University of Arkansas at Little Rock Law Review

Volume 30 | Issue 2 Article 12

2008

Cooper v. Aaron: Development and Implementation of the Litigation

Judith Kilpatrick

Cooper v. Aaron: Development and Implementation of the Litigation

Cover Page Footnote

In September 2007, the city of Little Rock — and the entire country — commemorated a crisis of public school integration and race relations that occurred fifty years ago at Central High School in Little Rock, Arkansas. The following is one of six essays which are products of the Ben J. Altheimer Symposium on the 50th Anniversary of the Central High Crisis, held at the University of Arkansas at Little Rock Bowen School of Law on September 20 and 21, 2007. Symposium speakers and participants included nationally-renowned civil rights activists, members of the local judiciary, and local leaders involved both fifty years ago and today in working toward equality between all races and ethnicities.

COOPER V. AARON: DEVELOPMENT AND IMPLEMENTATION OF THE LITIGATION

Judith Kilpatrick[*]

When *Brown v. Board of Education*[1] was decided on May 17, 1954, Wiley A. Branton was a sole practitioner in Pine Bluff, Arkansas. He also was president of the Pine Bluff Chapter of the National Association for the Advancement of Colored People. He was also chair of the Legal Redress Committee for the Arkansas State Conference of the NAACP.[2]

Branton and his colleague, George Howard, Jr., scheduled a meeting on August 6 to explain the *Brown* decision to Pine Bluff's black community. Similar meetings were held across the state. The Legal Redress Committee began working with parents in various communities, including Little Rock, to prepare petitions requesting admission of their children to white schools.[3]

Branton and other members of the committee met with the Little Rock School Board on September 9, 1954, to present the petition and to offer their help in implementing desegregation. They were told that studies would have to be performed before any changes would be made. Their offer of help was ignored.[4]

On May 24, 1955, the School District published a plan for desegregation developed by Superintendent Virgil Blossom. Instead of providing for full desegregation of all schools in the district, it stated that only one high school—Central—would be integrated.

Instead of admitting all black students living in the school's geographic boundaries, school officials required potential students to apply and survive a screening process before some of them would be admitted.[5] Over that

---

* Professor and Associate Dean, University of Arkansas, Fayetteville, School of Law; J.S.D. 1999, L.L.M. 1992, Columbia University, J.D. 1975, B.A. 1971, University of California-Berkley.

1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. Judith Kilpatrick, *The Little Rock Crisis and the Courts: A Forum, Wiley Austin Branton and* Cooper v. Aaron: *America Fulfills Its Promise*, LXV ARK. HIST. Q. 7, 8 (2006).

3. JUDITH KILPATRICK, THERE WHEN WE NEEDED HIM: WILEY AUSTIN BRANTON, CIVIL RIGHTS WARRIOR 64 (2007).

4. Transcript, Hearing Before the Pulaski County School Board Wherein Petitions Were Introduced by Attorneys Representing the Patrons of the Sweet Home and College Station Schools, Regarding Integration, p. 2. Blossom Papers at Box 3, File 2.

5. TONY FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION 16–17 (1984).

summer, Blossom spoke with over a hundred white groups, emphasizing that this plan was the least the District could do and remain within the law.[6]

In late July 1955, the Little Rock NAACP publicly protested the limited nature of the plan and its failure to set a date by which other schools would be desegregated. When there was no response to its protest, the Little Rock chapter voted to file a lawsuit against the School Board.[7]

Wiley Branton was asked to handle the case and filed a complaint on February 8, 1956.[8] The complaint was based on a model developed by the NAACP Legal Defense and Education Fund, Inc. (LDEF) for the purpose of implementing the *Brown* decision. Branton and the LDEF lawyers all signed as lawyers for the plaintiffs.[9]

The case went to trial on August 15 before the Honorable John E. Miller, judge of the United States District Court in Fort Smith, who decided the School Board's plan was a reasonable response to *Brown.* Branton and the NAACP immediately filed an appeal with the Eighth Circuit Court of Appeals in St. Louis, Missouri, which set a hearing for March 11, 1957.[10] By the time of the hearing, the NAACP had recognized the importance of the case. Attorney Robert Carter from the NAACP's New York office shared the presentation with Branton. They lost again.

At this point, the September 1957 date for the limited integration of Central High School was looming. Branton and his clients decided not to appeal their case further. Instead, they waited to see how the School District's plan would be implemented.[11] This ended phase one of *Aaron v. Cooper.* If the District had proceeded with its plan and dealt summarily with the increasingly vocal and violent segregationists objecting to any integration, we might never have heard of Branton again.

Instead, on September 2, Governor Faubus ordered the Arkansas National Guard to prevent entry by the Little Rock Nine (the only black students to survive the screening process and demonstrate the courage to stand up to the segregationists). Angry mobs protested in the streets. The District petitioned the court, asking what it should do.

A newly-assigned federal judge, the Honorable Ronald N. Davies from Fargo, North Dakota, held a hearing the evening of September 3 and ordered that the plan move forward. The students were prevented from entering Central High on September 4. A second request from the School Board to sus-

---

6. Irving J. Spitzberg Jr., *Racial Politics in Little Rock 1954–1964, in* AMERICAN LEGAL AND CONSTITUTIONAL HISTORY 33 (Harold Hyman & Stuart Bruchey eds., 1987).

7. KILPATRICK, *supra* note 3, at 67.

8. KILPATRICK, *supra* note 3, at 71.

9. Complaint, Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956) (No. 3113).

10. KILPATRICK, *supra* note 3, at 75.

11. KILPATRICK, *supra* note 3, at 76.

pend its plan was made on September 5. It was denied after a hearing on September 7.

It was during this period that Branton realized he needed help and asked Thurgood Marshall to join him in the fight. Branton and Marshall, who was Director-General of the NAACP Legal Defense and Education Fund, Inc., spent long days dealing with the court over the next two weeks, trying to get the Nine into school and to keep them there.

Branton later recalled that during the September 1957 crisis, "we were either in court or in conference with people from the Justice Department and others for 30-some-odd consecutive days, and meeting on all kinds of legal situations, from the state court to the federal court."[12]

With favorable decisions from Judge Davies, including one on September 20 ordering Governor Faubus and the National Guard not to interfere with entry of the students, Branton and Marshall succeeded. The students entered the school on September 23, but they were evacuated when local police could not maintain control over the mob outside the building. The students finally entered Central and stayed after President Dwight D. Eisenhower ordered the 101st Airborne to Little Rock to protect them. Even after that, angry mobs made the black students' lives hell—both outside and inside the school.[13] This ended the second phase of *Aaron v. Cooper.*

In January 1958, the School District again requested the federal court's permission to suspend its integration plan, citing the adverse treatment of the black students by some white students and arguing that the presence of the black students in the school made it impossible to provide an education to all students.[14] The Board's lawyers suggested that *Brown* only required that the school district "comply with the constitutional mandate to enact a plan 'at the earliest practicable date,'" which had been done. A delay would not violate the law.

Under law, the "doctrine of impossibility" requires proof of two things: (1) that unforeseeable circumstances justified modifying the Order to proceed with integration, and (2) that it was impossible for the Board to proceed with its plan. The circumstances the Board cited as unforeseeable were "the harassment incidents against the Black students inside the school, the presence of soldiers inside and mobs outside the school, and laws passed by the state legislature in an effort to nullify *Brown*. These had 'made it difficult for teachers to teach and pupils to learn.'"[15]

The Board asked for a delay of two-and-a-half years in implementing the desegregation plan. They never stated what they expected to happen

12. KILPATRICK, *supra* note 3, at 81.
13. KILPATRICK, *supra* note 3, at 78–80.
14. KILPATRICK, *supra* note 3, at 83.
15. Kilpatrick, *supra* note 2, at 14.

during that period to change the situation, although questioning of Wayne Upton, attorney and president of the School Board, indicated that the Board itself did not intend to do anything and was just hoping that Faubus would not be re-elected.[16] The Board's lawyers had to know their arguments were weak and overshadowed by the plaintiffs' position.

The Supreme Court's opinion had stated that "these unconstitutional principles cannot be allowed to yield simply because of disagreement with them."[17] Branton and Marshall used that language to refute the Board's stated concern about the harassment. They also said performance was not impossible, since the Board could request the Court's help via an injunction against the segregationists, as the Hoxie, Arkansas, School Board had done.

The plaintiffs' lawyers acknowledged that the School Board faced big problems, but they argued that the problems did not relieve the Board of its constitutional duty to follow through on its plan. "Such a 'surrender,' they said, would 'thwart the Constitution of the United States and the orders of this Court,' leading to anarchy. And, 'such action would effectively deny plaintiffs and the class they represent constitutional rights heretofore recognized and guaranteed by this Court.'"[18]

After hearing arguments on June 3, the Honorable Harry T. Lemley granted the School District a two-and-one-half year suspension of the integration plan. Lemley defended his decision to newspaper reporters by saying integration was "counter to the pattern of Southern life."[19]

Branton and Marshall immediately appealed Lemley's decision to both the Eighth Circuit Court of Appeals and the United States Supreme Court. Judge Lemley had refused to stay his Order, preventing its effect until the appeal was heard. Little Rock students would be returning to a re-segregated system in the fall unless one of the higher courts overruled Lemley's decision.[20]

The Supreme Court refused to take the case directly from the District Court but hinted to the Court of Appeals that it should grant an early hearing.[21] The Court of Appeals responded, setting a hearing date of August 4. At that hearing, Branton and Marshall argued that confirming Lemley's decision would support mob rule, punishing the black students who had been the victims of harassment. The School Board repeated its arguments at the district court. The appellate court agreed with the plaintiffs and issued its decision overturning Lemley's order two weeks after the hearing.

---

16. Kilpatrick, *supra* note 2, at 15.

17. Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955).

18. Kilpatrick, *supra* note 2, at 16.

19. *Court Halts Integration 2 1/2 years in Little Rock, Cites Public Opposition*, N.Y. HERALD TRIBUNE, June 22, 1958, at 1.

20. KILPATRICK, *supra* note 3, at 84–85.

21. JACK GREENBERG, CRUSADERS IN THE COURTS 236 (1994).

In its opinion, the Court of Appeals agreed that *Brown* did not require an identical desegregation plan from every school district. The Court had allowed local school districts to tailor implementation of desegregation to local obstacles. The appellate court, however, noted "that the actions listed by the School Board and cited in Lemley's decision 'were the direct result of popular opposition to the presence of the nine Negro students.' Thus, the situation was squarely covered by *Brown*."[22]

The chief judge for the Court of Appeals, Archibald K. Gardner, who was the only dissenter from that decision, granted a stay of the appellate decision. That meant that Lemley's order remained in effect and, unless the Supreme Court acted very quickly, the Little Rock system would be segregated in the fall.[23]

This time, it was the School District that filed an appeal. A hearing before the Supreme Court was scheduled for September 11. In anticipation of an adverse decision, Governor Faubus asked the legislature to enact a number of laws that gave him control over the school system. He was prepared to close Little Rock schools and allow them to reopen as private schools, if the Supreme Court required the desegregation plan to continue.[24]

Hard questions were put to the School District's lawyer, Richard C. Butler, by the members of the Supreme Court. In response, Butler argued that it was preferable to deny constitutional rights to a few students in order to provide "full educational opportunities" to the many. He also admitted that the School District had no plans to change the situation for the better during any delay it received. He spoke of the School Board being "caught between two disputing 'sovereignties.'"[25]

The Court's decision affirming the Court of Appeals' reversal of Judge Lemley's order was announced the next day. In it, the Court noted that the School Board, as "an agent of the State," violated the Fourteenth Amendment to the Constitution if it failed to provide "equal protection of the laws." The public's confusion or ignorance of the law did not relieve the state agent of its duty.[26]

The School Board's attorney, Richard Butler, walked a fine line during his argument. Trying not to place blame on Faubus or the legislature, he came close to denying the supremacy of federal law in this area. When challenged by the Court, he backed down.

Faubus might have thrown up his hands and accepted the pronouncement. Instead, he closed the Little Rock high schools and scheduled a spe-

22. Kilpatrick, *supra* note 2, at 18.
23. KILPATRICK, *supra* note 3, at 86–87.
24. *Id.* at 87–88.
25. Kilpatrick, *supra* note 2, at 19.
26. *Id.*

cial election for September 27, at which the voters would state whether or not they favored integration.

In the meantime, he began negotiations to turn the high schools and the teachers over to a private corporation that would operate the schools on a segregated basis. Branton and Marshall asked the district court, where Judge Miller again was presiding over the case, for an order to prevent the transfer of property to the corporation. By the time the hearing on that request occurred, the School District announced it had signed a contract to transfer the buildings to the private corporation.[27]

Branton and Marshall immediately appealed to the Eighth Circuit, asking that the lease be declared void and without legal effect. While this hearing was in session on September 29, the Supreme Court's written opinion confirming its oral decision earlier in the month was delivered.

The Court of Appeals granted the plaintiffs a temporary restraining order. The high schools remained closed. Additional hearings in the Court of Appeals on October 6 and 15 resulted in an order to Judge Miller, requiring him to "'take such affirmative steps' as were needed to accomplish integration." [28]

One would have thought that this ended the dispute. It did not. Judge Miller did not respond until January 9, 1959, at which time he gave the District another ninety days to tell him what it intended to do to comply with the Supreme Court's decision.[29] By January, the board that had guided the School District for the duration of the case had resigned, and a new board, consisting half of moderates and half of segregationists, was in place.

The judge had come up with another way to evade the Court of Appeals order. He interpreted the order as not requiring him to act affirmatively to force the reopening of the schools, but requiring only that, if the schools were reopened, it be on an integrated basis.[30]

Two weeks later, the new board asked to reopen the schools on a segregated basis; the judge refused permission. It was as if the past year had not occurred and no Supreme Court decision applied. Frustrated, Branton and Marshall decided to attack the laws that had given Faubus power to control the schools.[31]

After almost a year's work, the United States Supreme Court found those laws unconstitutional. By that time, however, several white groups had formed to work toward reopening of the high schools. Working on public opinion, they convinced voters to elect a new school board in May 1959,

27. KILPATRICK, *supra* note 3, at 88–89.
28. *Id.* at 89–90.
29. *Id.* at 90.
30. *Id.*
31. *Id.* at 90–91.

composed of moderates who promised to get the schools opened for the fall semester.

Attitudes to desegregation had not changed. There was recognition, however, that if citizens wanted high schools, those high schools would have to be integrated to some extent.[32]

In a reprise of the School Board's efforts in 1957, the screening of eligible black students resulted in only ten being admitted at two white high schools. None of them had been members of the Nine. Again, the plaintiffs had to appeal from a decision by Judge Miller that the school board was acting in good faith. Although incremental gains were made over the succeeding years, the issue was never resolved finally.

Branton remained with the case as a consultant for the rest of his life, but he turned primary responsibility for it over to another lawyer in 1962 when he went to Georgia to direct the Voter Education Project.[33]

32. *Id.* at 91.

33. KILPATRICK, *supra* note 3, at 92–93.