell's Letter of May 2, 1966, in SOUTHERN REGIONAL COUNCIL, SCHOOL DESEGREGATION 1966: THE SLOW UNDOING 15.

144. Interview with Edwin Yourman, Assistant General Counsel of HEW for Education, Jan. 18, 1967. See also *House Rules Hearings* 40.

eral reasons. Their response has been to enthusiastically endorse the guidelines, though, in part, to draw on the political strength of the United States Congress to justify their stance rather than to expend their own prestige too openly. Their endorsement of the guidelines helps to shift future responsibility back to the federal executive and hopefully reduces their own future involvement. The circle is thus squared. Everybody benefits by the process and no one involved on either side of the controversy must pay by having to publicly assume responsibility for adoption of the guidelines and the desegregation that results.

The catalyst that sparked this whole process was the Office of Education's decision to accept court orders in place of its own compliance requirements. Without this exception the school officials could not have tried to use the courts as a way to avoid the guidelines requirements and the pattern described above would not thereby have developed. Certainly, without the exception for court orders, an excuse for *Jefferson* would have been harder to find and a rational opinion harder to write. In the end, then, the regulatory exception for court orders which has caused so much difficulty to the Office of Education becomes, ironically, a positive asset. As a result of the exception the enforcement efforts of the courts and the Office of Education are as a whole greater than the sum of their parts.

Obviously, though, *Jefferson* will not prove the complete answer. *Lee v. Macon County Board of Education*,¹⁴⁵ demonstrates that political opposition to the Office of Education enforcement of the guidelines can not always be defeated by any such subtle interplay between the courts and the administrative agency. In this case, a three-judge federal court granted the government's request for a statewide injunction ordering integration in 99 school districts in Alabama not previously under a court order. The court held that active interference by the state government with efforts of local school districts to comply with Office of Education requirements made necessary the unprecedented breadth of its order. The decision specifies that all 99 school districts are to adopt free choice plans following a model plan adopted from the *Jefferson* opinion.

The opinion in effects puts the Office of Education out of business in the State of Alabama since henceforth every school district in that state will be subject to a court order. Even the approximately 40

145. 267 F. Supp. 458 (M.D. Ala. 1967).

school districts which had submitted compliance forms that the government had accepted were included in the court order.

Consequently, it will never be possible to tell whether the *Jefferson* opinion could have succeeded in giving the Office of Education sufficient stature to reverse opposition to the guidelines in the state that in the past had most vehemently opposed HEW efforts. Alabama, of course, may be a special situation in which even the courts acting alone can not command obedience. Nevertheless, it remains clear that the courts stand a better chance of securing desegregation in Alabama than did the Office of Education. In deciding that the situation in Alabama required the active intervention of the courts on a statewide basis the court implicitly rejects all the prior Fifth Circuit dicta stressing both the institutional limitations of the judicial process and the superiority of administrative enforcement of the law. It makes clear that despite the tenor of some of the language in Fifth Circuit Court opinions, the courts are not withdrawing from the problems of day-to-day enforcement of the 14th Amendment.

The allocation of responsibilities between the courts and the administrative agency arrived at in *Lee v. Macon County Board of Education* completely reverses the roles originally envisioned for courts and the Office of Education under Title VI. Originally HEW thought that the courts would establish the standards and the government, through Title VI, would be responsible for administering them on a mass basis. In the Alabama opinion the courts are the institution administering the law on a mass basis and the Office of Education is at best serving in an advisory role helping the courts determine the applicable standards and then helping, in tandem with the Justice Department, to advise the courts on the adequacy of the desegregation plans submitted by the school districts.

Conclusion

Both *United States v. Jefferson County Board of Education* and *Lee v. Macon County Board of Education* are judicial acknowledgements of the inability of the administrative process to desegregate Southern schools when acting alone. Both decisions are massive reaffirmations of the courts' concern with the problem. The only question is whether the help the courts give the Office of Education in such cases as the *Jefferson* opinion will suffice or whether the solution of the court in the Alabama case will in turn be repeated in each Southern state until the

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Office of Education is stripped of any direct role in continuing efforts to enforce desegregation in the South.¹⁴⁶

For ten years supporters of desegregation contended that the courts were unable to enforce the law and that the only way desegregation could be achieved was if the political powers of government were invoked in the form of a federal statute delegating to the executive branch sufficient authority to enforce the law. Now the pendulum should begin to swing back and there should be a growing awareness that the courts cannot and should not retire from the field. At the least a close partnership between the judiciary and the executive is required.

146. The court in *Lee* held that the state had an affirmative duty to insure that local school boards had adopted successful desegregation plans. 267 F. Supp. at 478. While the Alabama state government has perhaps been more open than other states in its opposition to school desegregation, the duty of the state to direct desegregation efforts presumably exists whether or not the state government has in its past openly exerted its influence against desegregation. Since none of the states have taken as active a role as they might in encouraging desegregation the rationale of *Lee* could be applicable to all the states in the South. See p. 345 *supra*.