The original documents are located in Box C42, folder "Presidential Handwriting, 6/22/1976" of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

June 22, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: JIM CANNON

FROM: JIM CONNOR JEC

SUBJECT: Memorandum from Secretary Coleman re: Busing

The President reviewed your memorandum of June 21 concerning Secretary Coleman's memorandum on the Attorney General's Desegregation Bill and approved your circulating it to the Attorney General and Secretary Mathews.

Please follow-up with appropriate action.

cc: Dick Cheney

THE WHITE HOUSE

WASHINGTON

June 21, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Memorandum from Secretary Coleman Re: Busing

Attached is a memorandum from Secretary Coleman commenting on the Attorney General's proposed legislation to limit the remedial authority of Federal courts in school desegregation cases. In it, the Secretary expresses his strong opposition to the legislation, which he views as a retreat from existing constitutional doctrine in the school desegregation area, and urges that it not be submitted to the Congress.

Secretary Coleman has also requested that a copy of this memorandum to you be circulated among other Members of the Cabinet.

However, the nature of his memorandum is such that I do not feel I should circulate it without your authority.

_____ Circulate to Attorney General Levi and Secretary Mathews

_____ Do not circulate

THE PRESIDENT HAS SEEN

THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

June 21, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: William T. Coleman, Jr.

SUBJECT: Attorney General's Desegregation Bill

There is no level at which this bill can be condoned. Its submission has the potential for great mischief, in that it will raise false hopes in, and stiffen the resolve of, those who would violently or otherwise resist judicial desegregation orders. It also seeks to establish special rules for Blacks who especially need constitutional rights and this is particularly offensive because the Department of Justice is the leading contender for another rule of law when Blacks are not involved. In addition, I do not feel that what the bill seeks on a policy level to do is consistent with what I believe is the position of the Department of Health, Education, and Welfare. Finally, on a technical level, the bill, with all due respect, is confusing and clumsily drafted. If enacted, it will impose on litigators and trial judges unworkable standards and burdens of proof. It is unconstitutional in at least four respects.

I shall concentrate, however, on four major respects in which the bill seeks to roll back existing constitutional doctrine and on the fact that it will make one rule for Blacks and another for all other litigants.

1. The bill would limit judicial relief to those "particular schools" whose racial composition has been affected by intentional discrimination, and within those schools, to the correction of only that amount of racial imbalance that can be shown to have resulted from such discrimination (p. 8). There are two problems with

this. The first, as anyone with an ounce of trial experience will recognize, is that it will pose impossible burdens on lawyers (for both sides) and courts alike. The apparent attempt to place the burden of going forward on the causal issue on the school board (p. 9) will not simplify matters -- the standard is unworkable in any event -- and in addition is entirely negated by the subsequent declaration that no presumption of causation is to be drawn from a combined showing of racial imbalance and intentional discrimination (pp. 9-10): if those two together don't make a case, obviously nothing can.

The second problem, of course, is that the bill in this respect importantly cuts back on constitutional holdings of the Supreme Court. The Court has indicated repeatedly that where a school district is shown to have engaged in intentional segregation, the constitutional mandate will not be satisfied until there is "a unitary system": for years the remedial focus has been on the system, not on the individual school, let alone on the mere correction within the individual school of that incremental amount of imbalance that can be shown to have resulted from unconstitutional motives. The point, as you know, was made entirely clear in Keyes v. School District No. 1, 413 U.S. 189 (1973), where the Court indicated that a showing of intentional segregation in one section of Denver supported a city-wide remedy. The Court had two strings to its bow in Keyes: first, the limited showing was enough to justify classifying the entire district as a dual, segregated one which had to be made unitary, and second, "common sense dictates the conclusion" that officials who intentionally segregate in one part of a school district are similarly motivated as regards their actions in other parts, even though the plaintiffs are not able directly to prove it elsewhere. This bill would deny that obvious common sense.

The bill does nod to the demands of reality and the Constitution when it relieves the focus on particular schools where such focus proves "not feasible" (p. 8). But this is only a nod, clearly insufficient in both respects. In the first place, there doubtless will be occasions on which judges will refuse to make a finding of infeasibility. Some judges are not too bright; others are less than wholly sensitive to racial segregation claims; and still others, quite understandably,

will assume that the Attorney General and the Congress did not intend (no matter what common sense might suggest) the proviso to be universally applicable and will therefore seek at least some occasions on which to refrain from invoking it. But even assuming the proviso is widely or even universally invoked the findings that school-by-school causal breakdowns are "not feasible" become the order of the day, the practical and constitutional problems are not solved; such a finding serves only to remove the "particular school" limitation on relief. It does not purport to alter the more general limitation,[1]/ to the effect that correction must be made only to the extent that "the overall pattern of student concentration" throughout the district has been affected by intentional segregation (p. 8), and the incredible proof problems that more general limitation will entail. Nor, obviously -- because of the retention of the general limitation -- will this proviso, even assuming intelligent application, even begin to satisfy the demands of Keyes.

2. The bill would limit busing orders to three years, extendable under certain circumstances to five (pp. 11-12). No point to this, other than political expediency, is even hinted at: it is plainly arbitrary and will often fail to satisfy the constitutional requirement of a move to a unitary system. The Attorney General appears to regard busing as a criminal sentence rather than a remedy, with a single generation of students (of all races) being sacrificed as penance for the earlier misdeeds of the school board. The punishment having been thus served, things can revert to the status quo.

3. The bill would limit judicial relief to that racial segregation which is inflicted by school

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1/In fact, the bill becomes entirely unintelligible at this point. Within a district, it makes no sense to speak of imbalance except insofar as the racial percentages in one school vary from those in another. The more sensible course would have been to relieve the general limitation -- to correction of only that incremental amount of imbalance that can be shown to have resulted from intentional segregation -- when it became infeasible. The Attorney General must have realized, however, that in the hands of an intelligent judge that would gut the bill entirely, and therefore settled on an unintelligible compromise.

officials (thereby excluding, for example, a case in which there has been intentional segregation by housing officials applying a law which requires racial housing segregation, which in turn has resulted in imbalanced schools.) This result is not apparent on a first reading of the bill,[2] but it is clear nonetheless, for two independent reasons. The first is that racial intent on the part of officials other than school officials must be proved "on the basis of evidence other than the effects of /their/ acts or knowledge of such effects alone . . ." (p. 6). Presumably, as regards nonschool officials (why the difference?) a virtual confession of racial intent (not just knowledge) is needed. Surely the Attorney General is aware of what that means: even Gomillion v. Lightfoot, 364 U.S. 339 (1960), perhaps the clearest case of nonexplicit but intentional racial separation in history, involved only an (unavoidable) inference from effect. Second, "unlawful discrimination" is defined as action which is "intended to discriminate against students on the basis of their race . . ." (p. 5, emphasis added). Obviously, an intent on the part of nonschool officials to discriminate against minority students will not be demonstrable.[3] What will be demonstrable, at most, is an intention to discriminate against minority persons generally: the effect specifically on students will be derivative.

4. The Department of Justice has been the most successful exponent of the theory in the Courts that

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2/ Apparently officials other than school officials are subject to section 6 but not to section 5 (see p. 6). What that means is not clear, since the difference between sections 5 and 6 never entirely clarifies. But it doesn't matter, since, for the reasons discussed in the text, the acts of officials other than school officials are practically exempt from the entire bill in any event.

3/ There is an added problem here. Taken seriously, the definition resurrects Plessy v. Ferguson: one apparently has to show not simply an intention to segregate on the basis of race but rather an intention comparatively to disadvantage minority students.

once it is proven that a corporation has violated the antitrust laws the remedy can involve parts of the business which were acquired in legal ways which did not violate the antitrust laws. See, e.g., United States v. United Shoe Machinery Corporation, 391 U.S. 244 (1968); United States v. U.S. Gypsum Co., 340 U.S. 76, 88 (1950); and United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724 (1944). The same rule applies in reapportionment cases and in unfair labor practices cases. In fact, the novel concept advanced in the bill would apply only to racial segregation cases. This is not only offensive to those who believe in the Constitution but itself is unconstitutional.

In at least four respects, therefore, the bill would roll back the existing demands of the Constitution. The Attorney General's theory, apparently, is that Congress can control the jurisdiction of federal courts and thereby deprive them of constitutional remedies they have been invoking (see p. 3). But it is one thing to deprive a court of jurisdiction over a class of cases entirely, and quite another to prescribe to it what it can and cannot decide and order in a case over which jurisdiction is otherwise preserved. See, e.g., United States v. Klein, 13 Wall. 128 (1872); H. Hart & H. Wechsler, Federal Courts 316 (2d ed. 1973). In particular, Congress' control over the jurisdiction of federal courts cannot constitutionally be invoked intentionally to deprive litigants of rights to which the courts have found them to be constitutionally entitled. See, e.g., Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1307-08 (1970); P. Brest, Processes of Constitutional Decisionmaking, chap. 15 (1975). And even assuming it could get away with it, this Administration dedicated to restoring confidence in government, simply should not be attempting by statute to deny recognized constitutional rights.

Finally, the bill, if enacted, would destroy one of the high moments of U.S. history, namely how through the law the white majority recognized the legitimate demands of a discrete minority and under the leadership of courageous federal district judges brought about the changes which have helped this country to be no longer divided on racial grounds.

William T. Coleman, Jr.