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A Status Report On Litigation Affecting Historically Black Colleges and Universities with Postscript On April 12, 1993 Mississippi Hearing

J. Clay Smith Jr.

A STATUS REPORT ON LITIGATION AFFECTING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES With Postscript On April 12, 1993 Mississippi Hearing

J. Clay Smith, Jr.*

I am honored to participate in this great conference on "The Future of America's Historically Black Colleges and Universities: Post Ayers 'A Strategy for Survival and Excellence.'" My responsibility at this juncture is a narrow one: it is to give you a status report on litigation affecting historically black colleges and universities. I plan to do just that organized as follows: First, I will review the United State Supreme Court's opinion in United States v. Fordice, 112 S.Ct. 2727 (1992). I will then address the substantive issues in three states in which there is active post Fordice litigation; namely, Alabama, Louisiana and Mississippi.

Fordice Case

On June 26, 1992, the United States Supreme Court issued its opinion in United States v. Fordice and determined that the

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* J. Clay Smith, Jr. is a Professor of Law at Howard University School of Law. Before the Conference on "The Future of America's Historically Black Colleges and Universities Post Ayers: A Strategy for Survival and Excellence," co-sponsored by the University of the District of Columbia and the District of Columbia School of Law and the Howard University School of Law, April 5, 1993. A portion of this paper was prepared for the National Association for Equal Opportunity in Higher Education (NAFEO), Presidential Peer Seminar, Panel on "Implications for HBCUs of Supreme Court Decision: U.S. v. Fordice," August 4, 1992, Hilton Head Island, South Carolina.

principles of Brown v. Board of Education (Brown I), 347 U.S. 483 (1954); Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II), applied in the context of a public university system operated by the State of Mississippi. In an 8-1 decision, the Court found that the State of Mississippi does not fulfill its mandate under Brown merely by adopting race-neutral admissions policies where other existing policies traceable to the segregative de jure system are still in place. The Court also enunciated the proper standard for the lower court to use in determining whether a State has sufficiently eliminated all aspects of its de jure discriminatory policies.

A. FACTS

Mississippi's public university system dates back to 1848, when the University of Mississippi was founded to educate white persons. Additional, segregated institutions were later founded, and to date there remain four institutions originally formed to educate white persons (hereinafter historically white institutions or HWIs): Mississippi State University (1880), Mississippi University for Women (1855), University of Southern Mississippi (1912), and Delta State University (1925). In 1871 the State founded Alcorn State University as "an agricultural college for the education of [the State's] black youth." Fordice at 2732. Two more Historically Black Colleges and Universities (HBCUs) were subsequently founded by the State: Jackson State University (1940) to train Black teachers, and Mississippi Valley State University (1950) for vocational training.

Despite the Supreme Court's holding in Brown I and Brown II, Mississippi's segregated public college system continued. Attendance of the first Black student at the University of Mississippi had to be ordered by the court. Meredith v. Fair, 306 F.2d 374 (5th Cir.), cert. denied, 371 U.S. 828 (1962). However, in the years that followed, the "segregated public university system in the State remained largely intact." Fordice at 2732.

The Department of Health, Education and Welfare (HEW) took measures to enforce Title VI of the Civil Rights Act in 1969, and "requested that the State devise a plan to disestablish the formerly de jure segregated" system. Fordice at 2732. Four years later, the State submitted a "Plan of Compliance" which outlined measures to improve opportunities for students in the university system. HEW rejected the Plan of Compliance. The Board of Trustees, which oversees Mississippi's public university system, amended the plan, but HEW found the Plan, even with modifications, unsatisfactory. The Board adopted the Plan anyway.

In 1981, the Board designated to each of the State's eight institutions "mission Statements" which identified the purpose of each institution. Three predominantly white universities were designated as "comprehensive": University of Mississippi, Mississippi State, and Southern Mississippi. These three colleges were subject to the greatest amount of resources and program offerings. Jackson State University, was designated as the sole "urban" university with less funding for research and academic programs. The remaining institutions, two HWIs and two HBCUs, were

designated as "regional," and has the most narrow academic objectives.

B. Majority Opinion Written by Justice White

The Court acknowledged that "there was no dispute that the State of Mississippi had a constitutional duty to dismantle the dual school system once operated and mandated." The primary issue is "whether the State has met its affirmative duty to dismantle its prior dual university system." Fordice at 2735 (emphasis added). Justice White wrote that prior Supreme Court cases established that a State's obligations under the constitution were not met until the State "eradicates policies and practices traceable to its prior de jure dual system that continue to foster segregation." Id.

The Court determined that although "a student's decision to seek higher education has been a matter of choice," vestiges of a university system's de jure segregative policies goes beyond recognition of the State's adoption and implementation of race-neutral admissions policies. The Court wrote:

> That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. In a system based on choice, student attendance is determined not simply by admissions policies, **but also by many other factors. Although some of these factors clearly cannot be attributed to State policies, many can be.**

Fordice at 2736 (emphasis added). Further, the Court determined that there still remain discriminatory effects from "policies traceable to the de jure system," which must be "reformed to the extent practicable and consistent with sound educational practices."

The Court rejected application of the analysis contained in Bazemore v. Friday, 478 U.S. 385 (1986) as inapplicable in higher education. In Bazemore, the Court had held that the State was not responsible for the factors upon which people selected particular 4-H Clubs that were funded through the State. In Fordice, the Court found that "Bazemore plainly does not excuse inquiry into whether Mississippi has left in place certain aspects of its prior dual system that perpetuate the racially segregated higher education system." Fordice at 2737. Where the State "perpetuates policies traceable to its prior system that continue to have segregative effects ... and [where] such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden that it has dismantled its prior system ...." Id. The Court found that the standard applied by the district court was erroneous because it failed to make these inquiries required for compliance of the university system under the Equal Protection Clause.

The Court held that had the district court applied the correct legal standard, it would have found from the record that there are "several surviving aspects of Mississippi's prior dual system which are constitutionally suspect." Fordice at 2738. Although the policies are "race-neutral on their face," Justice White wrote that they "substantially restrict a person's choice of which institution to enter and they contribute to the racial identifiability of the eight public universities." The Court mandated that Mississippi justify its policies "or eliminate them." Id. Certain remnants of

the Mississippi's prior de jure segregated system highlighted by the Court are policies concerning admissions, program duplication, mission statements, and maintenance of all eight of the systems educational institutions.

1. Admissions

The Court found that the present standard for "automatic" admissions, which relies on higher ACT scores for admission to the HWIs than for the HBCUs, has its roots in the prior de jure system, was originally implemented "for a discriminatory purpose," and still causes "present discriminatory effects." Fordice at 2739.[1] The Board attempted to justify the differential admissions policies in the 1970s by determining that the lower ACT minimum scores for admission to the HBCUs was necessary because "too many students with lower scores were not prepared for the historically white institutions...." Fordice at 2739. However, the Court determined that the differential standards "requires further justification in terms of sound educational policy." Fordice at 2740.

The Court also found problematic the fact that the comprehensive institutions would not consider the applicant's high school grades as a factor to predict college performance. The record established before the district court studies showing that the gap between grades achieved by Black and white students is narrower than performance on the ACT. Justice White wrote that

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[1] The court noted that in 1985, 72% of white high school students in Mississippi scored 15 or better on the act, whereas less than 30% of all blacks earned tht score. Thus, "it is not surprising then that Mississippi's universities remain identifiable by race. Fordice at 2740 n. 10.

these studies would "suggest[] that an admissions formula which included grades would increase the number of Black students eligible for automatic admissions to all of Mississippi's universities." Id. Thus, with respect to the State's admissions standards, the Court found that sole reliance on ACT scores as a method for maintaining a dual system is traceable to the prior de jure segregated system and "seemingly continues to have segregative effects...." Id. "The State has so far failed to show that the ACT-only admission standard is not susceptible to elimination without eroding sound educational policy." Id.

2. Program Duplication

The district court found that many programs offered at the HBCUs were unnecessarily duplicated by the HBIs, e.g. 29% of undergraduate programs, and 90% of graduate programs. Id. The court found that it "can hardly be denied that such duplication was part and parcel of the prior dual system of higher education -- the whole notion of 'separate but equal' required duplicative programs in two sets of schools -- and that the present unnecessary duplication is a continuation of that practice." Fordice at 2741.

The Court determined that the district court erroneously placed the burden to prove the constitutional defect of unnecessary duplication on the aggrieved plaintiffs. Fordice at 2740. Rather, the Court found that under Brown, the "burden of proof falls on the State, and not the aggrieved plaintiffs" to establish whether such duplication of programs facilitates the State's prior de jure segregated system. Id. In addition, the Court found erroneous the

district court's failure to recognize any "educational justification" for the program duplication.[2]

3. Institutional Mission Designations

The court of appeals found that "the institutional mission designations adopted in 1981 have as their antecedents the policies enacted to perpetuate racial separation during the de jure segregated regime." Fordice at 2742. Notwithstanding this fact, the court of appeals upheld this aspect of the State's system as acceptable because of the State's good faith neutral admissions policies. Id. The Court overruled the court of appeals on this issue, finding that "different missions assigned to the universities ... limits to some extent an entering student's choice as to which universities to seek admittance." Id. When combined with other aspects of the university system, the Court determined that this aspect, too, "perpetuate[s] the segregated system." Id. Given the discriminatory purpose for which the policy has its ties, the Court held that the district court must determine whether the mission policy is necessary to satisfy sound educational practices. Id.

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[2] Strangely, the district court observed that program duplication by the State "cannot be justified economically or in terms of providing quality education." Fordice at 2741. However, the lower court determined that there was no proof that the elimination of program duplication would decrease institutional racial identifiability, affect student choice, or promote educationally sound policies. Fordice at 2741. The majority in Fordice found that the district court failed in its analysis to consider whether, in facilitating program duplication, the State satisfies its duty to dismantle its prior de jure system.

4. Maintaining all eight universities

The Court found that the State attempted to satisfy its constitutional obligations by maintaining all eight universities. However, the Court also found that "the existence of eight [institutions] ... was undoubtedly occasioned by State laws forbidding the mingling of the races." Id. Given the close proximity of some institutions, the Court noted the district court's observance that "continuing to maintain all eight universities in Mississippi is wasteful and irrational[,]" especially given the limited financial resources available to the State for funding higher education. Id. Although the majority opinion suggested that "closure of one or more institutions would decrease the discriminatory effects of the present system," the Court did not reach the issue whether closure is required under the constitution. Fordice at 2742-43. Thus, the Court remanded this issue for the district court to resolve.

To conclude, the Court remanded the case to the district court for examination of each of these policies under the proper constitutional standard. The Court noted that just because an "institution is predominantly white or Black does not in itself make out a constitutional violation." Fordice at 2743. However, the State will not be permitted to leave in place policies traceable to its segregated past when such policies facilitate the racially identifiability of the universities, especially when they can be practicably eliminated without eroding sound educational

policies. Id.[3]

C. Concurring Opinion by Justice O'Connor

Justice O'Connor agrees that public universities must "affirmatively dismantle their prior de jure segregation" in order to have effectively eliminated the effects of that discrimination. Fordice at 2743. Justice O'Connor "emphasize[s] that it is Mississippi's burden to prove that it has undone its prior segregation, and that the circumstances in which a State may maintain a policy or practice traceable to de jure segregation that has segregative effects are narrow." Id. Justice O'Connor indicates, citing Green v. New Kent County School Board, 391 U.S. 430 (1968), that any justification for maintaining a remnant of the State's prior discriminatory past should be viewed very skeptically, and that the State has a "heavy burden" to justify maintaining that policy. Further, the State must also show that "it has counteracted and minimized the segregative impact of such policies to the extent possible." Fordice at 2744.

D. Concurring Opinion by Justice Thomas

Justice Thomas agrees with the majority opinion that policies traceable to the State's prior de jure system that cause discriminatory effects must be "reformed to the extent practicable

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[3] The Court rejected any proposal by private petitioners that it mandate the upgrading of the HBCUS if solely to make the schools "publicly financed black enclaves..." However, the Court recognized the possibility of increased funding for the HBCUS as part of the State's obligation to achieve full dismantlement of the state's segregated past. Fordice at 2743.

and consistent with sound educational policies." Id. However, Justice Thomas indicates that the "standard is different from the one adopted ... in Green ... because it does not compel the elimination of all observed racial imbalances...." Id. In that regard, writes Justice Thomas, the Court's opinion does not signify the "destruction of historically Black colleges or the severing of those institutions from their distinctive histories and traditions." Fordice at 2746. Absent a current discriminatory purpose, where policies traceable to a State's segregative past are challenged, the court must determine whether the policy produces adverse impacts and whether there exists any educational justification for the policies.

Further, in analyzing the burden of proof, Justice Thomas indicates, citing Washington v. Davis, 426 U.S. 229 (1976), that the State has a higher burden of proof of disproving discriminatory intent, even though the standard announced by the majority opinion does not rely on the Washington case.[4] In Washington v. Davis, the Court placed the burden on plaintiffs to prove the existence of discriminatory purpose or intent in cases involving testing of applicants for public jobs. Justice Thomas suggests that in the context of higher education, the Washington v. Davis test "flips," so that the burden of proof not fall on the shoulders of the plaintiff, but rather on the State to show an absence of discriminatory intent and discriminatory effect, and any sound

[4] This burden could favor the HBCU's argument relative to funding because funding disparities is a remnant of past discrimination.

educational reasons for the policy.

Although the public HBCUs were founded as a tool of segregation, Justice Thomas indicates that "there exists 'sound educational justification' for maintaining historically Black colleges" because these institutions have expanded educational opportunities for Black students. Justice Thomas states that the HBCUs offer "institutional diversity" that can and should survive under the Court's majority opinion. Specifically, Justice Thomas states,

> Although I agree that a State is not constitutionally required to maintain its historically black institutions as such ... I do not understand our opinion to hold that a State is forbidden from doing so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.

Id.

E. Justice Scalia, concurring in the judgment in part and dissenting in part

Although Justice Scalia agrees that the standard of Brown I does apply in the context of public higher education, he reject the burden of proof required by the State under the Court's majority opinion. Justice Scalia finds that the requirement resembles that stated in Green, and thus has no "proper application in the context of higher education." Id.

At the outset, Justice Scalia is very critical of the various standards provided by the majority opinion, and finds the Court's opinion ambiguous and confusing. Fordice at 2747-49. Justice Scalia takes a much narrower view of the standard for desegregating

in higher education. Justice Scalia seems to side with the State of Mississippi, finding that in the context of higher education the only unconstitutional "derivations of that bygone system" are those policies that limit opportunity, or admission, on a discriminatory basis. Id. Further, Justice Scalia states that discrimination in higher education is most appropriately analyzed under the Court's opinion in Bazemore.

> Bazemore's standard for dismantling a dual system ought to control here: discontinuation of discriminatory practices and adoption of a neutral admissions policy. To use Green nomenclature, modern racial imbalance remains a "vestige" of past segregative practices in Mississippi's universities, in that the previously mandated racial identification continues to affect where students choose to enroll -- just as it surely affected which clubs students chose to join in Bazemore * * * Like club attendance in Bazemore ... attending college is voluntary, not a legal obligation, and which institution particular students attend is determined by their own choice....

Fordice at 2750

Under Justice Scalia's analysis, the only discriminatory barrier to higher education can be "discriminatory admissions standards." Fordice at 2751[5] Justice Scalia writes that once such barriers are eliminated, a State is "free to govern its public institutions ... as it will...." Id. However, where new discriminatory barriers to admissions arise, there must be a finding of discriminatory intent and causation. Id., citing Washington v. Davis.

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[5] Under Justice Scalia's narrow analysis, the only area of review for the district court would be a determination as to whether Mississippi's reliance on the ACT discriminatorily excludes Black students from the HWIs. Fordice at 2751.

Justice Scalia warns that the test provided by the majority opinion, i.e., "compelled integration," will result in the "elimination of predominantly black institutions." J. Scalia Fordice at 2751, 2752. He indicates that the majority opinion dissuades measures by a State to provide equal funding of HBCUs and HWIs, (Fordice at 2752), stating that the Court's prohibitory language against "duplicate programs" inhibits such equal funding as "part and parcel of the prior dual system." Id. Justice Scalia finds that the continued existence of HBCUs "is not what the Court's test is about, and has never been what Green is about." Id.

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Alabama Case

On December 30, 1991, six months prior to the Fordice decision, Judge Harold L. Murphy, District Judge of the Northern District of Alabama issued his decision in Knight v. State of Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991). Plaintiffs in Knight had sued the State on several grounds: Among these grounds was that in 1975 Alabama had racially frozen the academic mission of HBCUs in that state by issuing "Planning Document Number One." Secondly, Knight sued to remedy the disparate land grant funding as between Alabama's whites colleges and its HBCUs, including the inequality in funding facilities.

The Knight Case is presently on appeal in the United States Court of Appeals for the Eleventh Circuit: The Knight plaintiffs do not believed that the district court order provides an adequate

remedy to correct past discrimination consistent with the Fordice case.

The Knight appellants all contend and agree that the district court erred in concluding that the state did not discriminate against HBCUs in 1973 when it froze their academic mission. The district court ruled that this act was not discriminatory because the state limited the mission of some white schools. Therefore, relying on a rational basis theme, the court concludes that the state acted within a "sound education practice" and refused to determine that "Planning Document Number One" was an act of intentional discrimination. Oddly, the court's judgement was made after it spend a number of pages describing racial discrimination against black people and HBCUs in its December 30, 1991, Order.

DOJ/Mission Designations: The language of the Department of Justice's (DOJ) brief before the court is lukewarm, contending on this point, in support of the Knight appellate, that "Fordice may well support appellant's contention," that the State of Alabama did particularly discriminate against HBCUs in 1973 when it froze their academic missions. Brief 43-44.

DOJ/Land Grant Funding: DOJ's brief supports the Knight appellants. The language on this issue stronger as DOJ states that it has "serious questions about the court's reasoning." To DOJ the discriminatory funding under pertinent federal statutes is clear. DOJ does not argue for reversal of the district court order, I

don't think, it merely suggests to the Eleventh Circuit that the disparate funding can be remedied under the court's decree. Without going into great detail, the district court's order did recognize the Alabama A&M University receive a preference for any new high demand programs awarded in the Huntsville area, but it is far from clear whether this form of remedy adequately corrects the years of past discrimination and the attendant consequences of many years of state imposed disparate funding. It remains to be seen just how strong the DOJ will stand on this point.

DOJ/Facilities: The district court order gave Alabama State University $9,873,178 and Alabama A&M University $10,628,306 to eradicate the remnants of discrimination in facilities funding. The Knight appellants claim that such amounts are inadequate, and challenged the formula applied by the district court in arriving at these figures. The DOJ is on board with the Knight appellants, and believe that the court should retain jurisdiction over this issue in order to amend the terms of the remedial plan as required. Fordice mandates that the Alabama take corrective action "necessary to achieve a full dismantlement" of the remnants of discrimination. Fordice at 2743.

The state of Alabama argues that the district court applied the correct legal standard consistent with Fordice. The state argues that the correct standard is to remedy any continuing effects of discrimination. The state argues that measures claimed by private petitioners do not require remedy because these areas,

although historically affected by the state's discriminatory policies, no longer have a discriminatory effect and do not affect student choice. The state argues that the district court's failure to extend the remedial decree to the areas outlined by petitioners was not an abuse of discretion.

The state argues as follows:

I. The district court did not abuse its discretion by failing to alter the mission designations of ASU or AAMU.

A. Mission Designations

State disagrees with Knight's assertions that maintaining the mission designations is impermissible under Fordice. State argues that altering mission designations so as to create a HBU as a "flagship institution" would foster, rather than inhibit, segregation, and would unnecessarily channel educational resources from HWUs that already educate 59% of Alabama's black students. Further, district court already ordered that the ACHE give the HBUs preference in the award of high demand programs. The district court's remedy on placing high demand programs at the HBUs is more workable and effective.

B. Additional Funding for HBUs

Considering differences in the HBUs, the state argues that the HBUS have been equitably funded for decades. This is the case whether one examines educational and general funding, funding per headcount students, funding per full time equivalent student, etc. State argues that the court was correct in finding that the HBUs

have been equitably funded for years. Further, in terms of funding, the HBUs have protection afforded to them through the legislature. States notes that as a result of the increased numbers of black state legislators in Alabama, state appropriations to HBUs have dramatically increased. Thus, further judicial protection is not necessary.

C. Additional facilities for HBUs

The state argues that the district court should not be required to direct the state to provide additional funding for facilities at the HBUs. The state argues that when funds are allocated to HBUs, like to HWUs, the state leaves it to the institutions to decide how to spend the funds. The state will generally not "micromanage" an institution. The state notes, however, that testimony at trial showed that ASU and AAMU spent tremendous sums of state funding on athletic complexes, radio stations, and fine arts centers, "when faced with accreditation requirements which go unmet because of inadequate building space and library collections that are plainly insufficient."

II. Federal Land Grant Funding for AAMU

Finally, the state argues that conducting the state's agricultural research and extension program under the control of Auburn is not a vestige of segregation. The state argues that the district court was correct in finding that the federal land grant funds would have gone to Auburn absent the state's discriminatory policies "Auburn was already in existence as a thriving land grant

college when the * * * funds became available" and that this "accounts in large measure for that institution securing the benefits and obligations of those federal funds."

The Alabama case is pending resolution in the Eleventh Circuit Court of Appeals.

Louisiana Case

After the Supreme Court's decision in Fordice, the Fifth Circuit Court of Appeals vacated a October 30, 1990 decision, which had granted summary judgment against the United States and in favor of the State of Louisiana with respect to claims by the United States challenging the dual system in higher education. U.S. v. Louisiana, 751 F. Supp. 606,608 (E.D. La. 1990).

The Court of Appeals remanded the case to the Eastern District of Louisiana "for further consideration in light of The United States Supreme Court's decision in United States v. Fordice. See Opinion And Order in U.S. v. Louisiana, Dec. 23, 1992, at 1-6.

On December 23, 1992, the Eastern District of Louisiana reinstated its prior order in favor of the United States against the state of Louisiana. Accompanying the opinion was an order setting forth the Court's final remedial plan in the Louisiana Case. (The remedial plan had previous been adopted by the court on July 19, 1989, modifying the Special Master's proposed plan. 718 F. Supp. 499).

The elements of the remedial plan is the current direction for desegregating higher education in Louisiana, subject to the outcome of pending appeals. If the remedial plan were implemented today the elements of its implementation would be as follows:

The Court's Remedial Plan. On July 19, 1989, the court adopted a remedial plan, modifying the Special Master's proposed plan. 718 F. Supp. 499. On December 23, 1992, following remand for consideration of the record under Fordice standards, the court re-adopted the plan, with minor changes (see Dec. 23, 1992 Judgment). The plan requires the following:

(A) The four governing boards will be disbanded with 60 days of the "Implementing Date"[6] and their governing authority will be vested in a single governing board (Judgement at 2).

(B) The single governing board, within 120 days of the Implementing Date, will develop a system to establish new classifications and mission for all state institutions (Judgement at 5-8). LSU-Baton Rouge will be the flagship school, with the most graduate and research programs and the most selective admissions criteria (Judgement at 6). Louisiana Tech, Southern-Baton Rouge, University of New Orleans, and University of Southwestern Louisiana will offer significant doctoral and other graduate programs in addition to their four-year undergraduate

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[6] The court stated that the "Implementing Date" will be 35 days after entry of the Judgment or, if the case is stayed on appeal, after final appellate review (Dec. 23, 1992 Judgment at 2 n.2).

programs and adopt selective admissions criteria (Judgement at 6-7). The remaining schools--Grambling, Nicholls, Southern-New Orleans, LSU-Shreveport, McNeese, Northeast, Northwestern, Southeastern -- will have limited graduate and research programs and less selective or open admissions (Judgement at 7). The court said all new admission standards will be implemented for the "Implementation School Year," which the court defined as the school year which occurred in the calendar year which fell 500 days after the Implementing Date (Judgement at 6 n.6). Accordingly, the new admission provisions would not be applied until at least one, and more likely two, full school years had passed.

(C) Within 120 days of the Implementing Date, the State will end its general policy of open admissions, and develop selective admission standards for the five schools identified as doctoral schools (Judgement at 8). The selective admissions at Southern-Baton Rouge will be effective only after three years. Each college will set aside 15% of its admissions for admissions exceptions, with 10% for admission of other race students (whites at PBIs (Historic Black Institutions) and blacks at PWIs (Historically Public White Institutions)), which will be implemented during the Implementation School Year (Judgement at 9).

(D) The single board will implement a system of program review and management. Within 180 days of the Implementing Date the president of the board shall review all course offerings and recommend standards for program consolidation, transfer and elimination, and enrollment levels for each academic program

(Judgement at 12). The board will take appropriate action by the Implementing School Year (ibid). The program transfers to which Grambling and Louisiana Tech have agreed will be implemented by the Implementation School Year (Judgement at 13).

(E) The board will develop budgets for the newly classified schools, including expenditures for improving the quality of the Public Black Institutions (PBIs) whenever fiscally possible, with priority also given to capital needs which might attract other race students, in time for submission of the budgets for the Implementation School Year (Judgement at 15).

(F) The board will develop a program for recruitment and retention of other race students, faculty and staff at all schools within 120 days of the Implementing Date (ibid.), and will set realistic annual integration goals and financial incentives for all schools (Judgement at 17). The court has appointed three people to a monitoring committee, which evaluate all institutions' compliance with the remedial plan and achievement of desegregation goals on a quarterly basis. The committee will report to the single board (Judgement at 17-18).[7]

On January 20, 1993, the Eastern District Court of Louisiana issued an order holding that the factual findings contained in its prior opinion were sufficient to sustain its determination with

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[7] The plan also required the State to organize its two-year community colleges into one system, requires the LSU Law Center to recruit minority students for the next school year, required Southern University Law Center to remain in compliance with ABA standards, and required the State to desegregate faculties and staffs through recruitment of other race employees. Judgement at 13-14.

respect to the state of Louisiana's liability. Order And Reasons, U.S. v. Louisiana, Jan. 20, 1993, at 1. On February 4, 1993, Louisiana filed a motion requesting the court to stay and suspend, pending appeal, of the Judgment and Order entered by the District Court on December 23, 1992 and all previous Judgments and Orders Reimposed therein its order--which practically would cause the state to cease implementing the Remedial Plan. The request for the stay was supported by Governor Edwin Edwards. The DOJ filed an opposition to Louisiana's motion on February 17, 1993. On February 19, 1993, Louisiana's motion was denied by the Eastern District Court of Louisiana. Order And Reasons, U.S. v. Louisiana, Feb. 19, 1993, at. 1.

The State of Louisiana has appealed its case to the Fifth Circuit Court of Appeals, where it contends that the Remedial Plan places the cart before the horse because Louisiana never conceded liability by entering into settlement negotiations with the United States before the Court issued its Order reinstating summary judgment. Louisiana also challenges the summary judgment as improper because they claim there existed a factual dispute with respect to: (1) whether there is a causative link between state policies and racial identifiability at Louisiana colleges and universities and (2) whether those state policies can be justified as educationally sound, among other things.

Mississippi Case

After the Supreme Court's ruling in the Fordice case, the DOJ

sought to get the parties together on the future direction of the case. The parties met on September 8, and October 5, 1992 to talk settlement. No progress was made. See Ayers V. Fordice, Transcript of Proceedings Before the Honorable Neal B. Biggers, Jr. United States District Judge, at Oral Presentation/Status Conference Thursday, October 22, 1992, at 13, 14 (Hereafter Status Tran).

On September 24, 1992, Neal B. Biggers, Jr., United States District Judge for the Northern District of Mississippi scheduled a status conference for October 22, 1992. Each party was asked "to submit . . . its proposed remedies . . . including . . . [1] whether the state should continue to maintain eight universities; [2] whether the state should continue its present admissions policy; [3] whether the state should continue duplicative programs at some of its various universities; and [4] funding and staff for the state universities." Ayers v. Fordice, Order Setting Status and Scheduling Conference, Sept. 25, 1992.

The status conference was held in October 22, 1992. At that hearing the court was "presented [with] the parties' view points concerning the specific course further proceedings [would take]."

At the hearing Alvin O. Chambliss, Jr., counsel for plaintiffs took the "position that the State should continue to operate eight universities." Status Tran. 6. Chambliss also suggested that the Governor of Alabama appoint at least 5 blacks as overseeing governors of the University system. Status Tran. 8. He argued

that scholarship funds should be made available so that white students could attend HBCUs and so that black students could attend HWIs. Status Tran. 10-11. Chambliss informed the court that "the fact of the matter is that by year 2000, if nothing happens, mostly black college campuses are going to be majority white in terms of the [faculty]." Status Tran. 11. Chambliss proposed that the court "leave the black faculty at the black schools alone . . . and concentrate on [the dearth of] blacks in decision making positions [in HWIs]." Status Tran. 11-12. Chambliss's last point was on the inadequacy of funding of HBCUS. Id. at 12.

A DOJ representative informed the court that attempts by DOJ to facilitate agreement between all concerned thus far had failed. Status Tran. 15. DOJ gave a view on "what [they thought] should be in the final plan [although] it is impossible . . . to give a detailed plan proposal." Status Tran. 16.

DOJ continued: "[B]ut things we think must be in the plan would be the following:

"[1.] the people who operate [the educational] system must approach the issues and policies in a non-discriminatory manner.

"[2.] the board [of Governors] must be designated . . .

"[3.] the . . . access for minority students to all schools [is essential] and access for white students to historically black colleges [is essential].

"[4.] the court should require each of the institutions to come up with strategies that they know work best in terms of

recruiting students . . .

"[5.] the admissions standards . . . may determine what kind of faculty the school will be seeking . . . other race faculty members.

"[6.] there is unnecessary program duplication . . . All the court needs to do is require that the defendant immediately produce information showing what programs are offered by each institution.

"[7.] [Regarding Jackson State], Jackson State [should] be comprehensive . . . be on the same footing with other institutions . . . designated as comprehensive schools . . Jackson State should control the City of Jackson in all respects.

"[8.] [the] final plan should include monitoring provisions.

"[9.] [DOJ closed its oral presentation stating, that it thought] "the court and the government and the parties have an obligation to look carefully at any recommendation to close a school, (I think referring to Jackson State, Alcorn and Mississippi Valley) [because] at the present time. . . black schools continue to serve a very vital function of educating . . . minority students, and until [Mississippi] has eliminated discrimination in all respects, and white students and black students . . . have equal opportunity to attend any institution, [DOJ does] not think that the process should start by closing black schools, and, therefore, eliminating, access." Status Trans. 16-21.

Counsel for the State of Alabama seized upon the Fordice case as the basis for the closing of schools, Status Trans. 24. (Fordice had raised the closing question in the opinion.) They then appear

to attempt to base their theory for closing on economic efficiency, perhaps to avoid an unavoidable prospective correct remedy: equalization of state funds commensurate to its past discrimination against students and faculty at HBCUs. Status Trans. 25.

At this hearing (Oct. 22, 1992), Counsel for the State of Mississippi first disclosed a document not before disclosed to any party proposing remedies. It is titled "Defendant Board of Trustees of State Institutions of Higher Learning's Proposed Remedies, October 22, 1992." Status Trans. 26.

Mississippi's plan proposes to allow Jackson State's "unique mission [to] remain urban." Status Trans. 27. Mississippi Valley and Delta State "are proposed to be merged to create a unit of the University of Mississippi to be known . . . as Delta Valley University at Cleveland. Alcorn State University is proposed to be a unit of Mississippi University. Mississippi University for women is proposed to become a unit of the University if Southern Mississippi." Status Trans. 28.

It is clear from the Transcript of the October 22, 1993 hearing that prior to the hearing Mississippi's proposal was neither shared with Chambliss, DOJ, (Status Trans. 68) or Chambliss's co-counsel, Robert Pressman. Pressman, addressing the court said, "We come to court and are met with some charts where the paper is unwrapped in the courtroom, and some fancy computer outlines of a plan, and then a inch thick plan which counsel didn't see fit to give to us in advance so that we would be able to really address the concept that the state had raised." Status Trans. 54-

55, 60 (Jackson State), 62 (Delta State).

Pressman reminded the court that "Mississippi Valley gave 1,295 baccalaureate degrees to black persons, and its going to end . . . Delta State . . . has given 500 degrees to black persons . . . We will show . . . the problem of denying black persons equal access to higher education so that they get degrees in a proportion that is fair to their proportion in the population . . . " Status Trans. 61-62.

Interestingly, the court, itself newly informed about Mississippi's Remedial Plan, seemed to support the plan without any evidence before him to support it. Status Trans. 63. DOJ's legal representative called the proposal "a comedic plan," Status Trans. 67. (Nat Douglas), and argued that "the time has come to speak to this process that the defendants should make available whatever information they used to make these decisions. Status Trans. 72. Chambliss argued that the proposed plan "will substantially kill black higher education in the state . . . I think, Your Honor, that basically we need to decide in this state whether we will educate our black people or send them back to the cotton fields (Applause). 'The Court: All right, There will be order in the court.'" Status Trans. 79.

The court directed all counsel "to submit to the [Mississippi defendants] a list designating what in their view are properly challengeable policies and/or practices of [Mississippi's] system of higher education or 'remnants' of the prior de jure segregated system." These designations were to be sent to the Mississippi

defendants on November 2, 1993. Then the parties were to confer by November 12, 1992 and work out a stipulation to be presented to Judge Biggers by November 19, 1992. Order, October 23, 1992, at 3.

To date, no agreement has been reach in the Mississippi case. However, perhaps after a recently scheduled hearing set for April 12, 1993 is held, we will know more about the direction that the Mississippi case will take.

Fordice-Ayers Postscript 1

Report on April 12, 1993 Hearing to Intervene and File Briefs Identification of De Jure Segregation Remnants to be Examined at Trial and Matters Relating to Pre-trial Discovery (hereafter Transcript)

Days following the Conference at the University of the District of Columbia, a hearing was held before U.S. District Court Judge Neal B. Biggers, in the Northern District of Mississippi (as set forth in the caption). This postscript summarizes the critical issues raised in this hearing.

First of all there were several motions before the Court. One group had filed motions to intervene in the case as interested parties. A second group wished to file amicus briefs (friend of the court).

The Intervenor Group. Mississippi University for Women and the Mississippi University for Women Foundation (MUW and MUWF)(argued that it was concern about the remedy that could affect MUW) Transcript 8-9.

The Amicus Group. Delta State Alumni Association (DSA) stated an interest in filing a brief to draw attention to the "College

Board's proposal" to create "the new university at Cleveland called Delta Valley, and surnamed into the University of Mississippi. DSA argued that such a merger would not save costs and that DSA viewed the merger as closing Delta State. DSA argued that it could not see how "merging Delta State with the University of Mississippi system will in any way eliminate any remnants of de jure segregation...." Transcript 12, 13. For response on this point by the State of Mississippi, see Transcript 50-51 (a merger is a merger).

The Ole Miss Alumni Association requested permission to participate in the proceedings from time-to-time to clarify specialized facts unique to the University of Mississippi, such as the effect that any remedy might have on the dental school. Transcript 14-17. See also Transcript 19-22 (Mr. Montgomery, an alumnus spoke in support of OMAA position, pointing out his concern about a remedy that would transfer the vet school to Jackson State University).

Mississippi University for Women Student Body and Government argued that "Black women and black men and white men were all entitled to an education when MVW was conceived, and it was conceived to fill the role that was then missing for the education of white women. Since the end of the de jure segregation, MUW...has...attracted enough blacks that it has the highest percentage of students who are African American of any historically white institution. It has the highest graduate rate for African American students of any Mississippi's eight institutions of higher

learning." Transcript 23-24.

The Amicus or Intervenor Group. Mississippi Valley State Alumni argued that the College's Board's proposal of October 22, 1992 would alienate MVS: "[W]e run the risk of being alienated, just wiped out completely....if [MVS] closes, I think the devastation in the community will be such that education for black Deltans will not be the same as we have known it...and will never be the same again." Transcript 17-18.

Opposition To Motions to Intervene and to File Amicus

The State of Mississippi

Counsel for the State of Mississippi: "We oppose them..." Transcript 22. Claimed "that intervention would...cause a practical nightmare." Transcript 28. As to the motions to intervene: "[W]e think it would delay the proceedings...." Ibid.

The Department of Justice

Counsel for the United States: "[W]e continue to vigorously oppose intervention by any party petitioner in this lawsuit...With respect to the briefs as amicus, we would request that if the Court would deem that it would be useful to have briefs submitted by these persons, by these entities, that it would be at the remedial stage, limited to providing written comment; that they would have no right to discovery, no right to presentation of evidence, or anything...." Transcript 29.

The Ayers Plaintiffs (Private Plaintiffs)

Preliminary Issues raised by the Court: are private plaintiffs

and the U.S. Government "adverse to one another?" Counsel for PP: "[H]aving disagreements doesn't mean that you are adverse to one another in your claims before the Court." Transcript 31. PP do not support the intervention of MUW. Ibid. "With regard to the other request and these parties indeed, our position is that this is a very important case, that all points of view should be heard, and at the time in which they all express interests; namely, the remedial stage, they should have the ability to file amicus briefs, not exceeding 25 pages...." Transcript at 32.

Disposition of Motions to Intervene or to File Amicus Briefs

On April 13, 1993, the Court denied the petition of MUW Alumni Association and the MUW Foundation to intervene. Beyond that the Court's Order is silent. It neither granted or denied the other petitioner's requests. Ayers v. Fordice, GC75-9-B-O, Order, April 13, 1993.

Issues for Discovery

The Court: "We have what is perhaps the most important issue to be decided before this case is tried and before the parties can even prepare for trial, and that is [1] the identification of the remnants of de jure segregation which the Court will examine at trial for the purposes of determining whether or not they are still encouraging desegregation of the higher education system, and [2] then whether or not, if that be the case, they can be practically eliminated or the education justified." Transcript 34.

At the time of the hearing the parties had not agreed on what

remnants of de jure segregation continue to foster segregation. The State of Mississippi appears to have agreed to eliminate "some of the remnants, not conceding that they continue to foster segregation or that they cannot be practically eliminated or the education justified, but they have agreed to eliminate them...." Transcript 35. The State of Mississippi later attempts to have the burden of proof assigned to plaintiffs: "Now, we have, of course, put before the Court [Mississippi's] definition of a remnant as a policy or practice traceable to or rooted in the unconstitutional de jure past, but before the burden shifts to the State and we conduct remedial proceedings, not only do you have to identify the policy or practice, but that policy or practice today must be presently causing discriminatory effects...The plaintiffs are improperly focusing on present discriminatory affects...They are not focusing on a present policy rooted in the past...." [The Court disagreed with this argument. Transcript at 55]. See inclusive discussion of these points. Transcript 52-55.

The crossroads faced in this litigation is the characterization by the parties of what remnants of de jure and de facto discrimination continue to foster, influence and effect present efforts to eliminate segregation in higher education in Mississippi. This is another way to phrase the issue. What follows is the opinions of counsel on the scope of discovery to ascertain and to fix the facts to answer these issues. Plaintiffs argued for the broadest scope of discovery, and prevailed [See Transcript 69-71], but note the exchange between the Court and

Plaintiff's counsel:

The Court: The Supreme Court listed four areas [of concern (see pp 6-9 of text above)], and they said this is not an exclusive list, but they said these four. It is these four areas are constitutionally suspect. Now you [Plaintiffs] have listed thirty-five areas...[A]re...thirty-five areas...proper for consideration....?" Transcript 39.

"...Mr. Pressman: ...[T]he Supreme Court basically discussed the four areas that were in the briefs cited by the Solicitor General as examples. Beyond that, we simply go to the language of the opinion [which list many other concerns]...So, basically, we find very broad language by the [Supreme] court, and no indication that any particular subject matter area is off limits." Transcript 39-41. (Other Counsel agreed with Pressman. Transcript 47 (Mr. Crenshaw)).

The District Court judge appears to attempt to channel the discovery issues into the four areas listed above (at pp 6-9), apparently attempting to have Plaintiffs to tailor their discovery (the thirty-five areas) as subparts of the four areas. Transcript 42. However, the record does not exact the Plaintiffs. Transcript 48 (The court states that the Supreme Court "succinctly say this is not an exclusive list [that is, the four areas].")

The State of Mississippi attempts to limit discovery on disparate funding of black colleges appears to have been lost. The State of Mississippi argued: "The law does not require...that the predominantly black universities be upgraded as if to be publicly

financed exclusively black enclaves by private choice...We do not see funding alone as a remnant. We certainly recognize the relevance of funding in the provision of resources, as relates to the implementation of any remedy to be provided by this Court..., but the Unites States Supreme Court has already rejected the demand for channeling the money according to predominant racial presence, rejected the request to upgrade cart blanche the predominantly black universities...So, our position on funding would be that it is not a remnant." Transcript 53-57. (But see, Mr Crenshaw's statement: "...the funding for the facilities has to be considered as part of the remedy, an agent of the remedy.") Transcript 62-63.

[Author's note: Crenshaw is right. The State's argument is overbroad, and is more properly stated as rendered previously in the text above at p. 10, footnote 3. The State's claim that "[t]he acute shortage of the available black faculty with terminal degree creating not only a lack of supply but a highly competitive situation" is not only vague, but places it blinders on to the fact that the de jure and de facto system in Mississippi made no historical effort to create a pool of available black faculty. The lack of present supply of black faculty in Mississippi is directly linked with and to the past. This appears to be an effort to reintroduced the neutral principle methodology that the United States Supreme Court rejected.]

The Court rejected the State of Mississippi's effort to limit discovery "whether it pertains to mission statement or funding[,etc.]" So, for that reason, the plaintiffs may proceed at

this time with the conducting of discovery in such areas as you claim are remnants of de jure segregation, which, of course, the Supreme Court said still foster segregation." Transcript 70.

Date Discovery commences: May 1, 1993, The period of discovery is six months. Transcript 81.

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