ORIGINAL

In the

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL.,

PETITIONERS,

V.

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.,

RESPONDENT.

No. 78-873

October 9, 1979
October 10, 1979

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Petitioners,	:	
v.	:	No. 78-873
PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.,	:	
Respondents.	:	

Washington, D. C.,

Tuesday, October 9, 1979.

The above-entitled matter came on for oral argument at 2:28 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOSEPH F. BRUNO, ESQ., Assistant Corporation Counsel, New York City, 100 Church Street, New York, New York 10007; on behalf of the Petitioners

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the Respondents

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-873, Board of Education of New York v. Harris, the Secretary of HEW.

Mr. Bruno, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOSEPH F. BRUNO, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BRUNO: Mr. Chief Justice, and may it please the Court: My name is Joseph Bruno, and I am Assistant Corporation Counsel of the City of New York. I represent the petitioner, the Board of Education of the City School District of the City of New York.

This case presents this Court the issue of the proper test of discrimination under a federal grant statute known as the Emergency School Aid Act as well as the proper test of discrimination under Title VI of the 1964 Civil Rights Act, as well as interrelationship between ESAA and Title VI.

It is the position of HEW and the Second Circuit Court of Appeals that the test of discrimination under both ESAA and Title VI is a disparate impact test. The Board's position is that under ESAA and Title VI, the test of discrimination is a constitutional intent test.

A bit about the facts: The ESAA statute sets up

a competition in this country among school districts who seek to apply for a limited pool of ESAA funds of approximately $1.5 billion. Proposals are submitted to HEW for grading on programmatic merits and a program would be funded if it came within the range of programmatic merits except if it was found to be ineligible under the provisions of section 1605(d)(1) of the ESAA statute.

Suffice to say that the Board of Education submitted a proposal, was found to have sufficient programmatic merit, was denied funding under section 1605(d)(1)(B) when HEW found that certain of the New York City high schools were racially identifiable based upon staff assignments.

QUESTION: Counsel, is 1605(d)(1)(B), the statute you question, does that involve the proposal submitted for funds or does it involve the practice, the existing practices of the school board submitting them?

MR. BRUNO: It involves the existing practice. It was a basis for finding ineligibility. That is the ineligibility section of the ESAA statute. It does not relate to the individual proposals. The proposals are apart from it. This is a basis upon ineligibility. It talks about current practices or activities.

The finding of ineligibility was based essentially on a statistical report done by HEW in relation to a 1976

OCR non-compliance letter. The validity of that determination of ineligibility was the subject of at least two reviews at HEW, was conceded by the District Court for the Eastern District of New York before Judge Jack B. Weinstein, and appealed to the Second Circuit.

Now, the circuit held that ESAA itself requires application of an impact test in determining eligibility for funding on the issue of staff assignments. The Court of Appeals also held that Title VI incorporates an impact test and therefore that the staff assignment policy of the Board also violated Title VI. Let me deal first with the ESAA statute.

The subdivision I have indicated is section 1605(d)(1)(B). It states: "No educational agency shall be eligible for assistance under this chapter if it has as of June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in ...demotion or dismissal of instructional or other staff, minority staff in conjunction with a desegregation plan" --

QUESTION: How do you get away from the language "which results"?

MR. BRUNO: We do not, and we concede with respect to demotions and dismissal--the issue in this case is assignment of staff -- with respect to demotions and dismissals, we concede that is a disparate impact test for

a very clear rationale, and Congress so stated. I will get to it very shortly.

With respect to the assignment of staff, however, the language is "otherwise engage in discrimination." HEW contends that this language of the statute makes it obvious that the test applicable, which we concede is the disparate impact to the motion to dismissal, is the same test that should be applicable to the assignment of staff. I would submit that the Congress used very different terms when it dealt with demotions and dismissals as opposed to assignment of staff.

I would also note that in this section 1605(d)(1) which is the entire ineligibility section here, five activities that render a board ineligible, within this section it uses discrimination twice. It uses it in subdivision (d) which deals with avoidance of minority group participation in curricular or extracurricular activities so as to discriminate against them -- that is the other place that it is used. HEW concedes that there that is an intent test. We say that if Congress knew what it was talking about with subdivision (d) it certainly knew what it was talking about with respect to subdivision (b) dealing with staff assignments. HEW could do nothing with that.

I would note that the real issue in this case is

what did Congress intend when it used the word "discrimination." HEW contends that the legislative history is extremely relevant, yet they totally ignore perhaps the most relevant legislative history in dealing with the meaning of the word "discrimination." They say not one word in their brief about Senate Committee Report 92-61 which states in essence that one and only one practice in subdivision 6105 (d)(1)(B) is presumed to be discriminatory if disparate impact exists.

That speaks directly to subdivision (B). Subdivision (B) has two types of activities, demotions and dismissals and for the sake of this argument assignment of staff. They are two very distinct clauses in it. That committee report makes it clear that one and only one is presumed to be discriminatory.

HEW ignores the language later on in that same Senate committee report where it states, "The phrase disproportionate to demotions or dismissals is not modified nor in any way diminished by the substantive phrase or otherwise engaged in discrimination in the assignment of staff." These are two separate and distinct clauses.

QUESTION: Well, you wouldn't contend, would you, that the rulemaking authority of the agency charged with carrying out the act is necessarily bound to follow the committee reports of one of the Houses of Congress.

MR. BRUNO: Oh, no, they are bound to follow the intent of the legislature in enacting the statute. We say the clear intent of the legislature in enacting this is to require an intentional discrimination test for assignment of staff. Let me tell you why.

QUESTION: But the reasoning of your last argument, as I understood it, was your reliance on the Senate committee report.

MR. BRUNO: My last argument was the reliance on the Senate committee report indicating what the intent of the legislature was in passing this particular statute and this particular section.

Let me say further, beyond that, there is other ample proof of what the Congress was talking about when it used the word "discimination."

QUESTION: I don't doubt that it is a factor, but I got the impression that you were saying that the agency charged with making the rule can never go against the language in a committee report.

MR. BRUNO: Absolutely not, I am not saying that, but I am saying that that language in that committee report, taken with the legislative history, indicates the intent of the discrimination test for this section of the statute which is the eligibility section which is at issue in this case.

In 1972, the language of the section was enacted, the meaning of the word "discrimination" as discussed by Congress, it was very clear what they were talking about. They were talking about Swann, they were talking about Brown, they were talking about intentional segregation, de jure segregation, and they were enacting this section. In fact, Rep. Dellenback said ESAA does not alter in any way the legal aspects of desegregation, its purpose is to help school districts see that existing law is enforced.

Senator Mondale, in discussing this, talked about Swann and said the only actual discrimination we have is de jure intentional segregation. HEW argues that it is equally plausible that discrimination can mean disparate impact and they allude to Title VII. They ignore, for one, the discussion of desegregation and the cases that we were talking about, of Swann and Brown. They ignore that Briggs had come down in March of 1971 and not one statement about Briggs in the Title VII case. They ignore that in the third section, 1605(d)(1), discrimination is mentioned twice. They can see in subdivision (d) that it is an intent test, and now they wish to ignore that.

QUESTION: Mr. Bruno, was there some -- Title VII was already on the books?

MR. BRUNO: Oh, yes, 1964.

QUESTION: And was there some comparison with Title VII as to what the standard was?

MR. BRUNO: Are you talking about HEW?

QUESTION: No, in the passage of this act. This is --

MR. BRUNO: Oh, yes, absolutely, and I will get to that if you would like.

QUESTION: Okay. In your own time.

MR. BRUNO: All right. Let me just go into the rationale for the demotion and dismissals test.

QUESTION: Before you go to that, Mr. Bruno, you two or three times mentioned the language in subdivision (d), but there they expressly use the intent language in order to avoid, so that is not saying -- it is not fair to infer that whenever they use the word "disciminate" thy had an intent test when they spelled it out in the --

MR. BRUNO: Your Honor, they use the word "discimination" and we think that it is extremely important that we use that. Let me talk a bit about the language of that subdivision (d) --

QUESTION: Wouldn't you agree that in order to avoid, it is pretty clearly intent language?

MR. BRUNO: Yes, we agree that that is an intent standard. We also feel that the (b) section is also. They

rely essentially on the word "otherwise," if you look at their brief. They rely on the use of the word "otherwise" to indicate that the test used for demotions and dismissals should be the same test used for staff assignments and they say "otherwise" denotes commonality or similarity. They say it is obvious from using the word.

Well, I just did very little research on that and looked inthe dictionary and the word "otherwise" does not mean commonality or similarity, it means contrast. Now, it could mean that and I would not say that it could not mean that in the context of this statute, but I think if we look at how it was used here and if we consider -- if Congress wanted to say demotions and dismissals, the same test applied to demotions and dismissals and used the same test, all they would have to say is disproportionate to demotions, dismissals, assignment of staff, hiring and promotions. They didn't do that. They broke this up in the legislative history.

To get back to Mr. Justice Rehnquist, that is why I cite Senate committee Report 92-61, because I think that points out that they were talking about two separate clauses.

The rationale for the disparate impact test for demotions and dismissals is very clear. HEW ignores what we say about this in their brief. Senate committee Report

92-61 points out that Congress was concerned that the districts at this time that had desegregation orders against them were demoting and dismissing black principals and staff in the South, and what Sanator Mondale said during the debates was that there have been wholesale firing of black teachers and principals in the South in conjunction with desegregation orders. So when they passed this section dealing with demotions and dismissals, a disproportionate demotions and dismissals in conjunction with desegregation order, so the rationale is very clear.

QUESTION: Mr. Bruno, is it your submission that just standing alone the phrase "practice discrimination" implies intent?

MR. BRUNO: The word "discrimination" as it was used there, which we indicate --

QUESTION: If it is unlawful to practice discrimination --

MR. BRUNO: Yes.

QUESTION: -- do you say, without reference to anything else in the statute, that that implies intentional?

MR. BRUNO: In that statute we believe it does. We believe it does.

QUESTION: Well, it is just a matter of meaning of words?

MR. BRUNO: Yes.

QUESTION: The practice of discrimination would imply intent.

MR. BRUNO: And I would say not only the meaning of the words but the juxtaposition in that statute, the way they use them. When they want to talk about disproportionate disparate impact test, they use the term disproportionate. They changed the term and they could very easily have kept that term to deal with the remaining elements.

HEW would have us believe that all they are really doing there is saying disproportionate demotions or dismissals and all the rest follow that test. For one, it doesn't read that way and I say it is illogical. It is not what they were doing. They use discrimination twice.

HEW relies on another section, and so does the Court of Appeals in finding that a disparate impact that applies to ESAA eligibility, they rely on section 1602(a) of the ESAA statute. At the time that ESAA was introduced, there was considerable discussion in Congress about doing something about de facto segregation. They wanted to do something but they realized that the decisions of this Court and elsewhere were prohibiting them from doing something about de facto segregation.

So what they did was they passed ESAA. They said if you want ESAA money, in order to be eligible you

must establish that you are implementing a court ordered desegregation order or you are going to do it voluntarily. What were they trying to do? They were trying to do away with de facto segregation by offering a carrot to districts they could not get after the courts, but saying do away with de facto segregation and we will offer you this ESAA funding.

Section 1602(a) states -- and so much is placed on this section, there is so much discussion in HEW's brief and in the Court of Appeals -- it states essentially, "that guidelines and criteria of ESAA be applied uniformally without regards to the origin of cause of segregation." What that means is that ESAA money be made available to districts regardless of whether it is de jure or de facto segregation, go out and do something, it was broadening these eligibilities. They would have us believe that 1602(a) meant a disparate impact test for ESAA eligibility. Well, if they had meant that, that at least one element of ineligibility in subdivision (b) knocks that logic out totally.

I would like now to get to the Title VI discussion. Perhaps the most -- we feel that perhaps the most important and significant error in the opinion of the Court of Appeals was its failure to assess the impact of the Bakke decision on the standards of discrimination applicable under Title VI.

The Court cited Bakke in its Title VII language but at least I think in our petition for cert inexplicably they said nothing about the Bakke case with respect to Title VI. Instead, they cited Lau v. Nichols. The Court of Appeals relied on Title VI as an additional basis for finding that the disparate impact test applies to ESAA eligibility.

HEW has determined that Title VI is not an issue. I say it is a rather cavalier determination because in our petition for cert, perhaps the most important and perhaps our strongest point was the Court of Appeals failure to even note the Bakke decision in discussing Title VI.

Title VI, whether it is the standard for ESAA or Title VI is the standard establishing what is discrimination we say in this context, but whether it provides the actual standard for ESAA eligibility or not is certainly interrelated, and let me explain why.

The Court of Appeals said it was. Their language says that it is. The statistics upon which the Court of Appeals and HEW relied in finding the Board ineligible was in Title VI non-compliance letters. Title VI is a major enforcement now for all federal funding. ESAA is incorporated through a series of amendments to the Elementary and WSecondary Education Act of 1964. Title VI

enforces that act and the procedural aspect of enforcement is codified in Title VI.

Secretary Finch during the ESAA debates said, when asked whether a district would be eligible for ESAA funding and it was discriminating in the assignment of teachers, he stated that such a district would not be eligible because it would be violating Title VI.

The Second Circuit in a later decision cited in our main brief, Parents Association of Andrew Jackson, has now said -- I will read it: "We think that Title VI does not authorize federal judges to impose a school desegregation remedy where there is no constitutional transgression -- i.e., where a racial imbalance is merely de facto."

So even the Second Circuitin issuing this decision was wondering if they did the right thing. They say the continued viability of Lau is suspect and they are waiting this Court's consideration perhaps in this case or another case.

The Second Circuit in the Jackson decision went into a bifurcated view of Title VI. It is in our brief and I really don't think I should go over it in any great detail. But what it did was it went through such a tortured reasoning of Title VI to find that in this context, in this very case that a disparate impact test could apply

and likened it to Title VII which is not. It did that because it felt that Title VI was extremely relevant, the test was extremely relevant to what the test for ESAA eligibility is.

This is a desegregation case. Even under the Jackson decision of the circuit, we would fall within the intent test that they have indicated.

The appropriate test we say for finding discriminatory intent was set out in the Arlington Heights case. HEW relied on two elements. They used a foreseeability test, citing to the Hart case in the Second Circuit, and on Swann they relied, some language in Swann.

As this Court has recently held in the Feeney case and in Columbus Board of Education, forseeability is one element in establishing intent. It is not in and of itself sufficient to establish intent.

Secondly, I would like to note that even the circuit, the Second Circuit in the Jackson case has some doubts about the viability of the Hart case that it relied on.

Lastly, I would like to note that the Swann case relied on by HEW in its finding of ineligibility for the Board of Education cites this language: "Disparate racial composition of staff to establish a prima facie case of equal protection of violation." Well, I would

say that is somewhat disingenuous to us that clause because in Swann you have a situation where you had de jure segregation and, yes, once you had a prior finding of de jure segregation, then you could use such a test to perhaps imply intent at a later time. Keyes makes that eminently clear. In New York City we had no finding of intentional discrimination.

Your Honors, I would like to ask the Court to have an understanding of the ESAA statute, that ESAA was intended to make money available to districts that were experiencing de facto segregation. What else would it be for? It was to assist in doing that, in eliminating de facto segregation. HEW argues in their brief that the solution adopted in ESAA was to employ the carrot approach to encourage the voluntary elimination, reduction or prevention of minority group isolation. They then continue: "It seems evident that with such a starting point, it would make no sense to grant funds to school districts that, although not violating the Constitution, were maintaining a segregated system." The logic is incredible to me.

That is what this is all about. I thought the money was to be made available to districts that had de facto segregation. That is what the intent is all about. They would deny it to the very districts that have the

type of segregation that this money is intended to work on.

We have an extensive program in New York. We are ready to go ahead with that program. HEW has taken a course that we are not eligible here, we are not eligible under the following year. I say that what they are doing is frustrating the legislative purpose, the clear intent of the legislature. Their brief doesn't deal with this. Their brief deals with virtually nothing with respect to the legislative history. It talks a bit about 1602, it cites no cases except for the Aspira case, and I think they think that -- if in fact they think it is all right and they want to interpret the legislative intent their way, that is sufficient. I think they have to look a little more closely to what Congress intended.

QUESTION: What do you do with this statement with section 1602(b) when you are making your Title VI argument --

MR. BRUNO: 1602(b) --

QUESTION: -- where it says that the guidelines and criteria under Title VI shall apply evenly throughout the country, regardless of whether it is de jure or de facto.

MR. BRUNO: Right. That is the Stennis amendment. That is part of -- we have an argument inour brief about this Stennis amendment. Senator Stennis put an

amendment on the floor of Congress which was later adopted and became section 1602(a) and 1602(b). What Senator Stennis was attempting to do was to make a police statement to perhaps the nation, to perhaps the Congress, perhaps this Court. He wanted to see something done about de facto segregation. He was saying essentially that the South was being burdened.

QUESTION: Well, if he was saying that Title VI-- if Congress was saying that here on this is what Title VI would mean --

MR. BRUNO: I don't think it --

QUESTION: -- that Congress was saying that --

MR. BRUNO: I don't think it was saying that.

QUESTION: -- at least five people in Bakke were a little off base.

MR. BRUNO: I understand that. But what he was saying was this is simply a policy statement. I think it is very clear from his own language -- he said why should not Congress light one little lamp --

QUESTION: He said it but this is in the act.

MR. BRUNO: I understand.

QUESTION: It isn't Senator Stennis. This was adopted by both Houses of Congress.

MR. BRUNO: I understand.

QUESTION: And it was signed by the President.

MR. BRUNO: I think it is no more than a policy statement and I don't believe it had any other action-ability. I don't believe that Congress intended it to do anything other than -- you have to look at the legislative history to get that and you get it very clear from the discussions of Senator Javits.

QUESTION: Well, you say the holding in Bakke is just to the contrary.

MR. BRUNO: Yes.

QUESTION: About Title VI.

MR. BRUNO: Yes, and I say that that portion of the ESAA statute is no more than a policy statement, as is section 1602(a). If 1602(a) means anything, it means to broaden ESAA eligibility.

In the end, I would ask this Court --

QUESTION: When you say to broaden ESAA eligibility, you mean to broaden it not only to cases where there was de facto segregation but where there was de jure segregation.

MR. BRUNO: Oh, yes -- actually the other way, I would say, clearly for de jure but certainly to broaden it to do something about de facto segregation. I think that was the clear intent of Congress. I don't think there could have been any other intent.

QUESTION: Then why would Senator Stennis be

putting it in?

MR. BRUNO: Well, Senator Stennis' remarks are very clear. He was attempting to light one little candle. He wanted to go on record -- to be honest, I think he wanted to go on record in an enactment of Congress to say something about doing something about de facto segregation.

QUESTION: But you would think that a Senator coming from a state where there had been a history of segregation by law and clearly de jure segregation would be urging that schools guilty of de jure segregation be eligible for this aid, not only schools just guilty of de facto segregation.

MR. BRUNO: You see, when he initially submitted the Stennis amendment, he included ESAA, Title VI and section 182 together. I think he was attempting to sensitize the Congress and the nation and I would say this Court to do something in the future about de facto segregation. I think he was clearly just attempting to make a policy statement. I do not know what else he could have been attempting to do. I think he may also have been trying to frustrate -- the way he presented it, I think he was trying to frustrate the use of Title VI because he realized what the law was and he was attempting to put Title VI in the same box with ESAA. ESAA could he used against de facto and de jure segregation, but the way he

presented it, it included ESAA, Title VI and section 182 altogether. They used the same language. Congress in the conference committee broke that out -- I think they broke it out because clearly ESAA could be used against de facto and de jure, but Title VI could not.

Your Honors, I would like to reserve my remaining time for rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. McCree.

ORAL ARGUMENT OF WADE H. McCREE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. McCREE: Mr. Chief Justice, and may it please the Court:

We understand that petitioners do not contest the substantial disproportions in the assignment of full-time minority teachers; further, they do not deny that the schools were statistically racially identifiable as a result of the disparities in staff assignments.

They argue that the statute and regulations must be construed to require the Department of Health, Education, and Welfare to establish that the disparities resulted from purposeful or intentional discrimination in the constitutional sense.

Although on remand, the Department of Health, Education, and Welfare found the petitioners' teacher

assignment policies were unconstitutional, and the District Court affirmed, we do not have to decide we submit whether the administrative record supports that finding because the Court of Appeals expressly declined to address that question.

Also we need to decide whether the Court of Appeals' dictum about the sufficiency of an objective test for a violation of Title VI of the Civil Rights Act of 1964 is present. The regulation, 45 Code of Federal Regulations 185.43 --

QUESTION: Mr. Attorney General, what if we disagreed with you or agreed with the submission of your friend here that this statute incorporates the constitutional test?

MR. McCREE: Well, we submit that it does not incorporate the --

QUESTION: I know you do, but what if we agreed with him? What if we agreed with him?

MR. McCREE: I think if this Court agrees with him, then its course would be to remand this to allow the Court of Appeals for the Second Circuit to address the question of whether there is a constitutional violation shown on the administrative record. And we think it does but we don't propose to argue it.

QUESTION: We would then also -- well, I will

put it this way: What if we agreed with you, is there any claim in this case that as construed to cover merely impact, this particular statute is unconstitutional because it is --

MR. McCREE: We don't understand the petitioner to make that contention.

QUESTION: Does this statute rest on the spending power or does it -- is it commerce or Fourteenth Amendment or does anybody know?

MR. McCREE: Well, I think it rests certainly on the spending power. It might rest on the implementation of the Fourteenth Amendment, but I don't think we need to decide that either.

QUESTION: Well, if it did it is running against the state and then you may have a little problem on it.

MR. McCREE: There might be a problem there. I would like to suggest that if Congress, for example, thought that it would be good to promote foreign language instruction in public schools, it could appropriate special funds for the purpose of encouraging public schools to inaugurate or strengthen existing foreign language programs and it could provide for certain qualifications and for certain disqualifying features. For example, it might say that a teacher to whom the language to be taught is not a native tongue may not participate in this program, and I suppose then we would just look to see whether the statute

was followed in the particular case and whether the regulations promulgated to enforce it were authorized by the statute.

I think that is exactly what we have here.

QUESTION: General McCree, your hypothesis that Congress is not directing the state or the school to have foreign language instruction, it is simply offering financial aid if the state chooses to have it.

MR. McCREE: Well, as we see this, Mr. Justice Rehnquist, the Congress is not directing the states to participate in this program; as my brother, Mr. Bruno, has suggested, this is a carrot on the stick. If the state wishes to do so, it may do so, but if it does it may not be disqualified as provided for in 1605(d) as we urge.

The regulation clearly makes the school board ineligible if it has assigned its teachers "in such a manner as to identify any of such schools as intended for students of a particular race, color or national origin." We do not understand the petitioners to challenge at all the determination that these schools are so identifiable, so we are right at the statute.

We submit that the Congress showed that it knew how to require unconstitutional or purposeful discrimination when it wanted to, and we refer to section 1605(d)

where in response to a question from the Court, my brother sought to make the point that discrimination there was purposeful and indeed it is because it says in order to avoid the participation of minority group children.

MR. CHIEF JUSTICE BURGER: We will pick up there at 10:00 o'clock in the morning.

(Whereupon, at 3:00 o'clock p.m., the case was recessed, to reconvene at 10:00 o'clock a.m., on Wednesday, October 10, 1979.)

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