The original documents are located in Box 6, folder "Busing" of the John Marsh Files at the Gerald R. Ford Presidential Library.

September 19, 1975

MEMORANDUM FOR: THE RECORD

FROM: JACK MARSH

SUBJECT: Senator Bill Roth re Busing

Senator Bill Roth called today in reference to the busing matter.

He is suggesting a two-step approach to this.

Step One would be a White House Conference to discuss the matter. He points out that views on the subject have changed and as an example, Edith Green has changed her view as has the individual named Coleman, who made many of the studies on busing which had had considerable impact earlier.

Step Two involves the Federal courts. He points out there is now a case in the Federal District Court in Delaware in the appellate procedure on the busing issue. He urges that the Administration intervene as a party to this suit and requests the Supreme Court consider it immediately. It is the Senator's suggestion that the brief that we would file in that suit would be a very comprehensive, detailed explanation of the situation nationally, and point out the whole history and problems associated with busing.

He envisions that the two steps would be taken in coordination and that at the White House Conference the group would be advised of the action of the Administration in reference to the subject.

He also cautioned that the President should try to retain his flexibility on a Constitutional Amendment. Roth says that several years ago he was also opposed to a Constitutional Amendment approach, but that he is becoming of the view that this is the only way to solve the situation. Therefore, he may

himself begin to push for an amendment and he indicates that he believes that the President would be in the best position if he can retain some flexibility on this subject, rather than coming down against the Constitutional Amendment approach.

JOM/dl

THE WHITE HOUSE

WASHINGTON

January 16, 1975

MEMORANDUM FOR: RUSS ROURKE

FROM: JACK MARSH

Study carefully the attached material on Presidential Executive Order, School Desegregation.

I am going to staff it to Buchen for his opinion and recommendations.

R—

Prepare memo to Phil B, or call Jones & ask him to refer to Phil — It is really a legal ques.

M

[see case file in box 74 "Buchen, Philip, 1/75"

THE WHITE HOUSE

WASHINGTON

June 1, 1976

DECISION

MEMORANDUM TO THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Alternatives to Court Ordered Busing

PURPOSE

To offer for your consideration possible alternatives to court ordered busing which the Federal government could make available to a community seeking remedies to school segregation.

ISSUE

Busing has become the most controversial remedy ordered by the Federal courts to facilitate desegregation.

As an appropriate remedy to desegregate, busing was first affirmed by the Supreme Court in 1971, 17 years after the Brown decision. A chronology of the major school desegregation decisions is at Tab A.

The school bus started to become a major element of elementary and secondary education in the 1920's as consolidated school districts replaced the little red school house. Today, more than 21 million school children, 51% of the total school enrollment of 41 million, are bused to school.

Busing for better education has been widely accepted in this country, but decisions by Federal courts to order busing of children against prevailing community opinion are often resisted and accompanied by violence and disorder.

Since most situations in which desegregation is occurring will involve some voluntary or involuntary busing, the need is to find a means by which the Executive Branch can best assist a community to undertake voluntary or cooperative busing plans rather than leaving it to the courts to impose forced busing.

BACKGROUND

On August 21, 1974 you signed the Education Amendments of 1974 which included the "Esch Amendments." These amendments (Tab B) are designed to place legislative limits on the extent to which busing could be ordered by Federal courts or agencies.

Last Fall you directed the Attorney General and the Secretary of HEW to explore better ways to bring about school desegregation than court ordered busing.

In an October 27, 1975 meeting with Senator Tower you directed Phil Buchen to ask Justice and HEW to review the busing situation with the objective of seeking alternative remedies.

On November 20, 1975, you met with Attorney General Levi and Secretary Mathews and requested that they consider and develop:

1. means of helping local school districts stay out of court.

2. alternative remedies and legal theories which a court might find acceptable once a school district was in court.

I have been working with HEW and others in your Administration on item 1 while Phil Buchen has been regularly in contact with the Attorney General on item 2.

On February 17, 1976, we outlined approaches and concepts under consideration. You indicated four which you felt merited further examination.

On April 12, 1976, I reported to you that we were developing approaches based on these premises:

1. Communities should find solutions on their own rather than have them imposed by the Federal government.

2. Remedies can best be reached before any court action begins.

3. Any approach must be in accord with Federal law enforcement responsibilities.

On May 17, 1976, I reported to you that we were in the process of refining and further examining three possible approaches to help a community avoid a court order to bus.

ALTERNATIVES TO COURT ORDERED BUSING

The following proposals have evolved as the most responsible courses of action available to be offered to a community to better enable it to desegregate its schools prior to the initiation of legal action. While it is likely that each of the alternatives would result in some busing the intent is to have such plans be developed by a community itself rather than imposed on it by the courts.

Alternative I: Mediation Service

Establish a Community Mediation Service, somewhat parallel to the Federal Mediation and Conciliation Service, to provide mediation assistance to a community in its efforts to desegregate. As proposed, it would be available to a community both before and after it was under a court order to desegregate. Such service could head off busing by court order by providing assistance to a community, at its request, to develop an acceptable plan to desegregate its schools. If any busing were involved it would result from a community decision assisted by the mediation process, not from a court order.

We believe such a mediation service could be set up by Presidential Executive Order.

Alternative II: Presidential Representative

At the request of a community, the President would designate a nationally known person to be his special representative to insure that the full resources of the Federal government were made available to communities who were initiating efforts, prior to legal action, to desegregate their schools.

This Presidential representative would seek to facilitate the use of the many existing Federal resources and also to involve religions, academic, business and labor groups in the response to a community's request for assistance.

This could be done by Presidential action.

Alternative III: National Community and Education Commission

Secretary Mathews proposes the establishment of a National Community and Education Commission to assist communities in preparing for desegregation activities and for avoiding community violence and disruption. (Tab C)

The bipartisan Commission would be independent of both HEW and Justice and would be composed of nine members who were nationally representative of business, education, labor, community leadership and local government.

The Commission would have a staff of approximately 50 and an annual budget of $2 million.

Its responsibilities would be to work through local community leaders, using existing Federal resources, to encourage and facilitate constructive, comprehensive planning for school desegregation at the local level. Its approach would be to work quietly with a broad spectrum of local leaders --

-- to identify problems before they develop.

-- to informally mediate so that communities themselves can cooperatively devise solutions.

-- to expedite Federal assistance, both technical and fiscal, from existing programs.

-- to encourage assistance from the private sector.

It would specifically not serve as a court-appointed intermediary between parties in a legal suit related to desegregation.

We believe such a Commission could be created by Presidential Executive Order.

DISCUSSION

The various advantages and disadvantages of these alternatives and the related staff comments and recommendations can, we believe, best be covered in the discussion at Wednesday's

meeting with the Attorney General, the Secretary of HEW, Secretary of Labor and other members of your staff.

DECISION

Alternative I: Mediation Service

Approve _____ Disapprove _____

Alternative II: Presidential Representative

Approve _____ Disapprove _____

Alternative III: National Community and Education Commission

Approve _____ Disapprove _____

CHRONOLOGY OF SCHOOL DESEGREGATION DECISIONS

A. Brown v. Board of Education (1954)

The landmark Supreme Court decision in the school desegregation area in this century was Brown v. Board of Education (of Topeka), decided in 1954. In Brown, the Supreme Court held that segregation in public schools on the basis of race, even though the physical facilities and other "tangible" factors may be equal, denies children of the minority group the equal protection of the laws in violation of the Fourteenth Amendment. In the Brown decision, the Supreme Court did not prescribe any specific method for accomplishing desegregation.

B. Brown II (1955)

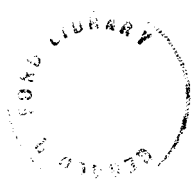
In a follow-up to its 1954 Brown decision, the Supreme Court in 1955 directed that desegregation proceed with "all deliberate speed."

C. "Freedom of Choice"

In the years immediately following Brown, from 1954 to 1964, the courts wrestled with the issue of appropriate remedies in cases of de jure segregation, finally concluding in a number of cases that the "freedom of choice" method of dismantling dual school systems was an acceptable approach. Under freedom of choice, school districts merely gave students -- black and white -- the choice of the schools they wished to attend. The result was a modest degree of desegregation, as some blacks elected to attend formerly white schools. However, rarely did whites choose to attend formerly black schools. The result was that only 1.2 percent of black students in the 11 southern states attended schools with whites in 1963-64.

D. Civil Rights Act of 1964 and Bradley Case

Shortly after passage of the Civil Rights Act of 1964, the Supreme Court stated in Bradley v. School Board of Richmond (1965) that "delays in desegregating school systems are no longer tolerable." The



Civil Rights Act of 1964 provided additional support for the desegregation process through Titles IV and VI. Under Title IV, technical assistance may be given to applicant school boards in the preparation, adoption, and implementation of plans for desegregation of public schools. If efforts to secure a school district's voluntary desegregation failed, administrative enforcement proceedings under Title VI would be initiated.

E. Green Decision (1968)

In April 1968, HEW's Office for Civil Rights directed that, where freedom of choice plans had not effectively eliminated dual school systems, the systems should adopt plans that would accomplish this task. During that year, the Supreme Court strengthened the HEW position in deciding Green v. New Kent County School Board (Virginia). In Green, after noting that in many areas desegregation was not yet a reality, the Court said that the time for mere "deliberate speed" had run out. The Court held that where a freedom of choice assignment plan failed to effectively desegregate a school system, the system had to adopt a student assignment plan which "promised realistically to work now." This was the death, since rarely, if ever, did freedom of choice result in effective school desegregation.

F. Alexander v. Holmes (1969)

In the summer of 1969, the Court decided Alexander v. Holmes County Board of Education (Mississippi), holding that school districts had a constitutional obligation to dismantle dual school systems "at once" and to operate now and hereafter as unitary systems. The Court, quoting from Green, reiterated its determination that school systems must develop desegregation plans that "promise realistically to work now." Thus, Alexander clearly reaffirmed the Court's position on the issue of timing in desegregation cases.

G. Busing - Swann v. Charlotte-Mecklenburg Board of Education (1971)

In the spring of 1971, the Supreme Court handed down the first "busing" decision in the case of Swann v.

Charlotte-Mecklenburg Board of Education (North Carolina). In Swann, the Court held that:

1. desegregation plans could not be limited to the walk-in neighborhood school;

2. busing was a permissible tool for desegregation purposes; and,

3. busing would not be required if it "endangers the health or safety of children or significantly impinges on the educational process."

The Court also held that, while racial balance is not required by the Constitution, a District Court has discretion to use racial ratios as a starting point in shaping a remedy.

H. HEW Responsibilities to Enforce (1973)

The immediate desegregation mandate of Alexander and the insistence in Swann that schools having disproportionately minority enrollment were presumptively in violation were not acted upon by HEW, which permitted these districts to remain "under review." HEW attempted to secure compliance through persuasion and negotiation, and the Title VI enforcement mechanism fell into disuse. These conditions led to the initiation of Adams v. Richardson, in which HEW was charged with delinquency in desegregating public educational institutions that were receiving Federal funds.

This suit alleged that HEW had defaulted in the administration of its responsibilities under Title VI of the Civil Rights Act of 1964. The district court (District of Columbia) stated on February 16, 1973, that, where efforts to secure voluntary compliance with Title VI failed, the limited discretion of HEW officials was exhausted. Where negotiation and conciliation did not secure compliance, HEW officials were obliged to implement the provisions of the Title VI regulations: provide for a hearing; determine compliance or noncompliance; and, following a determination of noncompliance, terminate Federal financial assistance.

The district court's decision was modified and affirmed by the Court of Appeals (D.C. Circuit, 1973). Essentially, the district court order requires that HEW properly recognize its statutory obligations, ensuring that the policies it adopts and implements are consistent with those duties and not a negation of them.

I. Keyes - "Segregative Intent" (1973)

In June 1973, the Supreme Court rendered its decision in Keyes v. School District No. 1 (Denver, Colorado). This was the Court's first decision on the merits in a school desegregation case arising in a State which did not have an official policy of racial dualism in 1954. In Keyes, the Court held that where it could be demonstrated that a school board had acted with "segregative intent" to maintain or perpetuate a "dual school system" this was tantamount to de jure segregation in violation of the Constitution. A finding of de jure segregation as to one part of the system creates a presumption that segregative intent existed in the entire system and in such cases, the school board had "an affirmative duty to desegregate the entire system 'root and branch'".

J. Milliken - Cross District Busing (1974)

In its most recent ruling respecting school desegregation, Milliken v. Bradley (Detroit, Michigan), the Supreme Court refused to require busing between school districts absent a showing that there has been a constitutional violation within one district that produced a significant segregative effect in another district.

TAB B

ESCH AMENDMENTS (1974)

You signed into law on August 1974, Amendments to the Elementary and Secondary School Act which included the Esch amendments which were designed to place legislative limits on the extent to which busing could be ordered by Federal Courts or agencies. The key elements of those provisions are:

A. Remedies to Correct Segregation

When formulating desegregation plans, Federal Courts and agencies must use following remedies in order listed:

(1) Assign students to closest school (considering school capacity and natural physical barriers).

(2) Assign students to closest school (considering school capacity only).

(3) Permit students to transfer from school where their race, color or creed is a majority to one where it is a minority.

(4) Create or revise attendance zones or grade structures without requiring busing beyond that described below.

(5) Construct new schools or close inferior ones.

(6) Construct or create "magnet" (high quality) schools.

(7) Implement any other educationally sound and administratively feasible plan.

B. Additional Restrictions on Federal Courts or Agencies

(1) No ordered busing of students beyond school next closest to home.

(2) No ordered busing at risk of students' health.

(3) No new desegregation plans may be formulated to correct shifts in attendance patterns once school system determined non-segregated.

(4) No desegregation plans can ignore or alter school district lines unless such lines were drawn to, or tend to, promote segregation.

(5) No ordered busing shall be effective until the beginning of an academic school year.

C. Rights Granted to Individuals and School Districts

(1) Allows suits by individuals (or Attorney General on individuals' behalf) under the Act.

(2) Permits voluntary busing beyond limits outlined.

(3) Allows reopening of pre-existing Court orders or desegregation plans to achieve Title II compliance.

(4) Requires termination of court-ordered busing if Federal Court finds school district non-segregated.

It should be noted that the priority of remedies set forth in the Esch Amendments is merely a slight elaboration on existing case law. A review of the cases from Swann on up to Boston and Louisville clearly shows that the Courts have always turned to busing as a last resort. Moreover, since several of the prior remedies set forth in the Esch Amendments (such as construction of new schools) would not accommodate immediate desegregation of a school system, it is doubtful that, as a matter of constitutional law, they are binding as to the Courts. Finally, as to the application of the Esch Amendments to Federal agencies (notably the Office of Civil Rights in HEW), it appears that OCR has never required busing on a massive scale and has, since their enactment, observed the terms of the Amendments.

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D.C. 20201

MAY 20 1976

MEMORANDUM FOR THE PRESIDENT

Pursuant to our conversation, I have prepared for your consideration a proposal to establish a National Community and Education Commission to assist communities in preparing for desegregation activities and in avoiding trauma, violence and disruption. At Tab A I have enclosed a brief discussion of the nature and functions of such a Commission and at Tab B a proposed draft Presidential Executive Order establishing the Commission. I would call to your attention the following two specific issues in terms of this approach.

Implementation Strategy - Executive Order or Legislation

Although the Commission could be established either through legislation or an Executive Order, the Executive Order approach appears preferable for the following reasons:

The chances of Congress considering legislation to implement this proposal in the near future are very slight.

You have the authority and precedent to create an action-type council or commission by Executive Order. As long as the Executive Order does not contradict or supersede any statutes, you may create councils, commissions, and committees to carry out any function from studying a problem to developing programs. You may also give such bodies review and regulatory authority and the power to mediate.

It is common practice for such commissions to receive appropriations from Congress without authorizing legislation. In most cases, the "parent" Department (in this case HEW) requests funds for the commission as a line item in its appropriation.

Although the Executive Order approach does not require Congressional action, it is imperative that consultations with minority members on the appropriate committees be initiated promptly if such a proposal is approved by the Administration. Unless handled carefully, the Democratic Congress could endanger the proposal by arguing that the

Administration is taking away Congress' authority to legislate. Even with an Executive Order, Congress' support and tacit approval is needed to enable the Commission to succeed in its complex mission.

Appropriations Strategy - Commission

To accomplish its mission effectively, the Commission would require a permanent staff of approximately 50 persons, as well as the ability to hire such consultants as it may need for specific projects. Support costs for such an enterprise would be around $2 million annually. As noted above, HEW would request funds for the Commission as a line item in its appropriation. Although funds could be requested through an emergency supplemental or obtained through a reprogramming of present HEW funds, the preferred course of action is a budget amendment which would fund the Commission as of October 1.

I believe the approach suggested herein provides the most viable and effective strategy for the Administration to demonstrate it is truly concerned about the issue of the disruption of communities because of desegregation activities. I would recommend your approval of this approach and the issuance of such an Executive Order after appropriate consultation with the Congress.

Secretary

Enclosures

ESTABLISHMENT OF THE NATIONAL COMMUNITY AND EDUCATION COMMISSION

A MAJOR INITIATIVE IN SCHOOL DESEGREGATION

Summary Description

In an effort to encourage and facilitate constructive, comprehensive planning for school desegregation at the local level, it is proposed that the National Community and Education Commission be established by Executive Order. The Commission would be a Presidentially-appointed, bipartisan group of distinguished citizens drawn from business and other professional circles. Its charge would be to assist local communities in carrying out desegregation planning activities designed to build lines of communication, avert disorder, and encourage constructive interracial classroom environments through the example of constructive interracial community environments.

Specific Function

The Commission's chief responsibility would be to advise local community leaders at the earliest stages of desegregation planning. Assistance would be initiated at the request of the affected community, and at that point a determination would be made by one or more Commission members as to what course of Commission activity offered the greatest promise of success within the particular community. In general, however, the orientation of the Commission would be toward working quietly with a broad spectrum of local leaders to identify problems before they develop and to devise solutions which could be carried out locally. While working within a community, the Commission would function primarily in a supportive and advisory role.

In the course of its consultations with the community and the school district, one of the Commission's chief functions would be to inform local leaders of additional sources of desegregation assistance (Federal, State, local and private) and encourage that these sources be investigated. Such sources include direct funding through the Emergency School Aid Act; technical assistance through OE's General Assistance Centers; OE's ten regional offices, and the Justice Department's Community Relations Service; formal mediation service through the Federal Mediation and Conciliation Service; and other forms of aid through the U.S. Commission on Civil Rights, State human relations agencies, and related private agencies.

Although the Commission's activities will overlap to some extent with those of the organizations mentioned above, the Commission should be

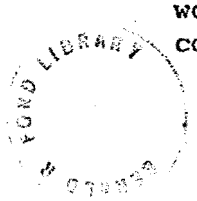
able to minimize unnecessary duplication through careful liaison with these other resources. It will be particularly important to work out non-duplicative roles with the Community Relations Service (CRS) since the function of CRS -- helping communities defuse tensions and conflicts arising from inequities or discrimination based on race, color, or national origin -- is notably similar to that of the proposed Commission. The CRS focuses less of its attention on pre-crisis intervention now than it did prior to FY 1974. Budget cuts that year effectively removed CRS from its earlier pre-crisis role, even though some individuals have held that the nature of the CRS function and expertise makes the agency particularly well suited to pre-crisis assistance. Thus, although CRS may not be currently active in some of the Commission's more important roles, its staff probably will have valuable insights and experiences to share with the Commission.

In keeping with its general functions already described, the Commission's role would not be to serve as a court-appointed intermediary between parties in a legal suit related to desegregation. Mediation would be a proper role for the Commission only in instances where it was conducted informally and with the voluntary participation of the major elements of the community. Similarly, the Commission would not be empowered to act for any State or Federal agency in an enforcement or compliance capacity. Moreover, it would not be expected to draw up desegregation-related student assignment plans at the request of a State or Federal agency.

Federal Incentives for Comprehensive Community Planning

The Commission is intended primarily to provide help to school districts which have not yet adopted or been issued a desegregation plan (although districts at other points in the desegregation process certainly would not be precluded from receiving assistance from the Commission). In order to provide support for districts which are conducting comprehensive, community-based planning for desegregation, it is proposed that a specified amount of funds in the Emergency School Aid Act (ESAA) discretionary account be set aside to support local planning activities, including those initiated with Commission involvement.

The ESAA discretionary account (Section 708 (a)) is the only part of the ESAA under which a school district without an eligible desegregation plan may receive funds. Therefore, it would be possible to stipulate by regulation that a community which showed proof of effort to conduct community-wide desegregation planning could receive funding to conduct such planning and other activities authorized under ESAA. The intention would be that this planning would involve all major sectors of the community, including business and housing representatives.



Structure

The Commission would be made up of nine members who would be appointed by the President for three-year terms of office. To provide continuity within the Commission, terms of office for individual members would be staggered at one-year intervals. The Commission chairman would be selected by the President, with the first chairman appointed for a full three-year term. Commission members would be expected to maintain their regular occupations but would be compensated at EL IV for the days they work on Commission activities. To ensure bipartisan representation, restrictions would be placed on the number of Commission members permitted from each political party. The Commission would have the authority to hire staff on an excepted service basis and to retain consultants as needed for specific projects.

DRAFT

EXECUTIVE ORDER

NATIONAL COMMUNITY AND EDUCATION COMMISSION

Throughout the history of our Nation, the education of our children, especially at the elementary and secondary level, has been a community endeavor. The concept of public education began in the community and continuous support for public schools has been provided by the community. Although the States, and to some extent the Federal government, have been providing increasing financial assistance for education, it has become clear that the solution of many of the most pressing problems facing our schools lies within the community which supports those schools.

This fact has particular relevance to the problem of school desegregation. Over the past two decades, communities have been under pressure from the courts, the Department of Health, Education, and Welfare, and in some cases the States, to institute changes in the assignment of students to schools. Too often this has been accomplished without the involvement of the community or with its involvement only after confrontions have occurred and community positions have been established.

The problems that have arisen in the process of school integration have not been due to the inadequacy of law or the lack of appropriate resources. Rather, they can be attributed to the fact that the burden of initiating and enforcing school desegregation has been borne by the courts and the Federal government without the benefit of those forces from within the community that are uniquely able to bring about necessary change in an orderly and peaceful manner.

It is therefore the purpose of this executive order to provide a means to activate and energize effective local leadership in the desegregation process at an early stage in order to reduce the incidence and severity of the trauma that would otherwise accompany that process, and to provide a national resource that will be available to assist communities in anticipating and resolving difficulties encountered prior to and during desegregation.

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States of America, it is hereby ordered as follows:

Section 1. Establishment of the Commission. (a) There is hereby established a National Community and Education Commission (hereinafter referred to as the "Commission"), the purpose of which shall be to consult with, provide technical assistance to, and informally mediate between, community groups and State and local governmental organizations (including educational agencies) in order to anticipate and resolve problems and conflicts relating to the desegregation of schools.

(b) Composition of the Commission. The Commission shall be composed of nine members who shall be appointed by the President from among individuals who are nationally recognized and respected in business, education, government and other fields and whose experience, reputation, and qualities of leadership render them uniquely capable of carrying out the purposes of the Commission. No person who is otherwise employed by the United States shall be appointed to serve on the Commission. No more than five of the members of the Commission at any one time shall be members of the same political party.

(c) Terms of members. The term of office of each member of the Commission shall be three years, except that of the members first appointed to the Commission three shall be appointed for a term of one year and three shall be appointed for a term of two years. Any member appointed to fill an unexpired term on the Commission shall serve for the remainder of the term for which his predecessor was appointed.

(d) Chairman; quorum. The Chairman of the Commission shall be designated by the President. Five members of the Commission shall comprise a quorum.

(e) Compensation of members. Each member of the Commission shall be compensated in an amount equal to that paid at level IV of the Federal Executive Salary Schedule, pursuant to section 5313 of title 5, United States Code, prorated on a daily basis for each day spent on the work of the Commission, including travel time. In addition, each member shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government Service.

(f) Executive Director; staff. The Commission shall have an Executive Director, designated by the Chairman with the approval of a majority of the members of the Commission, who shall assist the Chairman and the Commission in the performance of their functions as they may direct. The Executive Director shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. The Commission is also authorized to appoint, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, or otherwise obtain the services of, such professional, technical, and clerical personnel, including consultants, as may be necessary to enable the Commission to carry out its functions. Such personnel, including the Executive Director, shall be compensated at rates not to exceed that specified at the time such service is performed for grade GS-18 in section 5332 of that title.

Sec. 2. Functions of the Commission. The functions of the Commission shall include, but shall not be limited to:

(1) Consulting with leaders in the community and local groups in determining means by which such leaders and groups can, through early involvement in the development of, and preparation for, school desegregation plans, contribute to the desegregation process in such a way as to avoid conflicts and the invocation of judicial procedures.

(2) Encouraging the formation of broadly based local community organizations to develop a program designed to encourage comprehensive community planning for the desegregation of schools.

(3) Providing advice and technical assistance to communities in preparing for and carrying out comprehensive plans to desegregate the schools, involving the broadest possible range of community interests and organizations;

(4) Consulting with the Community Relations Service of the Department of Justice (established under title X of the Civil Rights Act of 1964), the Office for Civil Rights in the Department of Health, Education, and Welfare, the National Institute of Education, the U.S. Office of Education,

General Assistance Centers (funded under title IV of the Civil Rights Act of 1964), the United States Civil Rights Commission, and State and local human relations agencies to determine how those organizations can contribute to the resolution of problems arising in the desegregation of schools within a community; and

(5) Providing informal mediation services among individuals, groups, and agencies within a community in order to resolve conflicts, reduce tensions, and develop acceptable means of desegregating schools without resort to administrative and judicial processes.

Sec. 3. Limitations on activities of the Commission. It shall not be the function of the Commission--

(1) to prepare desegregation plans;

(2) to provide mediation services under the order of a court of the United States or of a State; or

(3) to investigate or take any action with respect to allegations of violations of law.

Sec. 4. Cooperation by other departments and agencies. (a) All executive departments and agencies of the United States are authorized to cooperate with the Commission and furnish to it such information, personnel and other

assistance as may be appropriate to assist the Commission in the performance of its functions and as may be authorized by law.

(b) In administering programs designed to assist local educational agencies and communities in planning for and carrying out the desegregation of schools, the Secretary of Health, Education, and Welfare and the heads of agencies within that Department shall administer such programs, to the extent permitted by law, in a manner that will further the activities of the Commission.

Sec. 5. Expenses of the Council. Expenses of the Commission shall be paid from such appropriations to the Department of Health, Education, and Welfare as may be available therefor.

Sec. 6. Confidentiality. The activities of the members and employees of the Commission in carrying out the purposes of this executive order may be conducted in confidence and without publicity, and the Commission shall, to the extent provided by law, hold confidential any information acquired in the regular performance of its duties if such information was provided to the Commission upon the understanding that it would be so held.

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D.C. 20201

MAR 29 1975

MEMORANDUM FOR THE HONORABLE JAMES M. CANNON

Here is a report on the reaction of our best staff in the Department to the options in your memo on "Alternatives to Busing:"

1. Many successful superintendents have been successful because of a low profile. The recognition, while flattering, might well be counterproductive. Civil rights groups could have a field day with suits aimed at proving that the efforts of these individuals really were not good enough.

   Furthermore, since many of the superintendents in such a group would have used busing, the President could be seen as endorsing busing by one group and then, for the same gesture, criticized for tokenism by the other side.

   Of course, as the Commissioner of Education notes, there is some value to reinforcement for people doing a hard job well.

2. DHEW is already doing much of what is suggested in this option. However, since the federal government is seen as the problem, its role as a point of reference or place for assistance is, regrettably, limited--regardless of how fine its services are.

3. The same comment just made applies here, too. More research can always be done, but as you will see from the attached status report, DHEW is already in the midst of a multitude of good studies. And the National Institute of Education predicts that these studies will show busing is "working" in eight out of ten situations.

   There might be some more work done, however, in studies on using community institutions outside the schools to aid in desegregation.

4. The staff advised great caution with this option. They made the point that to attack busing raises the question of alternatives and since there are not many good ones, the Administration would be left with its back to a wall.

Our working papers are available if they would be helpful.

Secretary

Attachments

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D.C. 20201

MAR 29 1976

MEMORANDUM FOR THE PRESIDENT

The best advice I can bring together from across the country leads me to recommend a few basic precepts from which to make judgments on a whole host of complex issues and options on the matter of busing and desegregation.

The best policy position would be one with three basic elements:

1. It is important that the President first reaffirm the national commitment to the basic moral principle that segregation is incompatible with any good vision of the future of this country and that no child should be denied the benefits of an equal education because of race. Any position that does not begin at this point and clear the air on it will mire down.

2. Your position on busing can then be restated and expanded by the assertion that because of this moral imperative, we cannot do other than pursue, with all diligence, the issue of the best means. There is evidence that busing is not an effective means in some situations, and we cannot escape an obligation to find better approaches to the problem. It is important at this point, however, not to go on to try to prove that any of the alternatives we now have is a certain cure either. None is. And there are a great many cases where transportation by buses is working well according to the research reports we have.

3. The "truth" that nobody is saying is that the solution is in taking an approach much broader than concentrating on busing or any of its alternatives. The first part of that solution is to turn the issue away from just a busing question. The busing debate is really not a constructive debate at all, and the issue must be "depoliticized" as much as possible. Perhaps this issue has met a stalemate in the political processes and must be lifted out of that atmosphere and placed in a nonpartisan, nonpolitical

forum for serious and far-reaching reassessment. The suggestion is that you push for real, useful-- not just rhetorical-- attention to the problem.

4. The other part of the solution is to focus on the problem as it really is, not as it seems to be. The issue is not what means are used to achieve desegregation but who controls that decision and how parental and community concerns are taken into consideration. To reframe the case and to focus on reuniting the community and parents with school control has great potential and is the way the cities have had some success with getting on with desegregation.

5. The public feels that the federal government (whether by the courts or the legislative process) has not only failed to solve the problem but has made it worse. Therefore, any solution from any part of the federal government is likely to fail--even if it were the "right" solution. The only good option for the Executive Branch may be to act as a "helper" and ~~a partner~~ to aid communities in helping themselves.

6. Using the precedent of the government to create a national force that is not governmental (the National Academy of Sciences and the National Council on the Arts and Humanities are examples), perhaps we should consider working with local governments and community groups to create a body from the best of the local community, education and parental leadership, titled perhaps the National Community and Education Council. It could work as a mediating force and provide technical assistance to communities to deal with problems before they become crises. In fact, the evidence from successes in Atlanta and Dallas is that citizen alliances of the type the Council should foster were the decisive forces. As I noted earlier, "success" seems to turn most on how well a community goes about making decisions that come up before the question of busing or any other means. The Council could also help cities to get the whole community, not just the schools, involved in voluntary efforts to prevent unhealthy racial isolation and foster constructive human relations.

Post-court decision — me?

The courts might find such a body a welcome referral point (that is, to get ideas but in no sense would it be proper for such a council to be an agent of the courts), and cities or community alliances might find it a source of good ideas and even endorsement.

Another alternative would be to use the occasion of getting the ESA legislation renewed to allow us to encourage many of the activities that the Council would foster without the fanfare of creating a new agency.

In sum, there do not seem to be any solutions that come from dealing with busing directly or even in searching for alternatives. The best chances for success seem to be in pioneering some new ground. Americans traditionally have solved problems not by changing the problem, but by changing their view of the problem.

David Mathews
Secretary

ON-GOING DEPARTMENT STUDIES AND ACTIVITIES RELATED TO DESEGREGATION

The Department has planned or on-going many analyses, evaluations, or research projects related to questions of quality education, urban education, and desegregation. The major ones are listed below:

Office of Education

The desegregation-related studies underway in OE are primarily directed toward the evaluation of OE's desegregation assistance programs and their effects on schools. One special study will look at a small number of districts that are successfully and peacefully desegregating in an attempt to discover the practices that contribute to successful desegregation.

- The evaluation of the Emergency School Aid Act (ESAA) basic and pilot programs is a longitudinal study of the effectiveness of two of the largest components of ESAA in meeting the objectives of the legislation. Special attention is being given to the relative efficacy of alternative school programs in raising student achievement. The study is being conducted through a contract with the System Development Corporation. The report on the first year of the study has been issued with subsequent reports due in May 1976 and May 1977.

- The evaluation of Title IV of the 1964 Civil Rights Act is assessing the effectiveness of this program in delivering training and technical assistance services to desegregating school districts. The study is being conducted by Rand Corporation, with the final report scheduled for release in June 1976.

- The OE study of exemplary desegregated schools is examining evidence showing the degree to which various school practices and programs contributed to successful desegregation. The final report is due in June 1976 from the contractor -- Educational Testing Service.

National Institute of Education

NIE has a number of on-going studies relating to various aspects of school desegregation. In FY 1976 the total amount spent on desegregation research was $682,000. The aim of these studies is to assist in making desegregated education settings exciting and humane places for children and is not to study the effects of desegregation on children. Some of the most policy relevant of these studies are:

- Six ethnographic studies of the cultural milieu and environment of desegregated schools. These studies are being carried on in New York, Pittsburgh, Pontiac, Durham, San Francisco, and Memphis. They are due July 1978.

- A study of status equalization and changing expectation in integrated classrooms. This will be due in 1978 or 1979.

- A study of racial integration, public schools, and the analysis of white flight. Due October 1976.

- A study entitled "Political Protest and School Desegregation: A Case Study of Boston". Due September 1976.

- A study of social impact on school desegregation, dealing with how much school desegregation is possible before it becomes counterproductive. Completed January 1976.

- A study of desegregation research and appraisal. This has resulted in a compendium that updates and evaluates the finding of recent research on integration and desegregation. Completed and at printers.

Assistant Secretary for Planning and Evaluation

The Office of the Assistant Secretary for Planning and Evaluation (ASPE) is beginning an analysis of Federal School Desegregation Policy as it has evolved through judicial, legislative, and administrative action in the last twenty

years. The analysis consists of six related studies. The first of these is a legal study that describes the implementation of desegregation actions in the nation's schools. It will systematically describe features of the various desegregation plans implemented in response to Federal actions. It will be due a year from now. Three other studies will investigate the impact of Federal action and different desegregation plans on the racial and socio-economic characteristics of schools and communities, attitudes toward desegregation, and student educational attainment. These studies will be completed in eighteen months. A fifth study will investigate minority participation in Federally-funded education programs. This study is in the design phase and will be completed in eighteen months. A study of Federal policy alternatives will complete the analysis.1/ It is anticipated that all six studies will be completed in approximately eighteen months.

Assistant Secretary of Education

A small scale effort is underway in ASE's Policy Development office to project probable effects of present court cases, to develop new measures of district and regional racial isolation, and to review other policy variables of interest to the Education Division. This work is being conducted as part of a larger policy analysis contract with Stanford Research Institute.

1/ A later effort will review the impact of Federal desegregation policy on postsecondary education. Study components will build upon the analysis developed for elementary and secondary education.

JUN 2 1976

THE WHITE HOUSE

WASHINGTON

June 1, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: Phil Buchen and Jim Cannon

SUBJECT: Busing Legislation

This memorandum briefly describes the substance of the busing legislation the Attorney General has submitted for your consideration.

DESCRIPTION

As you know, under current case law, where a Federal District Court finds that a school board has acted to foster, promote or perpetuate racial discrimination in a school system, the Court may order the board to take whatever steps might be necessary to convert the entire school system into a "unitary" (i.e., racially balanced) system. The Attorney General's bill (attached at Tab A) proceeds from the premise that the proper role of the courts in fashioning a remedy in a school desegregation case is simply to require the racial composition in the school system that would have existed but for unlawful acts by the school board.

Specifically, the bill would require a Federal District Court to determine the extent to which the racial or ethnic concentration in a school system is attributable to the unlawful action of a State of local school board and to limit the relief to eliminating only that racial or ethnic concentration. The bill would prohibit a court from ordering the transportation of students to alter the racial or ethnic composition of a school unless it finds that the current racial or ethnic composition of the school resulted in substantial part from unlawful acts of the State or local school board and that transportation of students is necessary to adjust the racial or ethnic composition of the school to that which would have existed but for such unlawful acts.

Additionally, the bill provides for a review by the court every three years to determine if the remedy imposed is still appropriate. With respect to forced busing, the bill requires that, except in extraordinary circumstances, no forced busing shall continue for more than five years.

Finally, the bill would authorize the Attorney General to appoint Federal School Desegregation Mediators to assist the court and the parties in school desegregation cases. It would also provide that, before a Federal judge may order busing, he must give notice to ennumerated Federal, State and local officials, who shall create a committee composed of leaders of the community, which committee shall immediately endeavor to fashion a feasible desegregation plan which can be put into effect over a five-year period. Such a plan would be subject to approval by the court.

IMPLICATION

The Attorney General argues in the "draft" message he has prepared for your consideration (attached at Tab B) that the bill will minimize the extent to which Federal courts may order the forced busing of school children. This interpretation is, of course, subject to review by the courts.

One thing is clear, however, and that is that this bill would involve the Federal government in major desegregation litigation by:

- authorizing the Attorney General to appoint Federal School Desegregation Mediators to work with the courts in designing appropriate desegregation plans, and

- requiring the Secretary of Health, Education and Welfare, in concert with other Federal, State and local officials, to appoint (and presumably oversee) the citizens' committees which will be responsible for developing the five-year desegregation plans.

These and other points can be discussed at tomorrow's meeting.

A Bill

To provide for orderly adjudication of school desegregation suits, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "School Desegregation Act of 1976."

TITLE I -- Adjudication of Desegregation Suits

Sec. 101. Purpose: Application

(a) The purpose of this Title is to prescribe standards and procedures to govern judicial relief in school desegregation cases brought under Federal law in order (1) to prevent the continuation or future occurrence of any acts of unlawful discrimination in public schools and (2) to assist in the identification and elimination, by all necessary and appropriate remedies, of the present consequences within the schools of acts of unlawful discrimination found to have occurred. This title is based upon the power of the Congress to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States.

(b) The provisions of this title shall apply to all judicial proceedings, and the award or modification of

all judicial relief, after the date of its enactment, seeking the desegregation of public schools under Federal law.

Sec. 102. Definitions

For purposes of this title --

(a) "Local education agency" means a public board of education or any other agency or officer exercising administrative control over or otherwise directing the operations of one or more of the public elementary or secondary schools of a city, town, county or other political subdivision of a State.

(b) "State education agency" means the State board of education or any other agency or officer responsible for State supervision or operation of public elementary or secondary schools.

(c) "Desegregation" means elimination of the effects of unlawful discrimination in the operation of schools on the part of a State or local education agency.

(d) "Unlawful discrimination" means action by a State or local education agency which, in violation of constitutional rights, discriminates against students, faculty or staff on the basis of race, color or national origin.

(e) "State" means any of the States of the Union.

Sec. 103. Liability

A local or State education agency shall be held liable (a) to relief under Section 104 of this Act if the Court finds that such local or State education agency has engaged or is engaging in an act or acts of unlawful discrimination and (b) to relief under Section 105 of this Act if the Court further finds that the act or acts of unlawful discrimination which occurred within thirty years prior to the filing of the suit increased the degree of racial or ethnic concentration in the student population of any school.

Sec. 104. Relief - Orders prohibiting unlawful acts.

In all cases in which, pursuant to section 103(a) of this Act, the Court finds that a local or State education agency has engaged or is engaging in an act or acts of unlawful discrimination, the Court shall enter an order enjoining the continuation or future commission of any such act or acts and providing any other relief that, in the Court's judgment, is necessary to prevent such act or acts from occurring, or to eliminate the effect of such act or acts specifically directed at particular individuals.

Sec. 105. Relief - Orders eliminating the present effects of unlawful acts.

(a) In all cases in which, pursuant to section 103(b) of this Act, the Court finds that the act or acts of unlawful discrimination increased the degree of racial or ethnic concentration in the student population of one or more schools, the Court shall order only such relief, in conformity with sections 213-216 of the Equal Education Opportunity Act of 1974, as may be necessary to eliminate the present effects found, in compliance with this section, to have resulted from the discrimination.

(b) Before entering an order under this section the Court shall receive evidence, and on the basis of such evidence shall make specific findings, concerning the degree to which the racial or ethnic concentration in particular schools affected by unlawful acts of discrimination presently varies from what it would have been had no such acts occurred. Should such findings not be feasible or useful because of the great number of schools that were or may have been affected, the demographic changes that have occurred over a period of years, or some other circumstance, the Court shall receive evidence, and on the basis of such evidence shall make specific findings concerning the degree to which patterns of racial or ethnic

concentration in the school system affected by unlawful acts of discrimination presently varies from what it would have been had no such acts occurred.

(c) The findings required by subsection (b) of this section shall in no way be based on a presumption, drawn from the finding of liability made pursuant to section 103(b) of this Act or otherwise, that the degree of racial or ethnic concentration in the schools or any particular school is the result of unlawful acts of discrimination.

(d) The Court shall notify the Attorney General of any proceeding pursuant to subsection (b) of this section to which the United States is not a party, and the Attorney General may, in his discretion, intervene in such proceeding on behalf of the United States to present evidence and take all other actions that he may deem necessary to facilitate enforcement of this Act.

(e) No order entered under this Act or any provision of federal law shall require the transportation of students to alter the racial or ethnic composition of schools unless, pursuant to this section, the Court finds that the racial or ethnic concentration in particular schools, or, if such findings are not feasible or useful, the patterns of racial or ethnic concentration in the school system resulted in substantial part from unlawful discrimination by a local or State education agency, and that transportation of students is necessary to adjust the racial or ethnic composition of particular schools, or patterns of racial

or ethnic concentration in the school system, substantially to what they would have been if the unlawful discrimination had not occurred.

(f) In all orders entered under this section the Court may without regard to this section's other requirements, direct local or State school authorities to institute a program of voluntary transfers of students from any school in which their race is in the majority to available places in one in which it is in the minority.

Sec. 106. Voluntary action; local control.

All orders entered under section 105 shall rely, to the greatest extent practicable and consistent with effective relief, on the voluntary action of school officials, teachers and students, and the Court shall not remove from a local or State education agency its power and responsibility to control the operations of the schools except to the minimum extent necessary to prevent unlawful discrimination and to eliminate its present effects.

Sec. 107. Review of Orders.

Subject to the provisions of section 105(f) of this Act, no requirement of the transportation of students contained in any order entered under section 105 of this Act or subject to that section's provisions shall remain in effect for a period of more than three years from the date of the order's entry unless at the expiration of such period the Court finds:

(1) that the defendant has failed to comply with the requirement substantially and in good faith; or

(2) that the requirement remains necessary to eliminate the effects of unlawful discrimination determined in compliance with the provisions of section 105 of this Act.

If the Court finds (1) above, it may extend the requirement until there have been three consecutive years of substantial compliance in good faith. If the Court finds (2) above, after the expiration of three consecutive years of substantial compliance in good faith, it may extend the effect of the requirement, with or without modification, for a period not to exceed two years, and thereafter may order an extension only upon a specific finding of extraordinary circumstances that require such extension. The Court may, however, continue in effect a voluntary transportation program to implement relief under section 105(f) of this Act. The provisions of this section shall not apply to any plan approved and ordered into effect under section 203.

Sec. 108.

With respect to provisions of its order not covered

by section 107, the court shall conduct a review every three years to determine whether each such provision shall be continued, modified, or terminated. The court shall afford parties and intervenors a hearing prior to making this determination.

TITLE II -- Federal School Desegregation Mediator

Sec. 201. Appointment of mediator.

The Attorney General is hereby authorized to appoint, at such times and for such period as he deems appropriate, a Federal School Desegregation Mediator or Mediators to assist the court and the parties in a school desegregation lawsuit.

Sec. 202. Functions of a mediator.

(a) When a mediator is appointed pursuant to section 201, he shall provide assistance to the court, the parties and the affected community to the ends of (1) full and orderly implementation of the constitutional right to equality of educational opportunity, (2) insuring that desegregation is accomplished in a manner which is educationally sound and (3) seeking to secure community support for proper elimination of unlawful school discrimination.

(b) A mediator may request the assistance of other Federal agencies.

Sec. 203. Type order

It is the sense of the Congress that required transportation of students beyond the nearest school in order to reduce the lingering effects of past unlawful discrimination is an unusual remedy which should be used sparingly. Accordingly prior to ordering such required transportation, the district judge shall give notice to the Attorney General of the United States, to the Secretary of Health, Education and Welfare, to the Governor of the State, the Mayor or other chief executive official of the governing unit involved, and the Secretary of Health, Education and Welfare in cooperation with these officials shall create a Council of citizens composed of the leaders of the community. The Council shall immediately endeavor to fashion a feasible plan which can be put into effect over a five year period, including such matters as the relocation of schools, which can give assurance that such progress will be made toward a removal of the effects of unlawful discrimination over the five year period, with specific dates and goals, so that in the meantime required transportation can be avoided or greatly minimized. Such a plan shall be submitted to the court for its approval. If, during the continuance or at the expiration of a plan approved under this section, the court determines that the plan is inadequate, progress made under such plan shall be taken into account in framing any order under Section 105 of this Act.

MESSAGE TO CONGRESS

I know I am speaking for the vast majority of Americans when I say we desire that the causes and effects of unconstitutional racial discrimination in our school systems must be removed. The process by which these causes and effects are remedied has been a long and difficult one. The goal must be achieved, and I believe substantial progress has been made.

The ultimate aim must be voluntary, whole-hearted compliance with non-discriminatory practices, practices we all accept because they are right. The public school system has been one of America's greatest assets. The desire for quality education is deep in the heart of American parents and children. And the long-standing tradition of local control of the educational system is very important.

The way to achieve the removal of the causes and effects of racial discrimination in the schools is not the same in every locality in which unconstitutional acts of discrimination have occurred. This is because of a variety of factors such as the geographic array of schools in various systems and the special characteristics of individual systems

which properly reflect diverse communities' ideas about the appropriate structure of the educational process.

On the long and difficult road our society has traveled in attempting to remove the causes and effects of racial discrimination there has at times been illegal resistance to the orders of federal courts and at times there has been some violence. This resistance and this violence are illegal. They contradict the Constitution. The federal government certainly will not condone them. The law will be enforced.

During this period it is inevitable that the decisions of federal district judges, faced with the arduous and often unpleasant duties of overcoming resistance, will have elements of artificiality in them. The Supreme Court has written that the remedy "may be administratively awkward, inconvenient, and even bizarre in some situations" (Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 28 (1971)). In many cases, judges have had to do things which under our system of government would better be accomplished by elected officials.

We must realize that what is involved in the effort to put an end to unlawful racial discrimination in the schools is a basic constitutional doctrine. That doctrine has been set forth in a number of decisions of the United States Supreme Court. And it is not surprising that there are certain ambiguities in the statements of the Court -- in the ways in which the doctrine should translate into action, particularly as to the scope of the remedy.

Courts have used various mechanisms for removing the causes and effects of racial discrimination in the schools, and the most controversial of them has been the forced busing of students. In an essential way, the use of busing highlights the ambiguities in the constitutional doctrine as stated by the Supreme Court. In my view, and consistent with the doctrines of the Supreme Court, the purpose of court ordered busing should not be to achieve a racial balance within schools which would not have occurred through the normal enrollment pattern in the absence of unconstitutional acts of school discrimination.

I have always been philosphically opposed to court ordered busing, but I realize that in some cases it is constitutionally required under the opinions of the Supreme Court. But, as Congress recognized in passing the Equal

Educational Opportunities Act of 1974, Pub. L. 93-380, 88 Stat. 514 et seq., 20 U.S.C. (Supp. IV) 1701 et seq., there are other remedies that may be used to achieve the elimination of the effects of racial discrimination and these other remedies should be given priority. These other remedies include voluntary transfer systems, creation or revision of attendance zones or grade structures without requiring student transportation, construction of new schools or the closing of inferior schools, and creation of magnet schools. Busing is not a good mechanism. Many of the federal district court judges who have ordered busing have stated publicly that it is not a desirable mechanism and that it is a mechanism of last resort.

While busing may be constitutionally required, it still makes a great deal of difference to communities and the people in them how much busing will be used, and this in large part depends upon the legal theory upon which the relief for unconstitutional acts of racial discrimination is based. I do not believe we can eliminate all busing, but I do believe we can considerably reduce its use while

still achieving the elimination required by the Constitution of the effects of illegal race discrimination.

Each school case involves two distinct questions. The first is whether the school authorities have committed acts of racial discrimination (the liability question). The second is what relief the court should afford once racial discrimination in the operation of the schools has been established (the remedy question).

Brown v. Board of Education, 347 U.S. 483 (1954), held conclusively that official acts to enforce racial discrimination in the operation of the schools violates the Constitution. The remedy question has not yielded easily to analytical solution. The first problem that arose was how

quickly the remedy must take effect. The second Brown case, 349 U.S. 294 (1955), was the Court's first attempt to grapple with that problem. The Court held (id. at 300) that "[i]n fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." The second Brown case stated that the remedy must proceed with "all deliberate speed" (id at 301).

That formula proved unsatisfactory when both school systems and courts used "all deliberate speed" as an excuse for inaction. A series of decisions in the 1960's called for more rapid compliance. In 1964 the Court held that "[t]he time for mere 'deliberate speed' has run out" (Griffin v. County School Board, 377 U.S. 218, 234), and in 1968 that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now" (Green v. County School Board, 391 U.S. 430, 439 (emphasis in original)).

What is the goal of the remedy that must "realistically . . . work now"? Many judges and courts thought at first

that the proper remedy was to direct school officials to cease their racial discrimination. The illegal practices could be prohibited and stopped. This is a common form of equitable relief.

The courts, however, went further. Some requirement to show there was a good faith abandonment of these practices and that they would not be renewed was no doubt essential. Moreover, it is within the jurisdiction of a court of equity to eradicate the lingering effects of a wrong -- to the extent this is feasible.

This recognition of a need to eradicate the continuing effects of past racial discrimination created problems

that continue to confront the Nation. What are those "effects"? How do we ascertain them? What means must we use to eradicate them? All of these questions go to the nature and scope of the remedy for unlawful discrimination.

We cannot begin to ask whether particular remedial tools -- such as busing to achieve racial balance -- are necessary, when viewed in light of all their advantages and disadvantages, until we are sure what it is that the remedy must accomplish.

The public school system in this country developed as people came together toward the common goal of educating their children in a manner which reflected the shared values of the community. This led to a tradition of diversity in the ways of the educational process, and that diversity in turn embodied our national commitment to individuality and community self-reliance. We also have a strong national commitment to social mobility and equal opportunity. These values find their expression in the constitutional requirement that public officials may not discriminate against individuals on the basis of their race,

color, national origin or sex. Neither the Constitution nor the traditions of the public school system requires that children go to school in their immediate neighborhood. But likewise, neither prohibits, absent illegal official acts of race discrimination, a community from sending its children to a neighborhood school. Only to the extent that unconstitutional official acts of race discrimination in the schools have created an artificial racial balance does the Constitution require remedial steps to create the racial balance in particular schools that would have occurred but for the illegal acts.

Busing is required only if, in fashioning a remedy for the unconstitutional acts, a court must assign students to schools far from home. When are such assignments necessary? That question, so basic to the task of devising a remedy for illegal discrimination, has never received a satisfactory answer from the Supreme Court.

The Court has emphasized that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation" (Swann, supra, 402 U.S. at 15). That formula, seemingly so simple, conceals a variety of

ambiguities. These ambiguities become of overriding importance when lower courts must attempt to translate the Supreme Court's generalities into the particulars of a plan for the operation of the schools.

The Supreme Court decision in Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 214 (1973), created an important ambiguity. The Court emphasized (413 U.S. at 203) that "racially inspired school board actions have an impact beyond the particular schools that are the subject of those actions." It therefore established a rule that, once a district court has found acts of unlawful discrimination in some schools of a school system, it should "presume" that unlawful discrimination was practiced throughout the school system -- in other words, that the school system is a "dual school system," for which the remedy is "all-out desegregation." But what is the real effect of this presumption? It means, at a minimum, that the court should assume that acts of discrimination have been pervasive and that they have effects throughout the system. Does it also mean that the court must presume that some observed distribution of the races was caused by the discrimination? That some particular part of the distribution was caused by the discrimination? That all of the distribution was caused by the discrimination? The Supreme Court did not say. Some lower courts have taken the last-mentioned interpretation. They have interpreted what the Supreme Court said in Keyes as support for orders that every

school should mirror the racial composition of the school district.

The ambiguities, standing by themselves, make it difficult to determine what the remedy should be designed to accomplish. The difficulty is compounded by the discretion traditionally accorded to trial courts in the formulation of equitable remedies. Discretion of this sort can cover a multitude of readings of the Supreme Court's precedents; the ambiguous nature of the precedents, combined with the factual complexity of each new case, make it difficult for the district court to devise a remedy and even more difficult for appellate courts effectively to supervise the actions of the district court.

The result of all of this is that many district courts use a finding of some unlawful discrimination as a "trigger" for a holding that all schools must be racially balanced. They define "all-out desegregation" as the elimination of racial distribution in the schools, however caused, and bend their efforts to some kind of racial balance in the schools even if the racial distribution would have occurred without illegal acts of racial discrimination. Such a task naturally requires many students to be assigned to schools far from home and,

hence, must be accomplished by busing.

The goal of the remedy in a school case ought to be to put the school system, and its students, where they would have been if the violations had never occurred. In other words, the goal ought to be to eliminate "root and branch" the violations and all of their lingering effects. Green, supra, 391 U.S. at 438- This articulation of the goal has been approved by the Supreme Court. It is the constitutional goal which the Supreme Court has mandated, but its application has been made difficult by the ambiguities discussed above.

First, the courts have held that the existence of schools attended predominantly by members of one race does not in itself amount to racial discrimination; if it were otherwise, there would be no meaning to the requirement of "state action" as a precondition to a violation of the Fourteenth Amendment. Keyes, supra; Spencer v. Kugler, 326 F. Supp. 1235 (D. N.J.), affirmed, 404 U.S. 1027.

Any legislation should make it clear that "desegregation" means only the elimination of the effects of racial discrimination by state officials.

Second, any legislation should make it clear that the remedy must deal only with the effects of the acts of school officials. Discrimination in other parts of society should be redressed with other tools. For example, Congress has enacted laws to rectify residential discrimination. See 82 Stat. 81 et seq., 42 U.S.C. 3601 et seq. Racial discrimination in housing should be attacked directly and eliminated as speedily as possible from our society. Its effects ought not to be the object of a "collateral attack" in school cases. As the Court has observed (Swann, supra, 402 U.S. at 22-23):

> The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination . . . .
>
> Our objective . . . is to see that school authorities exclude no pupil of racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when these problems contribute to disproportionate concentrations in some schools.

I should emphasize the language that one vehicle can only carry a limited amount of baggage. The schools have to try to fulfill the goal of quality education for all our children, and no goal is more important than this to all of our citizens.

Third, any legislation should make it clear that the remedy should not go beyond the effects of the violations. It should attempt to remedy past wrongs, but not to produce a result merely because the result itself may be attractive. "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution . . . . As with any equity case, the nature of the violation determines the scope of the remedy" (id. at 16). "[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." (Milliken v. Bradley, 418 U.S. 717, 746 (1974)). Cf. Franks v. Bowman Transportation Co., No. 74-728, decided March 24, 1976, slip op. 23. The attributes that make a system illegally operated can often be eliminated without an insistence upon a racial composition in each school that in some degree reflects the racial composition of the school district as a whole.

The objective of an order altering the racial or ethnic student composition of schools should be to recreate that student composition of each particular school that would have existed but for the illegal acts of discrimination.

It will sometimes prove impossible or not useful to recreate such conditions in particular schools. This may be so because of the great number of schools that are or may have been affected, changes in demographic patterns, or some other circumstance. In such cases, the objective of the desegregation remedy is to restore as closely as possible a social process that has been deformed by official action. To that end, the courts should attempt to recreate patterns of racial or ethnic integration that would have existed in the absence of illegal acts. Thus, to the degree that a neighborhood school system was in effect at any level of a school system, the court should take into account the extent to which attendance patterns would, in any event, have reflected residential patterns of racial and ethnic concentration. This will often require integration measures primarily at the borders of racial and ethnic areas of concentration. This, combined with appropriate opportunities for transfer, voluntary busing, magnet schools, the appropriate siting of new schools, and other forms of relief provided by the statute, will allow for the resumption of normal and free social processes. Of

course, approximations in achieving this goal must be permissible.

The inclusion in the decree of a provision for voluntary transfer of individual students from any school in which their race is in the majority to one in which it is in the minority can be a useful device to compensate for possible non-apparent additional lingering effects of the discriminatory conduct. In some circumstances, temporary additional remedial measures may also be appropriate to break down officially caused racial identifiability of particular schools. But the necessity for such devices and approximations should not divert the courts from the pursuit of the proper ultimate objective.

Fourth, the remedy ought to be limited in time (Swann, supra, 402 U.S. at 31-32). Any judicial order of this sort strongly interferes with normal social processes and local autonomy. The interference is necessary, but it ought to terminate as soon as the court can reasonably conclude that the object of the remedy has been attained. In some cases (for example, those involving teacher assignments or gerrymandering of attendance zones) a fully effective remedy can be devised and applied expeditiously. It may take longer to overcome the effects of discriminatory school siting and capacity decisions, for an effective remedy may involve school closings and construction. But however long each

component of the remedy may take to achieve, any legislation should ensure that the courts monitor the process and dissolve their orders once the effects of racial discrimination have been ameliorated to the extent possible. It should also ensure that the use of forced busing is, except in extraordinary circumstances, strictly limited in duration.

Under section 5 of the Fourteenth Amendment Congress has an important role in defining the nature of the constitutional prohibition and creating a remedy. Congress has exercised this power in the Equal Educational Opportunities Act of 1974, by establishing a hierarchy of tools and devices to carry out the remedy. But that effort has not proved to be sufficient, and Congress once more must meet the challenge and fulfill its constitutional role.

The legislation that I am transmitting to Congress today will meet that challenge. Last November 20 I met with the Attorney General and the Secretary of Health, Education and Welfare and directed them to devise legislation that would clarify the law in this area and move toward the reduction and eventual elimination of court ordered busing wherever possible. Since that time we have been at work on a bill that will provide that the constitutional goal of eliminating race discrimination in its causes and effects will

be met with the minimum amount of busing required by the Constitution. The legislation I transmit today will sweep away the confusion and ambiguity concerning the goal of the remedy.

The legislation brings certainty to the remedial goal. Instead of the ambiguous word "segregation" it uses "unlawful discrimination," which in turn means racial or ethnic discrimination in the operation of the schools. This makes it clear that the only proper objects of the remedy are to ban such acts and eliminate their effects. "Desegregation" is therefore appropriately defined as the elimination of the effects of unlawful discrimination by school officials.

In order to give meaning to these definitions, the legislation requires courts to hold trials and to make explicit findings of fact concerning the effects of unlawful discrimination. In making these findings, the courts are instructed not to rely on any presumption that the unlawful discrimination caused all (or any particular part) of any observed racial distribution. The effects of the discrimination must be proved as facts; they cannot be presumed. It will no longer be possible for courts to use a finding of unlawful discrimination as a "trigger" for an order to produce system-wide racial balance. Courts will produce only that balance within a school that would have occurred, but

for the unlawful discrimination by school authorities.

The legislation makes it clear, if it was not already clear from other sections, that in a school case only the acts of school officials are to be considered. Racial imbalance caused by voluntary choice, by private discrimination, or by unlawful discrimination other than discrimination in the operation of the schools, is not to be addressed in a school case. School cases should not attempt to cure social problems the genesis of which is outside the schools.

The legislation provides for a review by the judge every three years of the remedies he has imposed. With respect to forced busing, it requires that except in extraordinary circumstances no forced busing can continue for more than five years. These provisions would return the operation of a school system to local authorities at the earliest possible time.

Finally, we must give renewed emphasis to the fact that public schools are and must be of basic concern to local communities. Those efforts should be directed toward bringing local community leaders together so that proper educational procedures can be developed and can gain the maximum community support. The intervention of the federal courts to enforce

the constitutional mandate should as much as possible leave responsibility upon the local community. For this reason the legislation I am proposing places emphasis on the use of mediators and mechanisms that will bring community leaders together to solve their problems. The legislation authorizes the Attorney General to intervene in suits at the remedy stage in order to enforce the statute's objectives, and it authorizes him to appoint mediators to assist the court and the parties in these difficult cases.

Most importantly the legislation provides that before a federal judge orders busing a community council should be formed to endeavor to fashion a feasible plan which could be put into effect over a five year period to make progress toward the removal of the effects of unlawful discrimination. The creation and implementation of such a plan could result in the elimination or substantial minimization of forced busing.

The efforts to restore our public schools to the conditions in which they would have been but for unconstitutional acts of racial discrimination by school officials

should not be met with resistance and fear. We should be united in our attempt to achieve this goal. The legislation I today propose is an important step. To work toward this goal with a minimum of devisiveness can be an exercise in the harmony that we seek to achieve and can lead to the end we all so deeply desire.

THE WHITE HOUSE

WASHINGTON

October 28, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP BUCHEN PB
JAMES CANNON JC

SUBJECT: The Wilmington Busing Case

Yesterday, the Department of Justice filed a friend-of-the-court brief in the Wilmington busing case (Delaware State Board of Education v. Evans), arguing that the lower court went too far in ordering interdistrict busing between the City of Wilmington and ten suburban school districts. This memorandum provides background on the case and outlines the Department's arguments and reason for intervening.

BACKGROUND

As you know, in March 1975, a three-judge District Court in Delaware concluded that, as a result of a 1968 enactment, the State of Delaware had discriminated against black students in Wilmington in violation of the Constitution and that, to remedy such discrimination, an interdistrict plan for reassignment of students would probably be necessary. This holding was appealed to the Supreme Court and affirmed 5-3. On remand, the three-judge court fashioned an interdistrict desegregation plan which, in effect, combined the City of Wilmington and ten surrounding school districts in northern New Castle County into one school district, and required that every grade in every school in the new district have a student population which was not less than 10 percent nor more than 35 percent Black. The defendants in the case have appealed this order to the Supreme Court, maintaining, among other things, that the District Court went too far in requiring interdistrict busing. The plaintiff-appellees have until November 10 to file their answer.

DEPARTMENT OF JUSTICE POSITION

In its brief, the Department takes two positions. First, the Department maintains that the Supreme Court does not have jurisdiction to hear the appeal from the remedial order of the three-judge District Court, since the three-judge court was improperly convened. The Department argues that the appeal should be heard by the Court of Appeals. The Department goes on to state, however, that the case is an important one in the evolution of constitutional principles pertaining to racial discrimination in the schools and that it should receive the attention of either the Supreme Court or the Third Circuit Court of Appeals as expeditiously as possible.

Secondly, on the merits of the case, the Department argues that the proper approach to school desegregation cases requires a court to seek to determine, as precisely as possible, the consequences of acts constituting illegal discrimination and to eliminate the continuing effects. The Department believes that, in merging Wilmington and the ten surrounding suburban districts into one school district and requiring racial balance in each school, the District Court went beyond this requirement.

The Attorney General and the Solicitor General both felt (a) that this was a proper case for the Department to enter in light of the serious questions presented, and (b) that it was necessary to file their brief at this time in order to give the plaintiffs (i.e., parents seeking a remedy) in the case an adequate opportunity to study the Department's position before filing their response.

The Department's position is consistent with the approach taken in your 1976 busing proposal.

We have attached the story appearing in this morning's Washington Post for your information.

Attachment

U.S. Asks High Court Test On Limits to Busing Orders

10/28/76

By John P. MacKenzie
Washington Post Staff Writer

cisely as possible, the consequences of the acts constituting the illegal dis- crimination and to eliminate their

THE WHITE HOUSE
WASHINGTON

Date 8/25

TO: Jack Marsh

FROM: DAVID LISSY

Art Quern concurs with the attached, & tried to make it as brief as possible. If you want more detail, let me know.

DL

DRAFT-DHL-8/25/76

SUBJECT: Congressional Action on President's Busing Proposals

The Senate will take up Thursday consideration of an Omnibus Education Bill (S. 2657) covering a variety of education matters. The House has already passed a number of individual bills on education matters.

The question arises as to whether we would wish to use Senate consideration of an education bill as a vehicle for forcing a vote on the President's busing proposals. There seems to be little enthusiasm on the part of our supporters to bring this issue to a head now. Bob Griffin, for example, would specifically recommend against raising the President's proposed legislation as an amendment to the Omnibus Education Bill.

There is a sense that the President's position has been amply aired and that we gain little now by forcing a vote prior to any hearings and with the potential for a poor showing.

I am not recommending that we taken any action but I wanted to be sure you knew that the last logical opportunity for advancing the President's busing proposal in this session of Congress is about to pass.

THE WHITE HOUSE

WASHINGTON

August 25, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Congressional Action on President's Busing Proposal

The Senate will take up Thursday consideration of an Omnibus Education Bill (S. 2657) covering a variety of education matters. The House has already passed a number of individual bills on education matters.

The question arises as to whether we would wish to use Senate consideration of this education bill as a vehicle for forcing a vote on your busing proposals. There seems to be little enthusiasm on the part of our supporters to bring this issue to a head now. Bob Griffin is prepared to take the lead if we want him to, but Max Friedersdorf does not detect any particular enthusiasm on Griffin's part. Griffin also points out to Max that there are some dangers to pushing this issue now. Senator Helms, for example, might try to go beyond your proposal either by amending it or by proposing a vote on a Constitutional amendment. John Tower told Max this morning that his instinct was not to do anything because at this point we have as an issue the fact that the Democratic Congress has not acted, and we may be better off that way.

Senator Griffin has also advised Max Friedersdorf that because of an agreement to limit debate on S. 2657 and to exclude non-germane amendments there could be parliamentary obstacles to getting your busing proposal considered by the Senate.

I am not recommending that we take any action but I wanted to be sure you knew that the last logical opportunity for advancing your busing proposal in this session of Congress is about to pass.

due: ASAP

THE WHITE HOUSE

WASHINGTON

June 21, 1976

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MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Busing: Outstanding Issues

Two issues remain to be resolved:

1. Should Secretary Mathews' proposal for a National Community and Education Committee be created by legislation or by Presidential executive order?

   Secretary Mathews' original suggestion was that you create, by executive order, a National Community and Education Committee. While the Secretary continues to prefer this procedure, he has also drafted a bill to create the Committee should you decide to ask for legislation.

   The advantages of proceeding by executive order are:

   a. You could create the Committee by your own administrative act, thus demonstrating your commitment and willingness to take the lead in this important area; and

   b. Under an executive order, the program may be modified (or eventually terminated) to accommodate changing circumstances more easily than would be the case if it had been established by legislation.

   On the other hand, the advantages of proceeding by legislation are:

   a. It would enable you to secure Congressional endorsement of the concept of a National Community and Education Committee (which is particularly relevant since Congress will have to appropriate funds for the Committee); and

b. With the added weight of the Congress behind it, the Committee would enjoy an enhanced stature which, hopefully, would improve its capacity to function effectively.

DECISION: Proceed with Mathews' proposal via:

/M Executive Order

_____ Legislation

* * *

2. If you decide to proceed with Secretary Mathews' proposal in legislative form, should it be joined with the Attorney General's proposal in one bill, or should the two proposals be submitted as separate bills?

Secretary Mathews has suggested that we submit his proposal as a separate bill. He believes that, while there clearly is an interrelationship between the two proposals, the ideas embodied in the two are sufficiently distinct as to warrant their separate consideration.

The advantages of two bills are:

a. Separate bills would be referred to the Judiciary and Labor and Education Committees respectively, making it possible for Congress to act more swiftly.

b. The two measures complement each other, but either would be a significant step forward if the other is not passed.

The Attorney General has suggested that the proposals be combined and sent to the Congress as one bill.

The advantage to a single bill is:

a. One bill will present a more balanced combination of community assistance and limitation on courts.

DECISION: Submit the proposals as:

_____ One Bill

_____ Two Separate Bills

OCT 16 1975

October 16, 1975

MEMORANDUM FOR: DON RUMSFELD

FROM: MAX FRIEDERSDORF

SUBJECT: Bussing

Regarding Phil Buchen's comment at the senior staff meeting today, I am hopeful that any reassessment of the President's bussing position can be expedited because of increasing Congressional pressure for a Presidential meeting.

Senator John Tower has been promised a meeting and I am certain the request will be renewed when Congress returns.

Our office and the Press Office have been receiving amost daily inquiries about the Tower meeting.

cc: Jack Marsh
Phil Buchen