The original documents are located in Box 5, folder "Busing (2)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

April 6, 1976

MEMORANDUM FOR: JIM CANNON

FROM: ART QUERN

SUBJECT: Bussing Alternatives

The following is offered for your consideration:

In the correcting of racial imbalances in elementary and secondary schools the Executive Branch of the Federal government should attempt to concentrate its involvement on local efforts prior to court action.

It should make 75-25 Federal matching monies available to finance the costs of Local Leadership Councils which are designated by a Governor to address a problem of racial imbalance in a school district before any court action is initiated. Once a court order is issued dealing with that community's situation, the Federal funding must cease and the matter placed in the hands of the court as happens in the current situation.

The Local Leadership Council would be appointed by the Governor but 3/4 of its members must be residents of the school district and a minimum of 1/3 must come from names nominated by the school board.

Federal funding would be available for up to three years and could be used for efforts designed to assist in the community's development of plans to improve the quality of education for all the students in a community.

This could be accompanied by initiation of the information clearinghouse proposal at the Federal level but I believe should not include a national council, panel, or commission.

THE WHITE HOUSE

WASHINGTON

April 9, 1976

MEMORANDUM FOR: DICK CHENEY

FROM: EDWARD SCHMULTS

SUBJECT: Justice Department Involvement in Private School Bias Litigation

You requested some background for the President on this morning's news story concerning the position of the Justice Department in certain litigation affecting the right of private schools to discriminate on the basis of race. The material under "Background" and "Justice Department Involvement" was furnished to Dick Parsons by the Solicitor General.

BACKGROUND

The case in question was commenced by two private parties against several private schools in Virginia which discriminated in their administration policies on the basis of race. The contention of the plaintiffs was that such discrimination violated Section 1981 of the United States Code, which derives from the old Civil Rights Act of 1866. This law prohibits racial discrimination in the making of private contracts. The defendants in this case argue that Section 1981 could not be applied to private schools and, in the alternative, that if this section were applicable to private schools it was unconstitutional. The lower court and the U. S. Court of Appeals (Fourth Circuit) held for the plaintiffs. The case has been appealed to the Supreme Court by the defendants.

JUSTICE DEPARTMENT INVOLVEMENT

When the constitutionality of a federal statute is challenged in litigation before the Supreme Court, it is required that the Department of Justice be notified of the litigation, the statute in question and the nature of the constitutional challenge. As a general rule, the Department will defend, amicus curiae, the constitutionality of the statute, unless a constitutional prerogative of the President is being diminished.

I have been advised by the Solicitor General that it is clear from previous cases that Section 1981 is constitutional.

If the President is asked about this situation, I think he should respond that:

(1) The Justice Department is participating in this case because of its duty to defend the constitutionality of an act of Congress; the Department believes its position is mandated by the statute and previous judicial decisions;

(2) He has been advised that the Department's position is that the statute applies only to most sweeping forms of segregation;

(3) According to the Department, the statute would not be applicable to religious schools or those organized on some other right of association; and

(4) We should bear in mind the case involves a statute which is within the power of Congress to change.

Ron Brown

THE WHITE HOUSE

WASHINGTON

May 29, 1976

MEMORANDUM FOR: PHIL BUCHEN

FROM: JIM CANNON

Jack Marsh gave this to me and asked that you and I follow-up on it.

I am sending a copy to Dick Parsons, and asking him to give me a report on the Los Angeles situation as described by Congressman Goldwater.

Attachment

cc: Dick Parsons

THE WHITE HOUSE
WASHINGTON

Jack Marsh -

The attached was returned in the President's outbox with your name on it.

It is forwarded to you for appropriate action.

Jim Connor
5/29/76

BARRY M. GOLDWATER, JR.
20TH DISTRICT OF CALIFORNIA

COMMITTEE ON PUBLIC WORKS
AND TRANSPORTATION
COMMITTEE ON SCIENCE AND
TECHNOLOGY

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May 24, 1976

THE PRESIDENT HAS SEEN....

Gerald R. Ford
The President
The White House
1600 Pennsylvania Avenue
Washington D.C. 20515

Dear Mr. President:

As you may know, the question of forced busing of Los Angeles children is coming "to a head" soon with the pending decision by the California Supreme Court against the Los Angeles Board of Education.

Enclosed is a letter from a metropolitan Los Angeles area organization called Bus Stop. They are very interested in your reviewing the possibility of making the Los Angeles situation the test case for forced busing of students. In addition to forced busing of students, HEW has ordered the Board of Education to transfer teachers to provide for a racial balance of faculties. This 'busing' of teachers will prove more disastrous for education in Los Angeles.

I would appreciate your reviewing this matter and I would be happy to provide you with any additional information.

Sincerely,

Barry

Barry M. Goldwater, Jr.
Member of Congress

BMG/kmc

BUSTOP • P.O. BOX 7867 • VAN NUYS, CA. 91409

May 24, 1976

The President of the United States

My Dear Mr. President:

I was asked by Congressman Barry Goldwater, Jr., to apprise you of our concerns regarding a desegration case, Crawford vs. the Los Angeles Board of Education, now pending in the California Supreme Court. A ruling by the California Supreme Court against the Los Angeles Board of Education would offer an opportunity for the United States Department of Justice to intervene and accomplish a substantial result by asking for a review of the case by the United States Supreme Court.

The number of students in the Los Angeles Unified School District who would have to be transported by bus to implement racial balance is far greater than in Boston or any other community in the United States. There are over 600,000 students in this district located in over 700 square miles. The costs morally, educationally and fiscally would be higher than in any other city in the country.

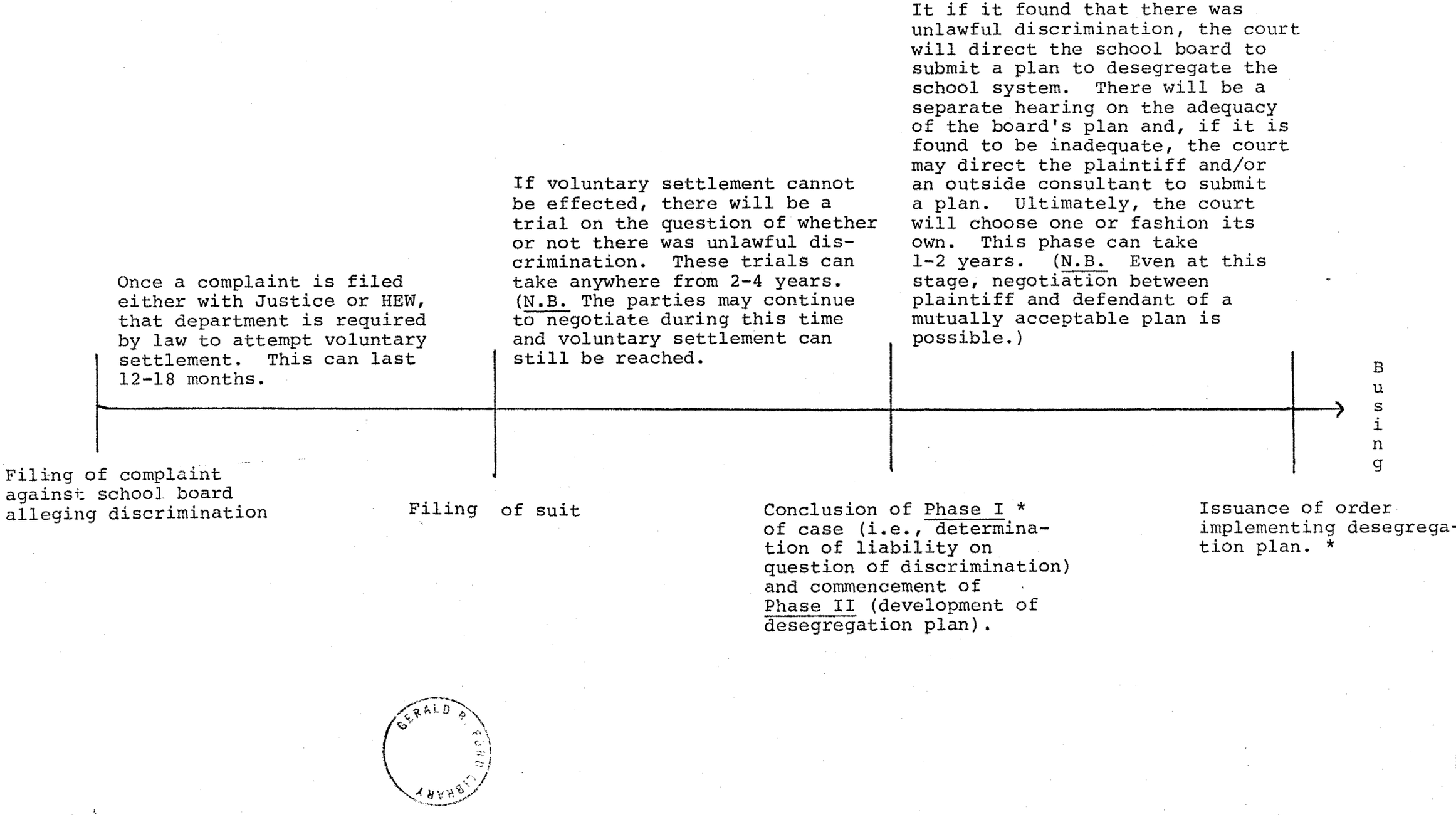
This letter is being written on behalf of Bustop, an organization which favors quality integrated education, voluntary methods of integration and the use of the democratic process to implement its position. Bustop opposes mandatory methods of integration and believes in the preservation of the neighborhood school system. Bustop opposes any and all forms of violence. This organization was formed nine weeks ago, and in that short time already represents well over 10,000 concerned parents and teachers. We feel we represent the majority point of view in Los Angeles and across the country.

In light of the foregoing facts, Bustop believes that Crawford vs. the Los Angeles Board of Education would be an ideal case for your Administration to utilize to bring the busing issue to the United States Supreme Court. For the education, health and welfare of all children, we urge you to consider this action.

Respectfully yours,

Bobbi Fiedler

Bobbi Fiedler
Executive Director



* Subject to appeal

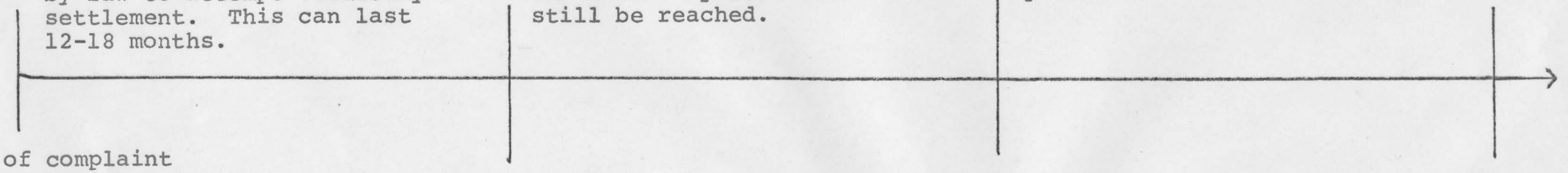
5-28-76

J. 1 yrs

Once a complaint is filed either with Justice or HEW, that department is required by law to attempt voluntary settlement. This can last 12-18 months.

If voluntary settlement cannot be effected, there will be a trial on the question of whether or not there was unlawful discrimination. These trials can take anywhere from 2-4 years. (N.B. The parties may continue to negotiate during this time and voluntary settlement can still be reached.

It if it found that there was unlawful discrimination, the court will direct the school board to submit a plan to desegregate the school system. There will be a separate hearing on the adequacy of the board's plan and, if it is found to be inadequate, the court may direct the plaintiff and/or an outside consultant to submit a plan. Ultimately, the court will choose one or fashion its own. This phase can take 1-2 years. (N.B. Even at this stage, negotiation between plaintiff and defendant of a mutually acceptable plan is possible.)



Filing of complaint against school board alleging discrimination

Filing of suit

Conclusion of Phase I * of case (i.e., determination of liability on question of discrimination) and commencement of Phase II (development of desegregation plan).

Issuance of order implementing desegregation plan. *

put after
U.S.C.R. Commission
agency of govt

At least one court appeal not reported

* Subject to appeal

5-28-76

cc: Quern, Parsons

MARVIN L. ESCH
REPRESENTATIVE IN CONGRESS
2D DISTRICT, MICHIGAN

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May 27, 1976

The Honorable James M. Cannon
Assistant to the President for
Domestic Affairs
Domestic Council
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Jim:

I would like to draw your attention to these two memorandums prepared by the Minority Counsel of the Education and Labor Committee on the legal issues surrounding busing. He has spent years studying the cases and the issues involved, and the President is familiar with his work.

His two major points are: (1) that the Federal courts have never satisfactorily defined what constitutes an action having an unconstitutional segregatory effect (beyond the most obvious ones): and (2) that they have provided no workable guidelines for limiting the scope of a remedy to the scope of the segregation unconstitutionally created.

In my judgment, these memorandums would help clear up some evident confusion surrounding the whole issue and assist the Administration in plotting a consistent and constructive course of action. Accordingly, I commend them to your attention.

With best wishes, I am

Sincerely,

Marvin L. Esch
Member of Congress

MLE:ds
Enclosure

COMMITTEE ON EDUCATION AND LABOR

U. S. HOUSE OF REPRESENTATIVES

MEMORANDUM

January 26, 1976

TO: Hon. Marvin L. Esch

FROM: Charles W. Radcliffe
Minority Counsel

RE: The Legal Background of Forced Busing in Desegregation Cases and Reactions To Its Use As a Remedy.

Twenty-two years ago the United States Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954) and companion cases held that any law which permits or requires segregation of the public schools by race or color is unconstitutional. This unanimous action of the Court outlawed legally-sanctioned or required racial segregation in the public schools of 17 States and the District of Columbia. In some of those 17 States the struggle to nulify or evade this historic ruling would continue for nearly 20 years, but today school desegregation in those States is virtually complete.

Of the 4,302 school districts involved (plus the District of Columbia, which quickly complied with the orders of the Court), 2,852 were never legally segregated or voluntarily desegregated with assurances acceptable to the Federal Government. Eventually 711 districts desegregated under a plan approved pursuant to title VI of the Civil Rights Act of 1964, and 646 were desegregated under court orders. Only 93 school districts in those 17 States remain in some form of litigation over desegregation.

One of the hallmarks of legally required racial segregation which caused bitter scars and left bitter memories for black citizens was forced racial busing -- where black and white students alike, usually in separate busses, were bussed away from their neighborhood schools to more distant ones for the purpose of maintaining a segregated system.

It is ironical, but also a matter of profound national concern, that today we are again resorting to forced racial busing on an increasing scale. Today the busing is ordered by courts as a remedy for actions found to be racially segregatory in their effect. Predictably, the "remedy" is proving to be one of the most expensive, racially divisive and educationally unproductive ever devised. Respected jurists, sociologists and educators, both black and white, have become alarmed by the national turmoil caused by widespread, forced racial busing and have called for a reconsideration of the legal and educational premises which had led courts to so freely employ the remedy.

Admittedly, a certain amount of busing may be required to correct unlawful racial segregation of schools, butas required by the "Equal Educational Opportunities Act of 1974" (popularly known as the "Esch Amendment"), it should be a remedy of last resort and then used sparingly. How we traveled the distance from a color-blind Constitution which forbids racial busing to maintain segregated schools to court orders which require it on a large scale as remedy for alleged segregatory acts is a question which demands examination. But it requires calm and reasoned examination devoid of demagogic appeals. Those who would inflame rather than help inform public opinion harm our society and our nation.

At the outset several related points need to be stressed.

First, voluntary efforts to lessen racial isolation, including voluntary busing having the consent of the students and their parents, are not at issue and indeed ought to be encouraged.

Second, unlawful racial segregation in public education or elsewhere is not tolerable in a free society and acts of public bodies which have the effect of creating segregation must be corrected -- but they need not be over-corrected or "corrected" by remedies which produce more, not less, segregation.

Third, disagreements with courts -- including the United States Supreme -- are not attacks on our judicial system or upon the primacy of law in our society; indeed, often bitter and stinging dissent in the Supreme Court itself has in many instances later become law (the Brown decision itself reflected the dissent in 1896 in Plessy v. Ferguson which enunciated the "separate but equal" doctrine by a 5-4 margin).

Finally, the notion should be dispelled that resistance to forced racial busing is a Northern reaction to a punishment once inflicted on the South and that, somehow, "it is now the turn of the rest of the nation to endure the Southern experience with desegregation." That reasoning simply ignores that there are profound differences between circumstances in which complete racial segregation of schools was once mandated by law and those, whether North or South, in which most segregation is de facto in nature -- the result of housing patterns and complex demographic changes. With the passage of time we tend to forget that de jure segregation mandated by law was marked by separate schools, separate faculties, separate transportation systems, and near total inequality of educational opportunity. Drastic remedies were required to desegregate a segregated system, but oddly enough these very often resulted in a sharp decrease in busing with the elimination of racial busing. That process having been largely completed, the desegregation problems and issues now arising in the Southern and Border states -- as in Charlotte, North Carolina, Louisville, Kentucky, Wilmington, Delaware, or Atlanta, Georgia -- are for the most part identical to those arising in the rest of the nation. We are now dealing nationwide with de facto segregation which is beyond the reach of the Constitution as thus far construed and with real or alleged segregatory acts of school boards or State legislatures which have brought about court orders in many cases believed to be excessive and counterproductive. It is undoubtedly for this reason that the Attorney General of the United States, himself a noted

legal scholar and respected as a civil libertarian, recently asked the United States Supreme Court to review its decision and holdings in the critical North Carolina case of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

The Swann case was decided June 21, 1973, and Chief Justice Burger wrote the opinion for a unanimous Court. The school system involved consisted of the City of Charlotte and all of surrounding Mecklenburg County. At the time it was the 43rd largest school district in the Nation, with more than 84,000 students attending 107 schools in the 1968-69 school year. Of these some 24,000 (29 percent) were black students, of whom about 14,000 attended 21 schools that were all-black. Typically, the black students were concentrated in the central city. A desegregation plan approved by the Federal district court in 1965 had little success in changing this pattern. A new legal action was initiated in 1968. All parties, according to the Chief Justice, agreed that in 1969 "the system fell short of achieving the unitary school system that those cases require" [having cited Green v. County School Board, 391 U.S. 430 (1968)].

The opinion was expressly intended to clarify major and troublesome issues arising in desegregation cases by "defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing Brown I [the "I" being used to designate the original decision as opposed to "Brown II" in 1955 in which the Court laid down guidelines for fashioning remedies] and the mandate to eliminate dual systems and establish unitary systems at once." On its face the opinion did deal with many of these issues. It reaffirmed the broad equity power of federal district courts to fashion remedies, particularly where school boards have failed to do so; it stressed the duty of school boards "to eliminate invidious racial distinctions" when a system has been segregated with respect to faculty, staff, transportation systems, extracurricular activities, and facilities, which are characterized as "among the most important indicia of a segregated system" independent of student assignment; and it dealt with what it identified as "four problem areas...on the issue of student assignment." These it identified as racial quotas, one-race schools, attendance zones, and transportation. It dealt with them, briefly stated as follows:

Racial quotas. The Court affirmed that there is no constitutional mandate in desegregating a dual (legally segregated) school system to assure that every school must reflect the percentage racial composition of the district as a whole, but it affirmed the decree of the district court which had used such percentages "as a starting point in shaping a remedy". The "starting point" in actuality became the final result, an outcome which apparently will be repeated in the Louisville-Jefferson County, Kentucky case with acquiescence of the Supreme Court. Thus the real effect of Swann has been to confuse the issue of whether district-wide racial quotas constitute a proper remedy for localized segregation.

One-race schools. It was held that "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law... The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the courts that their racial composition is not the result of present or past discriminatory action on their part." Note that -- as has become the general rule in these cases -- once it is established that a "dual school system" exists the burden of proof with respect to all practices alleged to be discriminatory in the district shifts to the school district, which as any lawyer knows becomes a marked legal disadvantage to the party bearing the burden.

Attendance zones. The Court quite correctly observed that the remedial altering of attendance zones is within the power of a district court, particularly as "an interim corrective measure", and that a student "assignment plan is not acceptable merely because it appears to be neutral" unless it in fact counteracts the continuing effects of past school segregation. What the opinion left undecided and therefore to the discretion of district courts is how far beyond the mere counteracting of "continuing effects of past school segregation" a plan may or ought to go. The opinion noted with approval "that one of the principal tools employed by school planners and by courts to break up dual school systems has been a frank -- and sometimes drastic -- gerrymandering of school districts and attendance zones" and that "more often than not, these zones are neither compact nor contiguous; indeed they may be on opposite ends of the city."

Transportation of students. The Court said: "The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations." Given the guidelines for attendance zones and the lack of meaningful guidelines for busing the subsequent action of lower courts was predictable. The now-famous admonition that "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process" is not very helpful. Few if any federal appellate courts have found the "time or distance of travel" ordered excessive in those terms, and the formulation fails to take into account community disruption which may significantly impinge on the educational process.

The whole focus of the opinion in Swann is the "objective... to dismantle the dual school system." Despite the assertion that "the nature of the violation determines the scope of the remedy" and that "it must be recognized that there are limits" in employing the equity powers of a court in fashioning desegregation decrees, the Court took the position that "no fixed or even substantially fixed guidelines can be established as to how far a court can go...". Instead the Court reaffirmed and made repeated references to its opinion in Green v. County School Board, 391 U.S. 430 (1968) which held that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" through the application of "a plan that promises realistically to work...now...until it is clear that state-imposed segregation has been completely removed."

The Green decision has not been criticized in the context of the circumstances with which it dealt. The defendant New Kent County, Virginia, was a rural area in which there was no residential segregation. Its school system was formerly segregated by law and at the time of the case maintained only two schools, one formerly for black students and one for whites at opposite ends of the county. Beginning in 1965 the school board adopted a "freedom of choice" attendance plan which by 1968 had resulted in no white student transferring to the black school and only 115 black students transferring to the white school, so that 85 percent of the black students still attended the all-black school. The Supreme Court invalidated the "freedom of choice" plan and ordered the school board to adopt a plan which would have the results quoted of eliminating the dual system "root and branch".

The criticism of the Green decision, and of its use in Swann and other cases, has come in its application to circumstances completely different and easily distinguished from those to which it was applied. When segregative actions having a most limited effect -- or actions arguably neither segregative in their intent nor effect as applied to the schools -- can be used to characterize large metropolitan school districts as "dual systems" the application of Green can be disastrous.

In Keyes v. School District No. 1, Denver, Colorado (1973) Justice Powell in a separate opinion (concurring in part and dissenting in part) took note of the problem of applying Green to different circumstances. He said:

> "The Court properly identified the freedom of choice program there as a subterfuge, and the language in Green imposing an affirmative duty to convert to a unitary system was appropriate on the facts before the Court. There was, however, reason to question to what extent this duty would apply in the vastly different factual setting of a large city with extensive areas of residential segregation, presenting problems and calling for solutions quite different from those in the rural setting of New Kent County, Virginia.
>
> "But the doubt as to whether the affirmative duty concept would flower into a new constitutional principle of general application was laid to rest by Swann v. Board of Education, 402 U.S. 1 (1971), in which the duty articulated in Green was applied to the urban school system of metropolitan Charlotte, North Carolina. In describing the residential patterns in Charlotte, the Court noted the 'familiar phenomenon' in the metropolitan areas of minority groups being 'concentrated in one part of the city', 402, U.S. at 25, and acknowledged that:
>
> > 'Rural areas accustomed for half a century to the consolidated school system implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting populations, numerous schools, congested and complex traffic patterns.' 402 U.S. at 14.

"Despite this recognition of a fundamentally different problem from that involved in Green, the Court nevertheless held that the affirmative duty rule of Green was applicable, and prescribed for a metropolitan school system of some 84,000 pupils essentially the same remedy -- elimination of segregation 'root and branch' - which had been formulated for the two schools and 1,300 pupils of New Kent County."

Justice Powell's proposed solution to this Court-created problem was to ignore the legal distinction between de jure segregation imposed by law and de facto segregation caused by a multitude of circumstances, many having no connection with governmental actions. He expressed concern that Southern metropolitan school districts would be treated differently from those having no history of state-imposed segregation, although their present circumstances are identical to those in the rest of the Nation. The Court in Swann took some note of the problem by saying that at some point the desegregation process would be complete and that courts need not then continually attempt to redress segregation caused by demographic changes not brought about by state action. A more satisfactory response than that, but less drastic than the one proposed by Justice Powell, would be a complete review by the Supreme Court of the legal principles enunciated in Swann and applied in subsequent cases.

Justice Powell squarely addressed the busing issue raised in Swann, as follows:

"To the extent that Swann may be thought to require large-scale or long-distance transportation of students our our metropolitan school districts, I record my profound misgivings. Nothing in our Constitution commands or encourages any such court compelled disruption of public education."

****

"The single most disruptive element in education today is the widespread use of compulsory transportation, especially at elementary grade levels. This has risked distracting and diverting attention from basic educational ends, dividing and embittering communities, and exacerbating rather than ameliorating inter-racial friction and misunderstanding. It is time to return to a more balanced evaluation and recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert. This will help assure that school systems will be established and maintained by rational action, will be better understood and supported by parents of both races, and will promote the enduring qualities of an integrated society so essential to its genuine success."

These surely are not the views of one who looks with equanimity upon a segregated society. Rather, they suggest a more certain grasp of the limitations of law and of the rigid application of purely legal reasoning in dealing with broad social issues than does the law of these cases.

In his trenchant dissent in the Keyes case Justice Rhenquist criticized the Green case itself as "a drastic extension of Brown" which was "barely, if at all, explicated" in the Green opinion. He said that: "To require that a genuinely 'dual' system be disestablished, in the sense that the assignment to a child of a particular school is not made to depend on his race, is one thing. To require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by neutrally drawn boundary lines is quite obviously something else...Whatever may be the soundness of that decision in the context of a genuinely 'dual' school system, where segregation of the races had once been mandated by law, I can see no constitutional justification for it in a situation such as that which the record shows to have obtained in Denver."

Justice Rhenquist also attacked the notion that equitable remedies in these cases should extend beyond correcting the constitutional wrong done. He wrote:

> "Underlying the Court's entire opinion is its apparent thesis that a district judge is at least permitted to find that if a single attendance zone between two individual schools in the large metropolitan district is found by him to have been 'gerrymandered,' the school district is guilty of operating a 'dual' school system, and is apparently a candidate for what is in practice a federal receivership. Not only the language of the Court in the opinion, but its reliance on... /Green/...indicates that such would be the case. It would therefore presumably be open to the District Court to require, inter alia, that pupils be transported great distances throughout the district to and from schools whose attendance zones have not been gerrymandered. Yet unless the Equal Protection Clause of the Fourteenth Amendment now be held to embody a principle of 'taint', found in some primitive legal systems but discarded centuries ago by ours, such a result can only be described as the product of judicial fiat."

The Court in Swann did make a critical legal point in discussing attendance zones, which, if U.S. district courts were guided by some common concepts of the types of actions required to establish a constitutional violation and were uniformly strict in the standards of proof required to prove those actions were taken, could have avoided much future conflict and turmoil in our schools. The Court said:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All other things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation."

The difficulty with this perfectly sound formulation is that it hinges upon other interpretations of both the Supreme Court and of lower Federal courts of (a) what constitutes a "constitutional violation" and (b) the extent of the remedy required to correct such a violation which in itself may have had very limited effect. We recall that in the Detroit desegregation case (Milliken v. Bradley, 418 U.S. 717 (1974)) that the Supreme Court narrowly sustained the view that "an isolated instance of a possible segregative effect as between two of the school districts involved would not justify the broad metropolitan-wide remedy contemplated, particularly since the remedy embraced 52 districts having no responsibility for the arrangement."

But in later cases in 1975 the Supreme Court would affirm or refuse to review lower federal court decisions which would involve cross-district remedies (Evans v. Buchanan -- Wilmington, Delaware -- Newburg Area Council v. Jefferson County, Kentucky -- Louisville) where no current cross-district violation had occurred and would leave a district-wide remedy to the discretion of a lower court (Keyes) where the only showing of a segregative intent related to a relatively small area of the school district. In some cases the extent of the effect of segregative acts has been very limited; in other cases the effect upon racial isolation in the schools of acts found to be "a constitutional violation" could best be described as highly speculative and at worst as remote or unconnected. For example, see the dissent of Judge Layton in the three-judge federal district court holding in the Wilmington, Delaware case which the U.S. Supreme Court refused to review, in which he says:

> "In my view, the majority's findings, so sweeping in effect, so heavy with inferences but so lacking in concrete, relevant substance, have fallen far short of fixing the responsibility for inter-district racial discrimination upon the Defendant's shoulders. What the majority does not face up to is that there seems to be no definitive explanation for the huge tide of black immigration into the nation's cities, and the white flight therefrom, in the past two decades."

The Supreme Court in Bradley v. School Board of City of Richmond, 462 F. 2d 1058 (1972), 412 U.S. 92, barely upheld by a 4-4 decision the refusal of the Fourth Circuit Court of Appeals to order the integration of the schools of Richmond with those of two surrounding county districts (a plan which would have required extensive cross-busing). In its opinion the Fourth Circuit Court of Appeals got right to the heart of the problem in an analysis later quoted by Judge Layton in the Wilmington case. The Court said:

> "We think that the root causes of the concentration of blacks in the inner cities of America are simply not known and that the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the public schools of Richmond. We are convinced that what little action, if any, the counties may seem to have taken to keep blacks out is slight indeed compared to the myriad reasons, economic, political and social, for the concentration of blacks in Richmond and does not support the conclusion that it has been invidious state action which has resulted in the racial composition of the

> three school districts. Indeed this record warrants no other conclusion than that the forces influencing demographic patterns in New York, Chicago, Detroit, Los Angeles, Atlanta and other metropolitan areas have operated in the same way in the Richmond metropolitan area to produce the same result. Typical of all of these cities is a growing black population in the central city and a growing white population in the surrounding suburban and rural areas. Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend. That there has been housing discrimination in all three units is deplorable, but a school case, like a vehicle, can carry only a limited amount of baggage. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 24, 91 S. Ct. 1267, 28 L. Ed. 554."*

The existence of heavily-black inner cities -- whether in the North or the South -- and the court efforts to eliminate heavily-black schools through widespread and often long-distance racial busing, is of course the heart of the problem. Even the objections of black parents to busing and the growing black resentment of the concept that an inner-city black child must sit next to a white child from a more affluent family background in order to learn has not had a pronounced impact upon the courts. Neither has the pleading for more realistic approaches of black jurists and educators such as Derrick A. Bell, Jr., Professor of law at Harvard University, thus far had much effect. In a statement before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee on Education and Labor on December 18, 1975, Professor Bell did not in any sense urge retreat from carrying out the constitutional mandate of Brown v. Board of Education, but he did criticize an "inflexible insistence on racial balance remedies in every school desegregation situation, regardless of the expected educational value for minority children, and in the face of Pyrrhic victories resultant from white flight." He said: "What is needed now are remedies that protect and enhance the school desegregation progress made thus far, and provide alternative remedies -- particularly in those 100 or so large school districts where over one-half the minority students reside -- that will so improve the quality of predominantly minority schools that equal educational opportunity will become a reality today and integration a possibility in the near future."

In many of our metropolitan areas it is literally impossible to racially balance the schools, even if that were a constitutional requirement, which Chief Justice Burger in his opinion in Swann appears to deny. In Inglewood, California, for example a state court judge has rescinded his own order mandating a racial balance of the public schools on the grounds that it is impossible to carry out in a system which has changed from 38 percent minority to 80 percent minority since the order was issued in 1970. The Board of Education in Philadelphia has refused to file a plan for racial balance of its schools ordered by a court on the grounds that it was impossible to devise one.

The Congress has never confused desegregation and racial balancing. Section 401 of the Civil Rights Act of 1964 carefully makes that distinction as follows:

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* Bradley v. School Board of Richmond, 462 F. 2d 1058, at 1066.

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." /Emphasis supplied./

Now many sociologists and other academics have joined the Congress in making this distinction and in wondering how the courts have managed to stray so far from the requirements of law and the findings of research, to say nothing of common sense. Writing in the Washington Star of November 9, 1975 (in an article adopted from one published in the Phi Delta Kappan) Biloine W. Young and Grace B. Bress blame the advocacy of social scientists who they say in some cases have "published exagerated claims for their research" and distorted data "to serve predetermined political goals". They single out Dr. James S. Coleman as a prime example of one who "fell victim to this conflict between neutral, 'value-free' scholarship (concerned with finding 'the truth') and commitment to what he perceived as desirable social policy (promoting 'the good')." They are referring to the famous "Coleman Report" which was published in 1966 as a result of federally-funded research pursuant to the Civil Rights Act of 1964. Young and Bress described the problem in these terms:

> "In more and more American cities, courts and communities have reached a stalemate over the conflicting principles of mandatory racial balance and individual rights.
>
> "How does the goal of equal educational opportunity embodied in the Brown decision become distorted into a judicial demand for the imposition of racial quotas? A large part of the answer lies in the molding of the Coleman Report into an instrument of political advocacy for racial balance as an educational goal and in the vigorous dissemination of the report's assertions by Coleman himself."

Dr. Coleman in a response to the article disclaimed responsibility. He agreed that some social scientists had engaged in "advocacy for mandatory racial balance", but denied that he had been one of those. He stated that "Mandatory racial balance in the public schools did not develop out of social science advocacy, as claimed by Young and Bress, but out of legal advocacy." He builds a strong case for this contention, but more importantly he outlines his own thinking on the issue as follows:

> "Young and Bress seem, as do many persons from all points of the spectrum of opinion about these issues, unable to distinguish between the encouragement of integration in the schools through community actions that involve some concensus among the affected parties, black and white, and the imposition of racial balance by

the courts as a constitutional requirement. In my statements about school integration, which have been infrequent until this last summer, I have consistently favored the former but not the latter. My research of this last year has reinforced my beliefs about the incorrectness of the latter, and had led me to be more cautious about the conditions under which the former will be stable. I have engaged in no 'turnabout', though opponents of school integration find it useful to see me as the principal advocate of mandatory racial balance who has reversed his position, while advocates of mandatory racial balance attempt to find ways to dismiss my most recent research results."

Carefully read, Dr. Coleman's original report supported the contention that the family and socio-economic background of the student weighs most heavily in school performance, and that the racial and socio-economic composition of the classroom had little effect. His "most recent research results" tend to show that forced racial balancing accelerates "white flight" and the resegregation of school systems.

In any event, the Congress by repeated action (including the "Esch Amendment") has sought to convey to the courts and to federal agencies the national judgment that forced racial busing is an unpopular and counterproductive "remedy". Even where there has occurred a clear violation of the constitutional right to be assigned to public schools without regard to race, color, and other irrelevant considerations, such busing should be held to a minimum, and in any event go no farther than necessary to correct the offense committed. As this review has demonstrated, that message has not sufficiently penetrated the consciousness of our federal courts.

Whatever the merits of the debate between Dr. Coleman and his critics, it is indisputable that it has been legal advocacy and not academic advocacy which has led us to our present confused and unsatisfactory legal position. Since the fault is in the interpretation of the law the cure must be found in correcting that interpretation. Many critics of forced racial busing have advocated a constitutional amendment to deal with the problem. This memorandum is not addressed to the merits of that proposal, but I would note that the process is a long and uncertain one. I simply argue that the legal thinking which leads to wide-scale forced racial busing is defective and should be corrected. For this purpose, nothing short of a complete review of these issues by the United States Supreme Court itself will suffice.

COMMITTEE ON EDUCATION AND LABOR

U. S. HOUSE OF REPRESENTATIVES

MEMORANDUM

November 20, 1975

TO: Republican Members
Education and Labor Committee

FROM: Charles W. Radcliffe
Minority Counsel

RE: Implications of the U.S. Supreme Court Action Affirming the Wilmington (Delaware) School Desegregation Decision.

On Monday, November 17, the U.S. Supreme Court affirmed without a hearing the action of a three-judge Federal district court in Delaware which struck down a Delaware school districting law as unconstitutional and opened the way for busing between predominantly-black Wilmington and predominantly-white school districts in the rest of Newcastle County in which the Wilmington school district is located. The Chief Justice and Justices Powell and Rhenquist objected to the action being taken without an examination of the findings of the lower court or a written opinion.

Because of the nature of the findings of the lower court and its conclusions of law (in a 2-1 decision and opinion handed down March 27, 1975), it could have wide application elsewhere and lead to the type of cross-district remedies, very likely involving large-scale busing, rejected in the Richmond and Detroit cases. I find it almost ominous that five Justices of the Supreme Court refused even to cite reasons for their action in this particular case.

Without going into great detail, Delaware before 1954 practiced de jure racial segregation of its schools and pursuant to that policy children were transported across the district lines between Wilmington and the surrounding districts to segregated schools. This practice was rather quickly terminated after Brown v. Board of Education in 1954 and since that time both Wilmington and the surrounding school districts have maintained unitary (desegregated) systems within the common understanding of that term. What occurred was a massive demographic change of the type now familiar in large cities North and South: in 1950 Wilmington had a population of 110,000 of whom 15% were black and suburban Newcastle County had a population of 62,000 of whom 6.4% were black; by 1970 Wilmington's population had shrunk to 80,000, of whom 43.6% were black and suburban Newcastle County's population had grown to 306,000, of whom 4.5% were black. Of course, this shift was reflected in school attendance. In 1954, 4% of the children attending suburban Newcastle County schools and 28% of those attending Wilmington schools were black; by 1973 these percentages were 6% and 83%, respectively. Many formerly "white" schools in Wilmington are accordingly today all black.

I have not had access to the actual trial record and rely upon the opinions, majority and dissenting, of the trial court for a description of the factual base upon which the court found acts constituting de jure school segregation and distinguishing this situation from that of Richmond and Detroit where the Supreme Court had barred a cross-district remedy. (Essentially, in Richmond the Court found that both the Richmond and two surrounding school districts were unitary systems and that the State lacked authority arbitrarily to combine them; in Detroit the Court found that any substantial de jure segregative acts had been limited to Detroit and refused to approve a cross-district remedy involving school districts not shown to have committed such acts). My reaction to the facts recited in the trial court opinions is that they are fragile enough to merit a full reconsideration by the Supreme Court. The failure to provide that is disquieting, to say the least.

The majority in this case (Evans v. Buchanan, 393 Fed. Sup. 428), as reported in the press, pinned their major contention of a segregatory action by the State upon the potential effect of a 1968 Educational Advancement Act which encouraged the consolidation of small school districts in the State but specifically exempted the Wilmington school district from its provisions. Even the majority opinion took note of the facts that the Wilmington school district had always been treated separately, that it derived special benefits from such treatment, and that all the legislators black and white representing Wilmington voted for the Act. Nor did the majority contend that the Act had any segregative intent in treating Wilmington separately, but rather that it prevented consideration of a possible merger of the Wilmington district with surrounding suburban districts as a possible response to the problem of black schools in Wilmington. The opinion did not indicate that anyone had suggested such a merger, or had criticized the Act at the time of its passage, and in fact affirmatively recognized that the surrounding districts operate unitary systems. So State action was relied upon to support an inter-district remedy.

The only other argument advanced with respect to education was that the school district boundaries were "permeable" because prior to Brown there was cross-district busing to maintain segregation and the State still pays for the transportation of parochial school children (94% of whom are white) across district lines (although there was no contention that parochial school attendance zones had ever taken public school district lines into account).

The balance of the case made by the majority concerned real estate and housing policies which had taken place largely in the past and were presumed to have had some effect upon demographic changes described herein. The State real estate board in 1936 had published an F.H.A. mortgage manual which advocated racial and economic homogeniety in neighborhoods; F.H.A. as late as 1949 issued mortgages on a basis favoring this policy -- both of which practices terminated over 21 years before this action was brought. The majority also pointed to the construction of public housing units in Wilmington rather than in the surrounding suburbs -- but did not discuss whether this might have been a response to the reality of where prospective tenants work rather than a desire to increase the segregation of Wilmington.

Undoubtedly many others would not view the fact situation in this case as I do (which apparently includes five Justices of the Supreme Court), but I am nevertheless struck by the fact that the one solid operative fact in the whole situation is the existence in Wilmington of overwhelmingly black schools. To me -- and this incorporates a study over the years of the opinions in these cases as they have developed -- this points up a large area of confusion among Federal judges, and in the state of the law, about (a) what is unconstitutional segregation, (b) what kinds of actions by government does it take to support a finding of segregative acts which makes de jure segregation and (c) what type and how direct an action is required to support an inter-district remedy. It seems to me that the confusion on these issues goes all the way back to Brown (hindsight is better than foresight and ought to be used when possible!), and that the Supreme Court missed another opportunity to clarify them.

In Brown, for example, the Court fell short of coming straight out and saying the practices complained of were unconstitutional because distinctions between citizens based upon race are inherently arbitrary and capricious and a denial of the equal protection of the laws under the Fourteenth Amendment. Rather, the Court spoke to the educational issue of the psychological damage done to black children in being singled out by law for segregation in separate schools which meant that such schools could never be "equal". Undoubtedly that is a valid point and worth making, but through considerable imprecision of expression there was left also the impression that all-black or all-white schools were inherently unequal, not by virtue of an invidious and psychologically damaging legal distinction and its effects, but simply because they are not racially integrated. In my judgment, this fundamental confusion is evident in cases up to the present, although the Supreme Court has gone to some pains to say that the existence of some all-black schools in a formerly de jure segregated system, while highly suspicious, is not conclusive proof of now existing de jure segregation. At the same time the Court has declared that all vestiges of former unlawful segregation must be removed "root and branch". But in more recent cases -- and I would conclude in Wilmington -- we are not dealing with the vestiges of former de jure segregation, but with the effects of social and economic forces which are indistinguishable in Atlanta and Detroit.

The legal confusion over what in fact constitutes de jure segregative acts requiring extensive remedy appears evident on the face of recent opinions in these cases. It seems odd that the Supreme Court did not review these in the Wilmington case.

Is there a remedy for this confusion other than prolonged legal action? Attempts at legislative remedies aimed at the courts, the most comprehensive being the Esch Amendment, are perhaps too recent to judge their effectiveness; but the courts do not appear to be fully aware of the Esch Amendment. Congressman Esch wrote the Attorney General on September 19 urging that the Department of Justice act diligently to call the provisions of the law to the attention of Federal courts, but has not yet received a response (Secretary Mathews of HEW responded on November 10, that HEW is applying the provisions in title VI enforcement actions).

The proponents of a constitutional amendment recognize that their course -- which many opponents of forced busing also oppose -- could take years to become effective.

Accordingly, in addition to whatever other remedies one prefers to seek, it might be productive to think in terms of a Joint Resolution of Congress (if that is the appropriate form) citing the confusion over the operative legal principles governing these cases and over the proper application of such principles and calling upon the United States Supreme Court to speedily resolve them. The Court, after all, is responsible for the proper administration of the entire Federal judicial system. In addition to its powers in that capacity, it could undoubtedly call upon a group such as the Judicial Conference of the United States for assistance.

We are dealing here with one of the most important legal issues and one of the most explosive social issues of our time; any constructive effort toward their resolution would seem worth making.

THE WHITE HOUSE

WASHINGTON

May 26, 1976

MEMORANDUM FOR: JIM CANNON

FROM: JB for ART QUERN

SUBJECT: Busing

Attached are the following:

Tab A - A Congressional Quarterly summary of the Esch Amendment provisions and of the compromise language that was finally adopted.

Tab B - An August, 1975 memo listing cities where busing problems could be anticipated for the autumn of 1975.

Tab C - A list of pending cases in which the Department of Justice is involved. This is not a complete list of major cases; for example, the Wilmington, Delaware and Louisville, Kentucky cases are not included. We are asking Martin Gerry, Director, Office for Civil Rights, HEW, for additions to this list.

The Federal entities currently involved in busing are the Department of Health, Education, and Welfare, the Office for Civil Rights, the U.S. Office of Education, and the Department of Justice.

TAB A

Anti-Busing Amendments Added to Education Bill

Following are provisions of the anti-busing amendment in HR 69, offered by Rep. Marvin L. Esch (R Mich.) and adopted by the House March 26 on a 293-117 vote. The amendment, if enacted, would become Title II of the Elementary and Secondary Education Act.

- Declared it U.S. policy that all public school children were entitled to an equal educational opportunity and that a child's neighborhood was the appropriate basis for public school assignment.
- Found that student transportation which created serious risks to health and safety and disrupted educational processes was excessive; found that court guidelines for dismantling dual school systems were incomplete and imperfect and had not established "a clear, rational and uniform standard" for determining the extent to which a local education agency was required to transport students to eliminate dual school systems.

Unlawful Practices

- Prohibited a state from denying equal educational opportunity to students on account of race, color, sex or national origin by 1) deliberate segregation, 2) failure to remove vestiges of their dual school system, 3) assignment of students to schools other than those closest to student's homes where the assignment resulted in segregation, 4) discrimination against school faculties and staffs, 5) use of transfers to increase segregation, and 6) failure to take action to overcome language barriers that impeded equal participation by all students.
- Stated that the failure of a school district to attain a balance of students on the basis of race, color, sex or national origin would not constitute a denial of equal educational opportunity or equal protection of the laws.
- Stated that assignment of students to schools nearest their homes was not a denial of equal educational opportunity or equal protection of the laws unless the assignment was for purposes of segregation.

Enforcement

- Allowed suits by individuals under the act and allowed the U.S. attorney general to intervene in such suits and to institute suits on behalf of individuals.

Remedies

- Provided that federal courts and agencies, in formulating solutions for segregation, had to use the following remedies in the order listed below:

1) Assign students to schools closest to their homes, taking into account school capacities and natural physical barriers.

2) Assign students to schools closest to their homes taking into account only school capacities.

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

4) Create or revise attendance zones or grade structures without requiring busing beyond that described elsewhere in the bill. *(Next six provisions, below)*

5) Construct new schools or close inferior ones.

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

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

- Prohibited federal courts or agencies from ordering busing of students to any but the school closest or next closest to the student's home.
- Prohibited federal courts or agencies from requiring busing where it would pose a risk to the student's health or significantly impinge on the educational process.
- Prohibited federal courts and agencies from formulating new desegregation plans for any school district that had shifts in patterns of attendance due to residential changes if a court had already determined that it was a unitary (non-segregated) school system.
- Provided that in formulating remedies for segregation, school district lines could not be ignored or altered except where it was established that the lines were drawn for the purpose of, or had the effect of promoting, segregation.
- Provided that voluntary plans that included busing beyond the limits described in the bill were permissable.

Reopener, Court Limitations

- Provided that any school district under a federal court order or desegregation plan in effect on the date of enactment of HR 69 could ask that the case be reopened and made to comply with the provisions of Title II.
- Required that any court order requiring busing be terminated if a federal court found that the school district was no longer segregated by race, color or national origin, whether or not the school district was previously segregated either *de jure* or *de facto.*
- Required that any court order requiring desegregation of a school system be terminated if a federal court found that the school district was a unitary system, whether or not the school system was previously segregated either *de jure* or *de facto.*

Definitions

- Defined segregation as "the operation of a school system in which students are wholly or substantially separated among the schools of any educational agency on the basis of race, color, sex or national origin or within a school on the basis of race, color or national origin."

Ashbrook Amendment

By a 239-168 vote, the House March 27 adopted an amendment to a separate section of the bill, by John M. Ashbrook (R Ohio), to prevent school districts from using federal funds to overcome segregation or achieve racial balance.

The Ashbrook amendment would bar the use of federal funds even if the limited busing prescribed in Title II was employed or if school districts voluntarily used busing to achieve desegregation.

Conference Report

After nearly two months of deliberation, House-Senate conferees submitted their conference report (H Rept 93-1211—July 23; S Rept 93-1026—July 22) on HR 69. Two House members—John M. Ashbrook (R Ohio) and William D. Ford (D Mich.) refused to sign the report.

The conference committee had resolved differences on all issues except school busing before Congress adjourned for the July 4 recess. Another two weeks were needed to work out an acceptable compromise on this issue, with House conferees finally ignoring repeated instructions of the full House to hold fast to its language.

The major conference compromises on the bill were as follows:

Busing Compromise

Both House and Senate versions listed several alternatives that a court must find ineffective before it could order busing to desegregate public schools. The House bill then flatly forbade any student to be bused beyond the school next closest to his home. The House language also allowed all previous court busing orders to be reopened and brought into compliance with the amendment's busing restrictions.

The Senate amendment, on the other hand, declared that no student should be bused beyond the school next closest to his home but allowed courts to order more extensive busing if it were required to guarantee the student's civil rights. The Senate amendment did not contain the reopener provision.

Reopener Provision

Conferees agreed to the Senate amendment allowing courts to determine when more extensive busing was necessary. They also rejected the House reopener provision, settling on a compromise that would allow parents or the school district to seek to reopen a case only if the time or distance traveled was so great as to endanger the health of the student or impinge on the educational process.

Termination of Court Orders

A key compromise involved the termination of court orders. The final provision allowed a court to terminate a busing order if it determined that the school district was no longer violating the civil rights of any of its students and was not likely to do so in the future. The provision also prohibited the imposition of new busing orders unless the school district was found to be in violation of the 5th or 14th Amendments to the Constitution. The House bill would have made such terminations mandatory.

Other Busing Compromises

Other busing provisions agreed to by conferees included a prohibition on any federal education funds, except impact aid that was not designated for handicapped children or the educationally disadvantaged, from being used to transport pupils or teachers to overcome racial imbalance or carry out a desegregation plan. Conferees also agreed to a Senate floor amendment allowing court busing orders to take effect only at the beginning of the academic year.

Conferees accepted another Senate floor amendment that prohibited desegregation plans from using cross-district busing unless the boundaries had been drawn up or maintained deliberately to promote segregation.

Compensatory Education

The House and Senate had adopted the same formula for distributing federal compensatory education funds for disadvantaged children (Title I), the major education program authorized under the Elementary and Secondary Education Act. That formula generally shifted funds away from wealthier, urban states to poorer, rural states. To compensate somewhat, conferees agreed to a Senate provision that authorized a continuation of the special incentive grant program which gave bonuses to states that exceeded the national average for financing public education. Conferees agreed that $50-million should be set aside for the grant program from regular Title I funds. The Senate version had provided a total of $75-million; the House version repealed the program.

FINAL ACTION -

Senate adopted the conference report, 81-15.

HOUSE

The House July 31 adopted the conference report by a 323-83 recorded vote. *(Vote 298 p. 96-H)*

The July 25 Supreme Court decision striking down a Detroit, Mich., cross-county busing order and the fear of losing federal aid for virtually every federal elementary and secondary education program were considered key factors in dissipating opposition to the conference agreement on school busing—which contained weaker anti-busing language than originally approved by the House.

Urging his colleagues to adopt the conference report, Education and Labor Committee Chairman Carl D. Perkins (D Ky.) called HR 69 "one of the most important and comprehensive elementary and secondary education bills ever brought before this chamber." The bill continued federal aid for the disadvantaged and the handicapped; impact aid; assistance for bilingual, adult and vocational education programs; and established several new programs, including one for reading improvement. The bill also consolidated several existing categorical grant programs and authorized more than $25-billion for all of the programs over a four-year period (fiscal 1975-78).

Failure to adopt the conference report, Perkins said, would mean "no appropriations bill for education this year.... The schools would just be deteriorating, not having the funds they need to carry out the educational process."

"Those who would be most severely affected by the failure to enact this legislation are those who can least afford to suffer the loss of support," said Albert H. Quie (R Minn.), ranking minority member on the committee, who also announced that the Department of Health Education and Welfare supported the conference report.

Perkins also said that if the House rejected the conference report, the Senate conferees would not go back to a new conference. "I want to see you go home and tell your constituents you wouldn't vote down this measure because you're afraid of the Senate," countered Joe D. Waggonner (D La.), who three times had offered successful motions to instruct the House conferees to uphold the House anti-busing language. Waggonner also said that the Supreme Court decision "means absolutely nothing.... It simply means...that [the Court] is not ready yet to order busing to achieve racial balance between adjoining school districts. It does absolutely nothing to prohibit busing within a school district." If anything, the decision shows there "is room for legislative action," Waggonner said, asking that the conference report be voted down and sent back to a second conference.

Charging that House conferees had caved in to the Senate, John M. Ashbrook (R Ohio) said that "on a scale of one to 100, we gave up 95 points, they gave up five."

"The application of the [Senate] language," said Marvin L. Esch (R Mich.), author of the original House amendment, "...raises a cloud over effectiveness of the rest of the Esch amendment." Because of that he opposed the conference report although "many of the provisions are concepts that I have worked to develop."

Final Action Delayed

After the conference report was adopted, a routine unanimous consent request authorizing the clerk to make corrections in the bill before forwarding it to the President for his signature was objected to twice, first by Robert E. Bauman (R Md.) and then by John H. Rousselot (R Calif.). The objections forced Congress to make the corrections by concurrent resolution.

The House Aug. 5 completed its action on education legislation when it agreed by voice vote to H Con Res 583 ordering the clerk of the House to make corrections in HR 69 before sending the bill to the President. The Senate agreed to the resolution by voice vote Aug. 7, clearing HR 69 for the President's signature.

TAB B

August 19, 1975

MEMORANDUM FOR: Jim Cavanaugh

FROM: Dick Parsons

SUBJECT: Busing

The attached was prepared by Stan Pottinger in response to my request for information about cities which may experience problems implementing busing orders this fall.

In that I asked Stan to list all cities where problems can be anticipated, I think we can assume that those cities not listed are "safe" in this regard.* However, if there are other cities you would like me to specifically inquire about, let me know.

Incidentally, Kirk Emmert in Bob Goldwin's office, has expressed an interest in this information. You may wish to send him a copy of Stan's memorandum.

Attachment

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* I note, however, that a busing controversy is currently raging in the Ferguson-Florissant, Berkeley and Kinloch school districts in St. Louis County, Missouri. While it does not appear as though the court will order student busing this fall, the local residents know that it is only a matter of time and they are upset by this prospect. A letter-writing campaign is currently under way.

Department of Justice
Washington, D.C. 20530

August 18, 1975

MEMORANDUM FOR

Richard Parsons
Associate Director
Domestic Council
The White House

Subject: Desegregation Involving Busing

This is in response to your request for information about cities which might be expected to experience problems relating to busing orders. I have also attached a memo which lists districts which will or may implement new desegregation plans, or modifications to existing plans. Not all of these new plans will involve busing. Those that will require moderate or heavy busing are listed below:

1) Boston: You are familiar with the situation there. School opens September 8th.

2) Louisville: On July 31st the district court ordered a plan requiring desegregation between the city and county school systems. All schools will have ratios of between 12 per cent and 40 per cent black and 22,000 students will be bused. A special master has been appointed by the court for enforcement purposes, and the court issued an order with guidelines for enforcement. Justice is monitoring the situation.

3) Indianapolis: The district court ordered limited inter-district relief on August 1, 1975. Under the order a total of 6,543 black students in grades 1-9 will be bused to eight separate suburban districts. The city system is required to present a plan for the rest of the city on

October 15th, but there will be no new intra-city plan this fall. Suburban districts have been denied a stay in the district court, and presently have a motion for a stay pending in the Court of Appeals.

4) Detroit: The district court has rejected plans proposing extensive busing and has ordered the school board back to the drawing board. There is no date set for resubmission of a new plan, nor is it clear how much busing will be proposed. The NAACP is appealing to the Sixth Circuit. It is doubtful there will be any significant new busing when school opens on September 3rd.

5) Corpus Christi, Texas: The court ordered a confusing "computer" plan (drawn by court-appointed computer people) on July 26th. While the plan requires about only 2,000 of 20,000 elementary students to be bused, over half of the students are assigned to "walk" up to two miles to school. One result is that many naturally integrated neighborhood schools will have all or almost all of their students walking to other schools. School opens August 24th.

6) Beaumont, Texas: The district court ordered a desegregation plan formulated by the school board with only a minimal increase in busing (about 800 students) on April 23rd. That situation is developing relatively smoothly. School opens August 24th.

7) Houston, Texas: The district court approved a board magnet school plan on July 11th. While involving some 30 schools, the impact on desegregation is minimal. Busing will be required, but all assignments are on a voluntary basis, and trouble should not be expected.

8) San Francisco: There is no known change to a plan already implemented (1971).

9) Denver: There may be minimal changes in the plan implemented last year. We are informed that it will

result in a small decrease in the busing, but this is not confirmed.

You asked about Philadelphia, but we have had no reports about any desegregation there.

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

Attachment

CC: Deputy Attorney General
Alexander C. Ross
Robert A. Murphy

ATTACHMENT

STATE	JUDICIAL DISTRICT	SCHOOL DISTRI AND COUNTY
Alabama	Northern	Anniston (Eto Cou
		Jefferson Cou
	Middle	Dothan (Houst Count
	Southern	*Hale County
		Escambia Cour
Connecticut	--	*Waterbury
Delaware	--	*Wilmington
Indiana	Southern	Indianapolis (Marion Count
Louisiana	Western	Rapides Paris
		*DeSoto Parish
		*Bossier Paris
Kentucky	Western	Louisville
Mississippi	Northern	*Columbus (Lowndes Coun
	Southern	*Covington Cou
		*Laurel (Jones Cou
Massachusetts	--	Boston
Michigan	Eastern	Detroit
		*Ferndale (Way Cou
Nebraska	--	Omaha

TAB C

TO : J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

DATE: May 14, 1976

FROM Harry Fair
Executive Officer

SUBJECT: Weekly Report

Following is a report of significant legal and legislative activities which have been brought to my attention by the various sections during the week of May 7 through May 13, 1976.

A. Appellate

1. Pasadena, California (Neal Tonken) On May 10, 1976, we filed a brief in the Court of Appeals for the Ninth Circuit in a new aspect of the ongoing Spangler and United States v. Pasadena City Board of Education school desegregation suit. This appeal concerns the board's decision to convert a "regular" primary school kindergarten into a "fundamental" grade in which emphasis would be placed upon traditional educational techniques and enrollment would be voluntary.

We argued in our brief that, in effecting the conversion, the school board had not fulfilled its affirmative obligation, during the "interim period" of "remedial adjustments" spoken of in Swann, to ensure that its action would not result in resegregation and would not place a disproportionate share of the burden on the black community; and that the district court was therefore correct in declining to approve unqualifiedly the change in question or further conversions until data is compiled showing the probable effects thereof. We also contended, however, that, in the particular circumstances of the case, the district court should have selected a less drastic remedy than immediate reconversion for dealing with the board's failure to discharge its duties, and we suggested that the more appropriate remedy would have been to allow the conversion for one year subject to conditions, including the development of a back-up plan.

In addition, we opposed the board's effort to obtain disqualification of the district judge on grounds of bias and prejudice; and, without addressing the correctness of the amount of attorneys' fees awarded to the plaintiffs-appellees, we supported the awarding of such fees in a case like this. Finally, we suggested, as we had in an earlier appeal, that the court of appeals direct the district court to enter an order requiring the board, during the remainder of the "interim period," to file periodic reports showing, inter alia, student

enrollments by race at the various schools, and to seek court approval of proposed enrollment method and other changes prior to their implementation.

2. City of Baltimore and State of Maryland: (Bill Graves, Cindy Attwood, Marie Klimesz) In the cases of Mandel v. H.E.W. and Mayor and City Council of Baltimore v. Mathews we have recently filed in the Court of Appeals for the Fourth Circuit, the following papers:

(a) On April 26 and 30, 1976, we filed responses to motions by plaintiffs-appellees in the two cases for a hearing en banc. In both responses we argued that plaintiffs had not shown the appropriateness of en banc consideration since the questions presented relate to administrative procedure and are not of exceptional importance, and there is not a conflict within the circuit in regard to their resolution. We also suggested that the court defer resolution of the motions until after it had received the briefs on the merits since at that time it would be in a better position to judge the correctness of plaintiffs' characterization of the issues and since it is unnecessary for an en banc court to consider stay motions.

(b) On May 3, 1976, we filed motions for a stay pending appeal and to expedite the appeals in both cases. (Our stay motions had been denied by the district court on April 20). In an accompanying memorandum we argued that expedition of the appeal is justified to prevent potential harm to both parties and should be ordered irrespective of the court's disposition of the stay request. With respect to a stay, we contended that HEW has a strong likelihood of prevailing on the merits since, inter alia, the threshold issue of the reviewability in federal court of HEW's Title VI enforcement activities prior to an administrative hearing was resolved contrary to the order on appeal in Taylor v. Cohen, 405 F.2d 277 (4th Cir. 1968) (en banc). We further pointed out that permitting the administrative processes to go forward would cause no tangible or irreparable harm to plaintiffs since they stand to lose no federal assistance until after a final and adverse agency decision is reached and that decision is fully reviewable in the courts. On the other hand, the over-broad injunctions entered by the district court will irreparably harm HEW's enforcement program and are contrary to the public interest.

(c) On May 3, 1976, we also filed a motion to consolidate the appeals in these two cases on the grounds that the legal issues presented are substantially identical and consolidation would promote judicial economy.

3. Parchman, Mississippi: (Judy Wolf) On May 10, 1976, a panel of the Court of Appeals for the Fifth Circuit (Tuttle, Ainsworth and Clark, JJ.) heard oral argument in Gates and United States v. Collier. The private plaintiffs and the United

States were appealing a district court order requiring the opening of new facilities at the Mississippi State Penitentiary and the closing of unfit ones according to a specified timetable. The district court first found in 1972 that inmates were living in facilities "unfit for human habitation under any modern concept of decency".

We argued that the district court erred in ordering relief which would not be fully effective until July 1, 1977, in view of the fact that the evidence showed that defendants could be reducing prison population and closing old facilities more quickly.

4. State of Mississippi: (John Hoyle, Jessica Silver) On May 5, 1976, we filed in the Supreme Court a memorandum in support of plaintiffs' petition for a writ of mandamus in Connor v. Coleman. The petition arises out of the litigation to reapportion the Mississippi state legislature.

After the Supreme Court, in Connor v. Waller, ruled that the 1975 plan enacted by the legislature was subject to Section 5, the plan was submitted and an objection interposed. The district court proceeded to formulate a "temporary" plan for the 1975 elections only, because there was insufficient time to formulate a final plan. The court stated that it intended to formulate a final plan which met constitutional standards and to hold special elections, if necessary, to coincide with the 1976 general election. Although the court expressed its intention to order into effect a final plan by February 1, 1976, it deferred further action on January 29, 1976 until decision of three Supreme Court cases.

We argued that further delay in implementation of a legally sufficient plan was unwarranted. Two of the three cases - East Carroll Parish School Board v. Marshall and Beer v. United States - have been decided and the Third United Jewish Organizations of Williamsburgh v. Wilson - will not be argued until next Term. The inordinate delay and the unlikelihood that the case will provide meaningful guidance, we stated, require that the district court be instructed not to await a decision in Williamsburgh. We argued that the history of delay in this case and the clear illegality of the present plan render urgent the need for prompt action by the district court to avoid further irreparable injury to the voters of Mississippi. Moreover, by declining to proceed expeditiously, we contended, the district court has acted in contravention of the Supreme Court's ruling in Connor v. Williams.

5. Cincinnati, Ohio: (Judy Wolf) On May 4, 1976, the Court of Appeals for the Sixth Circuit denied our petition for

rehearing in Board of Education of the City School District of Cincinnati v. HEW. We had contended that the court of appeals should not have ordered the district court to refrain from entering a final order until judgment had been entered in Bronson v. Board of Education, the private school desegregation suit. The board's suit against HEW challenged HEW's determination that the Board was ineligible for funds under the Emergency School Aid Act. The court of appeals reversed the granting of summary judgment in favor of HEW.

6. Victoria, Texas (Judy Wolf) On May 4, 1976, the Court of Appeals for the Fifth Circuit granted our motion to dismiss the petition for review in Victoria Independent School District v. HEW.

An administrative law judge had dismissed Title VI termination proceedings against Victoria on the ground that HEW was required to formulate a plan of desegregation prior to holding Title VI hearings. Victoria was seeking review of an HEW Reviewing Authority decision reversing the administrative law judge and sending the proceedings back for a hearing. We argued that the petition for review should be dismissed because, until the administrative law judge decided the case on the merits, there was no agency decision which was ripe for judicial review.

B. Employment

1. Los Angeles, California: (Richard Ugelow) On April 21, 1976, Judge Lydick granted the outstanding motion of defendant Local Union 776 for summary judgment in I.A.T.S.E. Group for Union Equality, et al. v. Association of Motion Picture Producers and Television Producers, et al. (including the United States) (C.D. Cal.). Previously, on March 3, 1976, the court had granted motions for summary judgment filed by the several defendants, except for that of Local Union 776. The court, at that time, held the matter was moot because all the defendants, with the exception of Local 776, had executed agreements with the United States merging their minority and general labor pools.

In granting the motion for summary judgment in favor of Local 776 the court held inter alia, that: (1) settlement agreement was not violative of the Fifth Amendment; (2) even if the settlement agreement adversely affected the plaintiffs economically, this was not sufficient to make it unconstitutional or against public policy; and (3) public policy favors negotiated settlement of employment discrimination complaints.

3. Tulsa, Oklahoma: (John McDonald) On April 29, 1976, the federal grand jury in Tulsa, Oklahoma indicted Bobby Lee Hughes, Chief of Police, Jay, Oklahoma, for a misdemeanor violation of 18 U.S.C. Section 242. Swake, a 5'4", 130 pound, American Indian, was arrested by Hughes, 6'1', 210 pounds, for public drunk. At the booking station and in the presence of the County Under Sheriff, a deputy and the dispatcher, Hughes, grabbed Swake by the neck and hit his head against a cement wall, swung him around hitting his head on the booking counter, threw him to the floor, and stomped him on the head. The witnesses say Swake was not resisting.

4. Tulsa, Oklahoma: (John McDonald) After two years of discovery and negotations, we were successful in gaining a dismissal in the matter of Logan, et al. v. Kleppe. We were defending the constitutionality of Osage Indian election regulations which had been promulgated by the Secretary of Interior.

The legitimate problems faced by the plaintiffs concerned the entire form of the law suit. The Commissioner of Indian Affairs agreed to appoint a legislative drafting committee to consider alternative future forms for that government.

F. Public Accommodations and Facilities

1. Winter Haven, Florida: (Bill Hackworth) ~~On May 6,~~ 1976, a consent decree was entered in the Title II case of United States v. Hensler, et al., d/b/a L-Bo-Room Lounge (M.D. Fla.). Among other things, the defendants agree to serve black customers on an equal basis with white customers and to post notices informing the public of their non-discriminatory service policy.

G. Schools

1. Valdosta, Georgia: (Kaydell Wright) On May 5, 1976, a hearing was held in United States v. Valdosta Board of Education (M.D. Ga.), to determine whether, as requested in the United States' motion for supplemental relief, the Valdosta Board of Education should be required to submit new student assignment plans. At the hearing, the United States argued that since the court's initial order was entered, the Supreme Court in Swann had stated that where one race or predominantly one-race schools remain in a desegregating district, a reevaluation of the system is required.

The defendants argued that Swann does not represent a change in Federal law and that the court order under which they are currently operating adequately desegregates Valdosta's elementary schools (6 or 7 elementary schools are racially identifiable).

The defendants further argued that the United States has failed to show any intent on the part of the board to segregate the elementary schools. In rebuttal, the United States informed the court that Valdosta is a system which formerly had de jure segregation and that elementary students have always been assigned to school in a manner which racially identifies their schools.

Following the evidentiary hearing and oral arguments the judge stated that he would take the case under advisement and issue an order shortly.

2. Bossier Parish, Louisiana: (Frank Marshall) On April 26, 1976, Judge Edwin Hunter held a conference of the attorneys of record in Lemon and United States v. Bossier Parish School Board (W.D. La.), to discuss the United States' submission of proposed guidelines for the bi-racial committee which Judge Hunter had appointed on April 12, 1976. The proposed guidelines submitted by the United States directed the bi-racial committee to utilize the standards set forth by the Court of Appeals for the Fifth Circuit in Cisneros v. Corpus Christi Independent School District. Additionally, the proposed guidelines instructed the committee that its tasks included the submission of alternate methods of desegregating the Bossier Parish School System, but did not include the submission of a determination of whether further desegregation was needed in the school system. Further, the guidelines set forth a proposed schedule setting forth specific submission dates for the committee's recommendations.

The court is presently considering the proposed guidelines and indicated that it would adopt the guidelines insofar as the timetable was concerned. Additionally, the court indicated that guidelines would be issued in the next few weeks.

3. Oxford, Mississippi (Jeremiah Glassman, Ross Conneally) On May 6, 1976, a hearing was held to determine the appropriate plan of desegregation in the case of United States v. Columbus Municipal Separate School District (N.D. Miss.).

The hearing was predicated by the court's August 6, 1975, order requiring the district to develop plans for desegregation. The district submitted a plan which modified zone lines but left one school all-black and two others with heavily black student enrollments. On November 6, 1975, in response to our motion, the court ordered the district to develop various pairing and clustering plans which would fully desegregate the district. On April 15, 1976, the district submitted two alternate plans which provided for zone modifications similar to their initial response, and additionally removed the all-black status of

Hughes Elementary School by assigning the 5th grade or 5th and 6th grade students from Columbus Air Force Base to Hughes.

The court ruled that the pairing plans would achieve the greatest degree of desegregation in Columbus. Additionally, the court found that the traffic conditions and the time and distance between schools would not be an impediment. However, taking into account the practicalities of the situation, the court ruled that the district could implement either of the two plans submitted April 15, 1976. The reasons offered were that the bi-racial committee favored the neighborhood school concept and had approved the plans, and that the pairing plans would cost the district approximately $130,000 per year.

4. Omaha, Nebraska: (Ross Connealy) On April 27, 1976, the district court in United States v. School District of Omaha (D. Neb.), issued a memorandum opinion which approved the desegregation plan submitted by the defendant school board as modified by this Department. In brief, this modified plan provides for student reassignments as follows:

1. Elementary schools - Seven clusters and three sets of paired schools will be established with over 50 schools involved in the reassignments. In each cluster, the former black schools will become 2nd-3rd grade centers. Kindergarten and first grade students will be exempt from mandatory reassignments. No school will enroll more than a fifty percent black student body. Approximately 3,300 white students and 2,300 black students will be reassigned.

2. Junior High Schools - The two former black schools will become ninth grade centers while four former white schools will become seventh - eighth grade centers. In addition, a number of boundary line adjustments will be made. Under this plan, the 13 junior high schools will range from 17 percent black to 30 percent black. Over 2,200 white students and 1,370 black students will be reassigned.

3. Senior High Schools - The one predominantly black senior high school will be desegregated through voluntary means. Under an accelerated recruiting program and through the establishment of magnet programs, school officials have pre-registered a 54 percent white student body for 1976-77.

The court indicated that other components such as transportation, health, safety and security precautions, special needs transfers, and monitoring provisions will be resolved through further orders.

Other developments in the Omaha school case are as follows:

1. On April 19, 1976, an amended complaint was filed in Dumke v. The Omaha Board of Education (D. Neb.), which names the United States as a party defendant. This is a "taxpayers' lawsuit" which alleges that the requirements of the Court of

Appeals for the Eighth Circuit in United States v. School District of Omaha, mandating that any necessary transportation for the desegregation of schools be paid for by the school district, constitutes a judicially imposed tax and is violative of the United States and Nebraska Contitutions. The amended complaint seeks an order, in part, enjoining the United States from enforcing the court of appeals' mandate.

2. On May 7, 1976, the defendant Omaha School District filed a motion for a new trial alleging that the district court erred, as a matter of law, in failing to adopt the plan proposed by the defendants without a finding that the plan failed to comply with constitutionally required standards. In addition, the defendants allege that the court erred, as a matter of law, in following Eighth Circuit guidelines which established definite inflexible requirements for desegregating the schools of Omaha without specific evidence or argument concerning appropriate remedies.

3. On May 3, 1976, the Omaha Board of Education directed its attorneys to file two suits against the United States. One challenges the right of federal courts to issue orders which necessitate the appropriation of tax funds. The second disputes the constitutionality of congressional actions prohibiting the appropriation of federal funds on transportation for court-ordered integration.

4. The plaintiff-intervenors indicated that they would appeal the April 27, 1976, order. The intervenors contest the exclusion of first-graders from mandatory reassignments and the conversion of two former black elementary schools to K-1 centers. It is expected that the defendant school district will cross-appeal from the denial of their motion for new trial.

H. Voting

1. Bessemer, Alabama: (Sheila Delaney) On May 1, 1976, an order was entered by a single judge in the three-judge court case of United States of America v. Board of Commissioners of Bessemer, Alabama (N.D. Ala.), denying the motion of several private individuals to intervene in our suit on the grounds that there is a substantial likelihood that our action and a pending action brought by the private parties will be consolidated, and that the applicants' interests are adequately protected by the United States. The court reserved ruling on the defendants' motion to dismiss for the three-judge court and ordered the defendants to file their answer within 30 days.

2. Shelby County, Alabama: (Michael Seadron) On May 3, 1976, the Attorney General declined to withdraw an objection previously interposed to six annexations to the City of Alabaster (Shelby County), Alabama.

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

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

May 20, 1976

MEMORANDUM FOR THE HONORABLE JAMES M. CANNON

Jim:

The attached memorandum to the President should be read with my earlier memorandum to him (March 29) on the same subject. The important considerations are not in the title of the Commission or the number of appointees but in the general considerations that led us to this recommendation.

Our basic proposal is still that (1) the President ought to address this issue as the leader of the nation with both moral and practical pronouncements, not just as head of the government, and (2) there ought to be an effort to increase the consensus/community building capacity in order to help cities keep out of courts. Our subsequent refinement is to recommend that the services provided be informally mediative but short of negotiation/arbitration.

The intent of the proposed Commission is to give the President a place of referral that could provide more practical relief than "studies" but would not become another "court."

If you can help keep these more basic issues before the President, I think he will have a better chance of seeing his options than if we get too involved too early in the mechanics.

Thank you.

Secretary

Attachment

5/17/76

2. Food Stamps

No suit has yet been filed to block your administrative reforms which begin to be effective June 1, 1976. We understand that the Food Research and Action Committee has been shopping for a judge and is leaning now toward a Kennedy appointee in northern Minnesota. As soon as the suit is filed, we will schedule your meeting with Attorney General Levi, Solicitor General Bork and Secretary Butz to discuss how we will win the lawsuit.

3. Busing

We are working on three possible approaches to help a community avoid a court order to bus:

a) A "School Mediation Service," somewhat like the Federal Mediation and Conciliation Service for labor-management disputes, which could, at the invitation of local officials, send a mediator to attempt to work out a solution on school desegregation before a Federal Court order to bus. Secretary Usery believes this could work.

b) A Federal "clearing-house" of information and technical assistance, which could be made available to a community at its request to help work out a solution before busing is ordered.

c) A modest Federal fiscal incentive to assist a community leadership group in working out a solution to its school desegregation problems. The federal grant would match funds locally raised and could continue for no more than three years. The incentive funds would also be shut off if a Federal Court ordered busing.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D.C. 20202

April 30, 1976

NOTE TO THE SECRETARY:

The attached report responds to your assignment to me to explore the perceptions of community leaders who have been involved in school desegregation. In a meeting convened for two days, we cultivated free interaction among participants. For the most part, their views contained a strong confidence based upon intense involvement in conflict or potential conflict accompanying desegregation in the various localities.

In summary, there emerged a clear indication that a National Commission could be effective in significantly reducing the trauma which often accompanies attempts to desegregate schools.

Robert R. Wheeler
Deputy Commissioner
for School Systems

Attachment

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION

TO : The Secretary

DATE: APR 30 1976

FROM : Deputy Commissioner for School Systems

SUBJECT: National Commission on School Desegregation

Purpose

This memorandum summarizes the observations, conclusions, and suggestions made by nine local school desegregation leaders invited to participate in a discussion of factors in the school desegregation process which either increase or decrease probability of destructive trauma within a community. The community leaders met April 26-27 in New Orleans with the Deputy Commissioner for School Systems and members of his staff charged with primary administrative responsibilities for Federal assistance in school desegregation.

Background

Those attending the New Orleans meeting were selected to represent a variety of experiences and knowledge from a diversity of communities. Those participating were not told that formation of a National Commission for School Desegregation was being considered, but were advised that the purpose was to get suggestions on how desegregation conflict and trauma might be reduced and the issue be substantially depoliticized. The communities represented were: Birmingham, Alabama (Chris McNair); Cleveland, Ohio (Richard Tompkins); Detroit, Michigan (Reginald Wilson); Kansas City, Missouri (Gayle Holliday and Daniel Levine); Montgomery, Alabama (Norvelle Clark); Pontiac, Michigan (Francile Anderson); Prince Georges County, Maryland; Alexandria, Virginia; and Wilmington, Delaware (Donald Sullivan); and Savannah, Georgia (James L. Hooten). The participants included three blacks, two women, one minister, and director of a local human relations council, one State legislator, one local Parent-Teacher Association leader, one State education agency official, two nonprofit foundation executives, one community college president, and one lay church leader. Only four of the nine were previous acquaintances of the Deputy Commissioner or his staff.

In addition, USOE staff members attending the New Orleans meeting had considerable personal knowledge of the situation in a large number of other school districts, including such major cities as Boston, Louisville, Chicago, and Los Angeles. Their perceptions and conclusions are reflected in this report to the extent that they corroborated positions which were first expressed and articulated independently by the participants enumerated above.

Summary of Conclusions and Recommendations

The nine participants were told that the purpose of the meeting was to seek information on two basic questions:

1. Can community trauma be prevented before or during school desegregation?

2. Is there a role which the Federal Government or Federal officials can play which would contribute to that objective?

The answer to the first question was equivocal: Community trauma probably cannot be completely prevented, but it can be kept within acceptable bounds. The answer to the second question was clearly positive: There is need for earlier, broader, more effective involvement of Federal officials with community representatives, both within the school system and within the larger community. This answer gave rise to a third question:

3. What should the Federal role be and how might it best be initiated?

Again the answer was clear:

--Prestigious Federal officials should use their good offices to encourage early, voluntary, and effective interaction among local power elites to prepare the community for peaceful desegregation, whether through voluntary compliance or court order.

--The President and appropriate top officials of the Executive Branch should make it unmistakably clear that school desegregation is Constitutionally required and the recurrent attempts to avoid legally required remedies are both vain and futile. At the least, the President and his appointees

must avoid either intentional or inadvertent encouragement of such vain and futile attempts to "escape" from judgment.

--A Cabinet-level task force headed by the Vice President was suggested as one possible mechanism. Such a task force could provide an early-warning system through which local power elites which are unaware or inactive (as regards desegregation) would be alerted to the immediacy of impending local problems, particularly the possibility of violent incidents or other traumatic community disruptions similar to those occurring in other communities. High-level "jawboning" in support of respect for the law and the social need to avoid social disruption and chaos as a threat to the emerging economic recovery also was suggested as a proper function for members of such a task force.

These suggestions represent a unanimous judgment that the resources and highest offices of the Federal Government can and should be used, either directly or indirectly, (1) to re-educate the Nation and its local leaders to the requirements of orderly political and social processes, (2) to persuade local power centers to use their authority and responsibility early and effectively in achieving lawful and peaceful desegregation, and (3) to develop the empirical knowledge which is necessary if communities facing social change are to have rational alternatives available rather than blundering into destructive events such as have occurred in school districts in which local options have been foreclosed by inaction and/or by too much polarization between large contending factions.

Discussion

The availability of options and alternatives appears to be particularly important in avoiding violence or other traumatic community disruptions when developing and implementing plans to meet constitutional standards for school desegregation.

If such plans are to succeed in practice (in terms of the objectives indicated above), they must be suited to the circumstances in each local school district, and hence must be devised in accordance with knowledge of such matters as the history of the district and the social characteristics and distribution of its population. Federal institutions, whether judicial, executive, or legislative, are in a relatively weak position to acquire such detailed knowledge at the local level, and the understanding of local circumstances they may obtain from local or national "experts" necessarily is incomplete.

Equally or more important, desegregation plans mandated from the "outside"--as when judges are forced to impose a plan following local inability or unwillingness to initiate constitutionally-acceptable solutions--inevitably are seen by many as coercive acts which are contrary to community traditions. Such developments compound the possibilities of violence by enabling some to believe that violent opposition is "legitimate" (i.e., in defense against outside "usurpers" of local authority). The best way to avoid this type of development, as illustrated below in brief case study materials provided by the participants in the New Orleans meeting, is to develop a plan suitable to specific local conditions through the cooperative efforts of local groups and interests, including particularly the leadership and support of local influentials who can help to get it implemented without major community trauma. The key imperative here frequently is to activate such leadership and support before events have developed too far to avoid major disruption or damage in the community.

In addition, the potential for violence is increased when particular groups in the community perceive themselves as having fewer options than other groups with respect to desegregation. This tends to happen, for example, when desegregation is mandated in big cities with large working class populations ringed by suburban districts in which little actual desegregation is taking place. In such cases, working class families with relatively little opportunity for residential mobility are reinforced in perceiving desegregation as a "burden" imposed on them by middle-class suburbanites. The remedy, if any, for this tendency is to adapt desegregation plans as fully as possible to the realities of the social situation in each district, while initiating re-examination of desegregation policies (local, state, and federal) in terms of these realities. Again, however, it appears that an activating force is required to help set planning in motion to develop plans and re-examination of desegregation policies as they impinge on local communities.

Elaboration of Evidence and Conclusions

Four themes became clear concerning desegregation of the schools in the cities discussed and analyzed during the New Orleans meeting.

1. Early and effective leadership for lawful and peaceful desegregation does not come voluntarily from established power centers, but may arise in other, less effective quarters, such as specially formed neighborhood citizen bodies. Such groups sometimes have an undesirable polarizing effect because they are viewed as usurpers of authority formerly wielded by already established power elites.

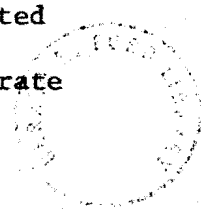
2. Violence or a surrogate for violence in the form of an overwhelmingly clear and present danger of community conflict and/or a threat of economic deterioration have been virtually the sole effective "triggers" for activating leadership from established power centers.

3. Once activated, established power centers can and sometimes do quickly come to terms with the requirements and demands of desegregation, most commonly in a very practical and pragmatic manner.

4. Desegregation is more likely to proceed without major community trauma when local power elites have worked to generate broad-based intra-community communication and discussion of the issues involved than when local leadership has been inactive or tardy in bringing school officials and community forces together to devise and execute a locally suitable plan.

Perhaps the best example of peaceful implementation generated in this way is Detroit, where initiatives by corporate executives and similar existing power brokers have been instrumental in gaining acceptance of court orders in 1975 and 1976. Other cities, such as Wichita, also have integrated peacefully after influential civic leaders (including a former mayor) took the lead in early efforts to develop and implement a desegregation plan. A good example of the opposite type of situation is Boston, where violent reactions followed closely upon school district decisions to resist even minimal standards for desegregation, with concomitant failure among influential groups to take initiatives in forcing reassessment of this position.

Parenthetically, it should be noted that in some respects the Detroit desegregation requirements are more moderate than the Boston requirements, and that the degree of stringency probably is related to the likelihood of violence occurring, on the one hand, and the degree to which local agencies and actors have made an effort to devise a plan suited to the specifics of the situation, on the other hand. Stated differently, judges are in a better position to select a plan adapted to local circumstances--and hence potentially less traumatic--in communities where sufficient leadership has been activated to generate "good faith" efforts toward systematic definition of an acceptable desegregation plan than they are in communities where all parties have become bogged down in either inaction or recalcitrance.



Underlying the conclusions described above was the perception of an insistent need for opening, maintaining, or expanding communications between the opposing forces and the moderate but inactive majority between them. This communications theme carried indications that those supporting desegregation, whether black or white, institutional or individual, commonly either found or felt themselves to be substantially powerless to stimulate and hold popular support. The same probably is true for opponents, as well as advocates.

Can a National Commission Help?

The issue, then seems clear: Can a peaceful, non-violent force be substituted for the traditional violence which too frequently has been the energizing factor mobilizing effective local action?

Subsidiary questions are:

1. Can "outsiders" introduce that non-violent force to the community?

2. Can any Federal body play such a role?

3. What kind of Federal body?

It was evident from the discussions that a properly charged and constituted National Commission for School Desegregation (which previously has been suggested, but the possibility of which was unknown to the participants) could become a Federal body capable of playing such a role.

The reasoning supporting this conclusion ran as follows:

Ultimately, school desegregation must be accomplished locally, by local officials, using their own ingenuity and available resources.

The efficiency, effectiveness, and particularly the trauma-inhibiting efficacy of local assumption of responsibility for school desegregation is sharply reduced as the time available before implementation of desegregation is reduced. The greater the time for planning and preparation, the greater the efficacy of local action; the less the time available to plan and prepare, the less the efficacy of local action. Participants in the New Orleans meeting said repeatedly that early involvement of local power elites is essential to peaceful desegregation, and strongly urged that external stimuli from prestigious national power elites could be used effectively to activate local counterparts. One particularly striking aspect of this viewpoint was that all the elites do not necessarily have to be supportive of desegregation. The most important factor is that there be continuing, directive communication among them.

There is a rather pervasive and almost universal local reluctance or apathy toward initiating positive local action early in the desegregation process. Commonly, however, similar reluctance and apathy are not displayed by opponents, who frequently are activated by outsiders of like mind.

The proposed National Commission for School Desegregation could, through the prestigious composition of its membership, arrange appropriate and persuasive discussion with local counterpart community interest groups and power elites to substantially increase the level of awareness of both the inevitability of desegregation and the potentially traumatic impact it may have under unplanned conditions. The central objective would be to substantially increase local concern about impending school desegregation while simultaneously offering positive recommendations for preventive pre-planning.

The U.S. Commission on Civil Rights, the U.S. Office of Education, the Community Relations Service of the Department of Justice and many other Government and non-Governmental organizations can provide rather extensive and substantially effective assistance and resources once the active interest of the community is aroused. In many cases, however, little can be done by these agencies until local interest is energized and activated, because these Federal services cannot be provided--either legally or effectively--in the absence of a request for assistance and/or a willingness by existing power centers to make real use of them. In short, the help these agencies can provide in avoiding trauma-ridden desegregation frequently is either minimal or is not systematically sought and utilized. For this reason, a prestigious national group such as the proposed Commission could be effectively used to activate a suitable civic nucleus which would make the existing agencies both available and effective.

In addition, "outside" assistance tends to be uncoordinated and fragmented at the local level. This situation almost inevitably will persist until local leadership emerges to initiate and direct a broad-based effort to avoid trauma in the desegregation process, since there is little or no reason to believe that the Federal Government can orchestrate such an effort effectively. There also is good reason to doubt that the Federal Government should do so, even if it could. In the past, as suggested earlier, the energizing agent has been violence or an effective and equally threatening surrogate for violence. In the future, the persuasive prestige and effective educative efforts of the National Commission for School Desegregation could be used as the energizing agent.

Summary of Case Histories

Evidence in support of the foregoing includes the following: In Pontiac, Michigan, the "Let's Make It Work" campaign led by the Pontiac PTA Council had been initiated but had limited overt public support until after the bombing of 12 school busses two weeks before school opened. The bombing energized previously uninvolved and detached citizens and the existence of the PTA campaign gave them an acceptable, non-extremist organization with which to affiliate

and associate. Like some developing activities in Cleveland, the Pontiac campaign to make desegregation work was neutral vis-a-vis the value issues relative to school desegregation, but was totally committed to the concept of accepting and abiding by the law, as enunciated by the court order. This posture allowed even many of the opponents of desegregation qua desegregation to support the "Let's Make It Work" campaign. The pre-bombing organization of the campaign had been made possible by the support and encouragement of the school superintendent and the Board of Education--elements which were absent in Boston and, at the moment at least, also are absent in Cleveland.

In Montgomery, the lessons of the Montgomery bus boycott, although it occurred much earlier, served as an educative and consequently as energizing factor which made school desegregation possible in a climate of minimal trauma.

Birmingham and Savannah had similarly prolonged exposure to the consequences of recalcitrance and resistance, fear of which was credited with making advance planning for school desegregation possible. "The bombing of the church and 'Bull' Connor helped us a lot," was the way the Birmingham representative put it. Savannah had the additional "advantage" of being essentially a "company town" in which economic elites could and did seek to assure peaceful school desegregation through the exercise of their economic power and prestige.

Detroit had the experience of riots in 1967 and the long-term law enforcement by the National Guard as an object lesson leading to the mobilization of Detroit elites into a New Detroit group concerned with urban problems and later a Pro-Detroit group concerned with peaceful school desegregation.

But, despite these examples indicating the value of recognizing the inevitability of school desegregation and of early action to achieve rational reconciliation with this prospect, the lessons clearly have not penetrated fully and effectively to Cleveland and Kansas City.

In Cleveland, the school superintendent has persuaded a substantial portion of the local power elite that the Cleveland school system will not be judged illegally segregated, despite some rather clear indications that a Federal court probably will so rule in June. The School Board, too, has taken the position that there is no segregation liability in Cleveland's school system and is reluctant to take any positive corrective action prior to a court order. To do so would be tantamount to an admission of liability, the Board feels. The Cleveland City Council and the Mayor have taken similarly passive stands.

The Cleveland Foundation has initiated and supported a number of apparently useful preparatory efforts designed to lay the groundwork for positive action after a court order, but these efforts have been only partially and minimally successful in disabusing local civic leaders of the probability that a court order will mandate school desegregation. For this reason, a Study Group organized by the Foundation has taken a neutral stance with respect to the legal issues involved in the suit while studying the consequences and necessities aroused by school desegregation in other communities and attempting to identify their counterparts in Cleveland. The neutral stance has earned the Study Group the dislike of both the school administration and the NAACP officials who originated the suit, indicating the forces which commonly are at work to have everyone choose up sides.

In Kansas City, lack of effective leadership in moving toward desegregation in a manner that might defuse the potential for violence or otherwise reduce the likelihood of community disruption has been equally obvious.

In contrast to Cleveland and Boston, the Kansas City Board of Education and the Superintendent have not entirely refused to face up to the realities of the situation and the likelihood of a court order, as indicated by the creation of a community task force on desegregation and offers to discuss compliance alternatives with representatives from OCR, HEW, and the Justice Department; at the same time, however, key elements in the community have not been brought together early or long enough to promise great hope for trauma-free implementation of a court-acceptable desegregation plan, and internal problems with and between the Board and the Administration and confusion about operating policies for the task force have combined to reduce prospects for development of such a plan.

In contrast to Detroit and Cleveland, influential civic leaders have not been sufficiently active in helping to provide leadership in working toward this goal (as in Detroit), and no "neutral" agent with sufficient resources, influence, and readiness was present to bring the right groups and individuals together to help develop awareness at an earlier date (as in Cleveland, where such activity possibly may be coming too late anyway). Many school districts elsewhere resemble Kansas City in lacking a willing and informed civic nucleus for this purpose. Cities in this situation might particularly benefit from the assistance of a Commission as well as other federal resources which might help energize such a nucleus.

Clearly, there is a role and mission for a National Commission comprised of prestigious and powerful members who could be effective in suggesting possible courses of action to local leadership. Moreover, the charge to such a Commission would not seriously overlap with the responsibilities of established Federal agencies. The Commission, however, might very well concentrate and focus the resources and expertise of other Federal agencies to make those services more effective.

Robert R. Wheeler

the match institution

April 22, 1976

TO: Arthur Fletcher
Deputy Assistant to the President for Urban Affairs

FROM: Timothy L. Jenkins
Chairman, The MATCH Institution

SUBJECT: The Development of Constructive Alternatives to Compulsory Busing

Summary

Pursuant to our conversation, this letter is to outline formally the interest I have in the need for greater minority involvement in the definition of policy and program alternatives in the area of de-segregating public schools.

As opinion polls have already established, there is considerable diversity in the minority communities of the U.S. concerning the wisdom and appropriateness of relying on busing as the primary tactical devise for achieving educational equality at the secondary school levels. This diversity of popular opinion is reflected at more sophisticated levels within the community of minority profes-sionals and technicians concerned with educational policy. However, heretofore there has been no systematic effort to invite the formal articulation of such professional views. This is an oversight, which the nation can ill afford to continue. It is my proposal, therefore, that the Administration establish a priority project for the analysis, statement and recommendation of those tactical alternatives to busing as viewed by sensitive and well informed minority group spokesmen and scholars.

It is my judgement that much of the confusion and emotionalism that currently exists is the product of suspicion and mistrust that all of those with views opposing busing as a technique reflect varying elements of bad faith concerning the merits of equal educational opportunity. Therefore, it would be an immense contribution in promoting a more sophisticated public opinion were the credentials of the persons involved in such a study beyond social and political reproach. Based on extensive investigation in this area, we are able to assure the feasibility of such an undertaking with the support and encouragement of the overwhelming majority of those individuals and institutions within the minority community which are actively involved in various aspects of this question.

Background

In 1954, when the Supreme Court banned state-imposed school segregation, almost two dozen states had laws that regulated citizens on the basis of their race. The Brown v. Board of Education decision more than any other single event, destroyed the foundation of segregation. During the past two decades, vast numbers of southern blacks have moved to the cities and whites have moved out. All of America's largest cities have substantial black minorities. Some, like Atlanta, Washington, D.C., Newark, Gary, and Detroit, have black majorities. Others, like Baltimore, St. Louis, Cleveland, New Orleans, Memphis, and Birmingham, are close to 50 percent black. The suburbs that ring these cities are generally more than 90 percent white. As a result of white flight, sixteen of our twenty largest cities now have a minority of whites in their public schools.

Alongside the familiar black city-white suburb dichotomy, other facts must also be considered. For one thing, four million black (17 percent of the black population) now live in the suburbs, an increase of 19.5 in the past five years alone.

Massachusetts and New York states have defined a school that is composed of more than 50 percent minority pupils as a "racially imbalanced" school. State officials have taken the position that a racially imbalanced school is incapable of providing equal educational opportunity. In policy terms, this means that any school that is more than 50 percent black and/or Hispanic is an inferior school. From this perspective, real integration requires both racial balance and a white majority. Courts can order racial balance, but few major cities still have a white pupil majority.

As the black pupil population has grown in the cities, civil rights groups have urged that a segregated school is one where the racial balance varies sharply from the racial composition of the metropolitan area as a whole. When the Supreme Court refused to merge Detroit with its surrounding suburbs, it was because there had been no evidence that the suburban districts had practiced racially exclusionary policies. Civil rights lawyers believe they will be able to document segregatory practices on both sides of the city-suburban lines and will sooner or later win metropolitan-wide integration orders in northern cities. This would involve cross-district exchanges of black and white pupils and would make it possible to eliminate predominantly black schools.

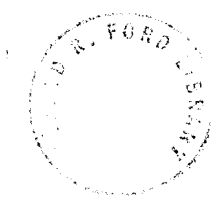
This realization, plus a growing awareness that desegregation is not necessarily linked to higher academic achievement, has caused

many black politicians, leaders, and scholars to criticize the civil rights lawyers' single-minded pursuit of city-suburban mergers. Atlanta's black leadership, now in control of the city government and the school administration, has no interest in diluting its base of political power. Charles Hamilton, a professor of political science at Columbia and successor to integrationist Kenneth Clark as president of the Metropolitan Applied Research Center, testified against busing before a congressional committee; Hamilton believes that blacks need economic and political self-sufficiency more than they need racially balanced schools.

Derrick Bell, professor of law at Harvard and a former civil rights lawyer, has written that civil rights lawyers have not adjusted their tactics to take into account the demographic changes since 1954. While they press unswervingly for racial balance, the cities get blacker and the educational needs of black children are ignored. Ronald Edmonds, director of the Center for Urban Studies at Harvard's Graduate School of Education, has complained that desegregation orders frequently deny black parents the right to make educational choices for their children. Howard University's Kenneth Tollett, while approving of desegration initiatives in elementary and secondary schools, fears that the next legal onslaught will imperil black colleges and universities, which continue to serve important educational, psychological, and cultural functions for blacks. Economist Thomas Sowell of UCLA holds that it is untrue that black schools are inherently unequal; he maintains that excellence has nothing to do with ethnicity.

Those blacks who are critical of the current thrust of the integration movement are not separatists; they are professionals who move in a racially mixed world and who value integration. They share a common fear that black institutions will be stigmatized by the implicit insult that whatever is black is inferior.

The emergence of thoughtful dissent among blacks is perhaps the healthiest trend in the evolution of race relations in America. So long as the question of assimilation is resolved by whites on behalf of blacks, then blacks remain in a subordinate, unequal position.



Proposal

It would be useful for the Administration to assist in providing a means by which those less strident voices in the black community can be heard on this vital question of secondary schooling. To this end I would propose that I be enabled, through my organization The MATCH Institution, to undertake a low profile project to systematically explore the current thinking of black leaders on the matter of goals in secondary education and the means for achieving them without the emotional reliance on the technique of busing. Such an effort should include examination of existing materials, the commissioning of additional research, the compilation of leadership reactions to the major findings of such studies, the selective convening of black educational and leadership figures, and finally a thoughtful session arranged with the President and/or Secretary of Health, Education and Welfare for the purpose of

an unpublicized and unpoliticized exchange exploring the depth of complexity and range of alternatives associated with the underlying subject matter. This should not be approached as an academic exercise but rather as an action oriented project capable of development and executed within a six month time frame. To this end it should be targeted on those figures who already have a reason for being familiar with the subject and readily capable of formally presenting their views. The magnitude of the undertaking, in my judgement, need not exceed a composite six man-years of effort with the bulk of the work to be performed with high caliber volunteer participants.

The importance of the timing for this effort should not be overlooked. Therefore if it makes any sense to you for us to go forward, the mechanics for action cannot long be delayed.

2. Busing

I have had two good discussions with Secretary Mathews about an attempt to find a better approach to this problem. I talked briefly with Ed Levi and will meet with him tomorrow.

At this point, we believe we must develop a concept based on these premises:

(a) Communities should find solutions on their own rather than have them imposed by the Federal government;

(b) Remedies can best be reached before any court action begins;

(c) Any approach must be in accord with Federal law enforcement responsibilities.

If this meets with your approval, I will continue meeting with both Mathews and Levi to develop specific proposals for you.

Approve_____ Disapprove_____

3. Navigability of Waterways

In the wake of Lake Winnipesaukee, other questions about which waters are navigable have been brought to our attention.

Since the Constitution was written, the definition of navigability has evolved to the point where its application often does not make common sense.

As a result, we believe we should ask Secretary Coleman to review the definition with the possible objective of recommending to Congress a more precise and practical interpretation. This review should include an examination of the Constitutional implications, and the advantages and disadvantages of making any changes in the definition of navigability.

Approve_____ Disapprove_____