**The original documents are located in Box 5, folder "Busing (4)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.**

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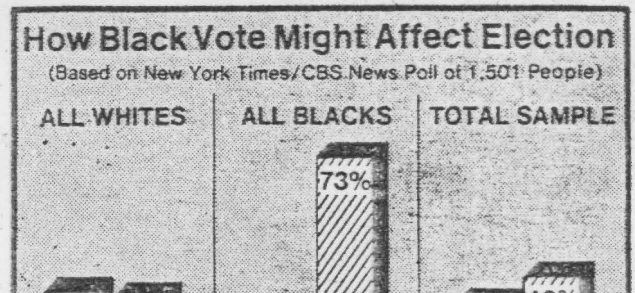
NEW YORK TIMES
6/2/76

# Carter Leads Ford on Black Vote in Poll

Continued From Page 1, Col. 4

seems likely, they help explain why he has so assiduously courted the black vote, and why he exerted so much effort to counter the adverse effects of his recent comments about preserving the "ethnic purity" of urban neighborhoods.




## Poll Shows Blacks Decisive for Carter In Lead Over Ford

By ROBERT REINHOLD
Special to The New York Times

# Louisville, a Place Where Busing Seems to Work

By PAUL DELANEY

# The Focus On Busing Is Now in The North

By JAMES T. WOOTEN

# Buses to Nonpublic Schools Supported

By LEONARD BUDER

The borough presidents of

cials, is now divided on the matter.

this transportation cuts down on the amount of state aid that

THE WHITE HOUSE

WASHINGTON

Draft

June 3, 1976

MEMORANDUM FOR: JIM CANNON

FROM: ART QUERN
ALLEN MOORE

SUBJECT: Proposed message on President's busing position.

To follow-up this morning's discussion on busing at the staff meeting, we are laying out the following rationale for and outline of a Presidential message on his busing position. The basic idea is that the message should be delivered as soon as possible (before legislation is submitted) to place the President's position in a broader context.

Rationale

The President's position has evolved piecemeal and, worse yet, has been reported piecemeal through leaks and press questions. The failure to make a comprehensive statement feeds speculation on the President's motives and precise position. In addition, the existence of a broad statement would give the press office a referral resource which they sorely need. Not only could this help to decrease the number of questions on the President's position, but might help to avoid misstatements like the reference to a review of the Brown decision.

Outline for Statement

I. Introduction

Talk about why statement is being given, i.e.

- Need for clarification of busing issue
- Need to de-politicize subject
- Need to inform public of President's philosophical and moral position
- Need to give description of current plans

II. President's philosophical/moral position and the goals of his administration vis-a-vis civil rights

(1) Commitment to achieving an integrated society where individual's race creates no barriers. This means:

A) Elimination of illegal discrimination.

B) Correcting, as appropriate, the effects of illegal discrimination.

(2) Commitment to improving the quality of education provided to the nation's children -- particularly black children in large city slums.

III. Means to achieving these goals

(1) Quality education

A) Straightforward federal aid to disadvantaged school districts, i.e. Title I, ESAA, Bi-lingual education

B) Compliance requirements of these laws requiring equalization of spending

C) Education research spending to improve capacity to deal with educational challenges

D) Revenue sharing, x% of which goes to public education

E) Education block grants permitting local authorities to have spending flexibility, linked to non-discrimination requirements.

(2) Integrated society

A) Discrimination in schools

i. Background

- Historic Brown decision found legally-sanctioned segregation

to be unconstitutional. [Express unyielding Presidential support of this concept.]

- Subsequent decisions expanded on what must be done to correct effects of illegal segregation (since many jurisdictions failed to act on their own) [Express support of concept of requiring action.]

- Indicate that some decisions pushed too far -- creating situations where courts ordered extensive busing to correct for segregation whose causes went beyond those traceable to specific discriminatory acts by public officials.

- The mere fact of a court order generated much resentment by local people who felt the courts had no business directing their affairs. The feeling is that given time, communities can work out better, less divisive solutions.

ii. Current plans

- Last November a directive given to Attorney General to search for case affording opportunity to submit friend-of-court brief seeking review of certain elements of post-Brown decisions leading to what may be excessive court-ordered busing [That search continues.]

- Legislative proposal to limit extent to which court can order remedy. Corrective action would be limited to segregation directly attributable to acts of public officials.

- President also seeking better means of encouraging community action to develop integration plan before court order is issued. Hopes to include a proposal of this kind with legislative proposal.

- One legislative proposal currently in draft form. President has directed senior

staff to discuss its contents with Constitutional lawyers, civil rights groups, pro and anti-busing groups, Congressional representatives, and judicial authorities.

- President plans his own meetings with Civil Rights, Congressional, and citizens groups.

- President cautions that this will not mean no busing, but rather place limits on busing. Desire is to have community work out its problems. Federal gov't will aid in this endeavor. If individual or joint effort fails, court will step in as necessary. It will, however, operate within well-defined parameters.

- President will support the decision of the courts. It also should be noted that many court decisions requiring busing are well within the parameters being considered. (Consider reference to one or two specific cases.)

- Cite the efforts carried out by many communities with or without a court order to eliminate illegal segregation. Point out that for every case of violence, there are many examples of successful, responsible integration plans which include busing.

B) Other discrimination in the society

- Housing policy (ethnic purity issue)

- EEOC efforts

- Affirmative action plans

- Equal rights amendment

- Commerce programs (OMBE, SBA)

- New initiatives ?

Mr. Cavanaugh

Busing

June 3, 1976

Ms file photo quotes on Busing (in Notebook) and Portsmouth

INTERVIEW WITH THE PRESIDENT
BY
OHIO NEWSPAPER EXECUTIVES

THE STATE DINING ROOM

11:20 A.M. EDT

THE PRESIDENT: There are no prepared remarks. It is very informal. I welcome you here to the State Dining Room. It is a pleasure to see some old friends and make some new acquaintances. I think we might as well start with the questions right off.

QUESTION: Mr. President, the rubber strike has gone now about April 27. Do you have any intention of invoking the Taft-Hartley Act and when will you make such a decision?

THE PRESIDENT: We have no plans to invoke the Taft-Hartley Act. It is my understanding that the two sides got together a day or two ago, resumed their negotiations, we are monitoring the situation very closely. We believe the resumption of negotiations is a positive step forward and we would hope that the matter could be solved by free collective bargaining.

QUESTION: We are a little bit concerned about our defense situation. Some like Schlesinger say we are not strong enough and some say we are. What is our position in defense?

THE PRESIDENT: The present position is one of strength. The budget that I submitted a year ago was the largest defense budget in the history of the United States in either war or in peace.

Unfortunately, the Congress a year ago continued its ten year practice of severely cutting or reducing the defense budget. This year I submitted in January of again the largest defense budget in the history of the United States -- one that called for $101 billion in spending and $114 billion now in what we call obligation authority. We have, or I have told the Congress if they cut the defense budget this year, I am going to veto the bill and I think the American people will support me.

Now with that background I can assure you that our defense capabilities are fully adequate to meet any of the anticipated missions either to deter aggression, to maintain the peace or to protect our national security and all of the top military authorities -- uniform authorities -- agree with that statement.

The reason we are asking for a very large military budget is to protect our interests two years from now, five years from now, because it does include a request for the B-1 bomber production line, to replace the aging B-52s.

It does provide for the Trident submarines which are an advantage over our Polaris and Poseidon. It does include additional research and development money of about a billion dollars, so technologically we keep ahead. It does include about four and a half billion dollars more for conventional forces, including additional funds for new Navy shipbuilding. But the additional money is basically,one, to maintain our unsurpassed capability at the present time, and to make certain that that capability exists two and five and more years ahead.

QUESTION: Mr. President, many school systems such as Dayton are preparing to implement court ordered busing programs this fall. Have you considered how your recent moves, if they fail, may disrupt those efforts?

THE PRESIDENT: I don't see how what I have said or the decision on the part of the Attorney General would in any way whatsoever affect individual communities at this point. My position, of cousre, has been since,during the last ten years,I am against court ordered forced busing to achieve racial balance. I think there is a better way, a better remedy for quality education.

At the same time I will, of course, uphold the oath of office that I took which means I will enforce the law in this country. Of course, I am also against segregation. But I think you can take from what the Attorney General has indicated that we would seek at some point in a proper case a clarification of the Supreme Court's decision in some of these busing cases. The Attorney General decided not to go into Boston case for the reason that he indicated and I support him in that regard but there may be some cases coming down the road where intervention by the Attorney General with amicus curie proceeding where such a clarification or modification might be in the best interest and yet a better solution than we have at the present time.

QUESTION: Back to the defense question. How did the Panama Canal situation get to be a campaign issue? Why couldn't it have been settled when it first came up by the Department of Defense, the Department of State? I don't understand how it got out of control this much.

THE PRESIDENT: I don't think it is out of control.

QUESTION: I mean it should not have been in the first place.

THE PRESIDENT: With that statement I fully concur. (Laughter) These negotiations have been carried on since 1965 by President Johnson, by President Nixon and by this Administration trying to find a solution that guarantees the utilization of the Panama Canal by the United States with no loss of our national interest. Now those negotiatons have moved slowly obviously for the last 11 years but to break them off as some people seem to advocate would,in my opinion,be very irresponsible We are going to continue those negotiations. We have no knowledge at this point how they will end up but I can assure you that this President is not going to in any way undercut our national interest as far as the Panama Canal is concerned.

QUESTION: It sounds like something from Allen Drury's novel.

THE WHITE HOUSE INFORMATION

WASHINGTON

June 5, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Busing

Secretary Coleman has submitted for your consideration a memorandum concerning the Attorney General's legislative proposal to limit the authority of Federal courts to order forced busing.

The Secretary states that it is his belief that the legislation suggested by the Attorney General is unwise as a matter of sound public policy, ill-timed and contrary to established legal principles.

In his memorandum, he outlines the nature of the constitutional violations the courts are required to remedy in school desegregation cases, sets forth his views as to why systemwide relief is the only practicable way to effectively vindicate the rights of those who have been the subject of official discrimination and cites several major desegregation cases which, in his judgment, offer support for these views. He has attached to his memorandum excerpts from several of these leading cases, as well as briefs and articles concerning this issue.

The Secretary's memorandum, with attachments, is attached for your review.

He has asked for an opportunity to meet with you on this subject as soon as possible.

Attachments

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

June 2, 1976

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

I regret that I will be unable to attend the meeting scheduled for 3:00 p.m. today to discuss remedies directed toward abolishing racial discrimination in the public schools of the nation.

Previously scheduled appointments in California and Ohio performing duties related to my Department, and campaigning activities requested by the President Ford Committee, prevent my attending this very important meeting to express my concerns. Therefore, for your immediate attention, I am enclosing a short memorandum briefly setting forth considerations of public policy and legal precedents in this difficult area which I know you will examine closely.

Mr. President, although I fully understand the severe time constraints under which you labor, I believe the enclosed memorandum will help you in making your decision. I have also enclosed relevant portions of decisions of the Supreme Court and other courts in which this very issue of scope of remedy in school desegregation cases is painstakingly analyzed.

I am aware that discussions, such as the one you will be having this afternoon, might initiate new approaches to a long-standing difficult problem. The complex, thorny issues of remedy being raised in Boston, Louisville, Wilmington and other school desegregation cases are not new issues, but have been raised and wrestled with by others. Their deliberations as reflected by these opinions may help you in yours. Actually, I feel that District Courts have handled this matter with great restraint and improper intrusion will be counter productive. I urge you to read the memorandum and enclosures.

Respectfully yours,

William T. Coleman, Jr.

Enclosures

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

June 2, 1976

MEMORANDUM FOR THE PRESIDENT

A proposed statute prohibiting the Federal Courts from granting a remedy broader than the proven violations in a school desegregation case, is, I believe unwise as a matter of sound public policy, is ill-timed and flies in the face of sound legal principles.

I urge you to consider the following:

(1) Nature of the Violation

Racial discrimination in the public schools is constitutionally prohibited by the equal protection clause of the fourteenth amendment. Where plaintiffs prove that a current condition of segregated schooling exists where a dual system was compelled either by statute or by a systematic program of segregation sponsored or aided by official actions, the State has an affirmative duty to eliminate "all vestiges of State-imposed segregation". Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971), and to take whatever steps "necessary to convert to a unitary system in which racial discrimination would be eliminated "root and branch". Green v. County School Board, 391 U.S. 430, 437-438 (1968).

This is the constitutional mandate and equity courts are charged with the responsibility of eliminating the effects of past discrimination and preventing future discrimination. To remedy these effects the district courts are obligated to fashion remedies which are pragmatic and enforceable to accomplish the greatest amount of system-wide desegregation taking into account the practicalities of the situation. (Swann, supra, 402 U.S. at 15-16).

The language in Swann that "(A) an objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process" is not language limiting the broad remedial powers of an equity court, Swann, supra, 402 U.S. 1, 30-31. Considerations of age, health, distance and educational objectives are practical, common sense concerns which should be, and have been, weighed by the courts in exercising their remedial powers.

(2) Nature of the System-wide Remedy

In enforcing the anti-trust laws, as well as in other areas, (e.g., voting rights, labor law) the Federal Courts have, because of practical necessities of enforcement, ranged beyond the narrow area of proven violations and enjoined licit as well as illicit conduct in order to enforce the law. See, e.g., United States v. United Shoe Machinery Corporation, 391 U.S. 244 (1968); United States v. U. S. Gypsum Co., "Acts entirely proper when viewed alone may be prohibited", 340 U.S. 76, 88 (1950; United States v. Bausch & Lomb Optical Co., "Equity has the power to eradicate the evils of a condemned scheme by prohbition of the use of admittedly valid parts of an invalid whole", 321 U.S. 707, 724 (1944).

In applying the above principle to school desegregation cases, the Supreme Court has recognized the duty of Federal Courts to look beyond proven violations in remedying the effects of segregation in the public schools.

> In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. Keyes, supra, 413 U.S. 189, 203 (1973).

Further, the High Court has clearly stated in the Denver School Case, that "a finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder". Keyes, supra, at 208.

The piecemeal approach of trying to cure segregation at only those schools where there is proof of a deliberate policy of segregation and leaving other schools segregated is so impractical as to promise no real reform of segregated situations. In the school desegregation context it is clear that

> Infection at one school infects all schools. To take the most simple example, in a two-school system all blacks at one school means all or almost all whites at the other. U.S. v. Texas Education Agency, 467 F2d 848, 888 (5th cir. 1972) (Wisdom, J. cited by majority in Keyes, supra at 201).

Further, such a limitation on a system-wide remedy is clearly inappropriate where the segregation is part of a policy which inevitably affects all students and schools, white or black, either directly or indirectly.

(3) Piecemeal Approach: Impractical and Ineffective

The proposed statute would place an impossible burden on plaintiffs in school desegregation cases, a burden not shared by plaintiffs in other cases (see paragraph 2) in which equity courts enjoin both legal and illegal actions to remedy violations. The courts have, correctly in my view, rejected the argument that the shares of segregation attributable to public and private action can somehow mystically be divined.

> Respondent argues, however, that a finding of state-imposed segregation as to a substantial portion of the school system can be viewed in isolation from the rest of the district . . . . We do not agree. We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system (Keyes, 413 U.S. 189, 200 (1973) (emphasis supp.).

This argument favoring a piecemeal approach to what is a system-wide violation of constitutional dimension was made and rejected in the United States Court of Appeals for the First Circuit in the Boston School Case. Morgan v. Kerrigan, 530 F2d 401, 415-419 (1st cir. 1976).

In an opinion written by the Chief Judge on behalf of a unanimous court, Judge Coffin said:

> It is of course the rights of individual students that are in question . . . Even if the Court could reliably determine that 40 percent of a school's segregation was caused by official action and 60 percent by private residential patterns, it could not bifurcate an individual student. The result would inevitably be that some victims of the School Committee's official policy would be forced to continue a segregated education. Morgan v. Kerrigan 530 F2d 401, 419 (1976)

It should also be considered that as a matter of public policy such a statute "requiring a district court to preserve intact every scrap of segregated education that somehow can be separated from governmental causation is to involve the Federal Courts, the Executive, and Congress in planning continued segregation and in perpetuating the community and administrative attitudes and psychological effects which desegregation should assuage". Morgan, supra at 418.

Such a statute would accelerate white flight and will really irritate beyond repair those white students who were caught in such an arbitrary net. Suppose it was proven that twenty blacks had applied for South Boston High and were denied because of race. I assume that South Boston High would then be a school which could be embraced in the court's remedy. But if no black had applied to Boston Latin (the primer High School in Boston) it could not be part of the remedy. Now, of course, the present parents or students would have cause of action against either high school, yet the children of one would be bussed, the other not. This would really cause discontent.

(4) North Carolina Anti-busing Statute

The United States Supreme Court struck down a statute enacted by the North Carolina Legislature which provided that no student shall be assigned to attend any school on account of race or for the purpose of creating a racial balance and further provided that involuntary busing in contravention of the provision was prohibited. North Carolina State Board of Education v. Swann, 402 U.S. 43, 45-46 (1971). The High Court found that the "color blind" requirement of the legislation "would render illusory the promise of Brown" and that the statute would "hamper the ability of local authorities to effectively remedy constitutional violations" and would contravene the implicit command of Green, supra, to take whatever steps necessary to eliminate all vestiges of discrimination in the public schools "root and branch".

ATTACHMENTS

TAB A Morgan v. Kerrigan 530 F.2d 401 (1976) (Boston School Case) pages 415-419

TAB B Keyes v. School District No. 1, Denver, Colorado 413 U.S. 189 (1973) pages 200-213

TAB C North Carolina Board of Education v. Swann 402 U.S. 43 (1971)

TAB D Petitioners' Brief in Keyes pages 71-79

TAB E Rowan article, Washington Star, May 28, 1976

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 9, 1976 1976 JUN 10 AM 8 18

MEMORANDUM FOR: Jim Cannon

FROM: Dick Parsons D.

SUBJECT: Washington v. Davis -- Recent Decision of Supreme Court

Art Quern asked me to give you a short memorandum outlining the essence of the recent Supreme Court decision in the case of Washington v. Davis.

Facts of the Case

The case was commenced by two black males whose applications to become police officers in the District of Columbia had been rejected, primarily because they failed to achieve a passing score on a written personnel examination. They alleged that this examination had the effect of discriminating against them on the basis of race, in violation of the Constitution, because a higher percentage of blacks failed the test than whites.

Decision of the Court

The Supreme Court held that, while the Constitution does prohibit the government from discriminating on the basis of race, it does not follow that a law or other official act is unconstitutional solely because it has a racially disproportionate impact. Under the Constitution, it must be shown that the law or other official act was racially motivated. The Court found no such motivation in this case and, therefore, determined that the examination is permissible under the Constitution.

Implications re: Busing

In my opinion, the Washington case has no direct or identifiable implications concerning school desegregation or, more specifically, busing because, in the words of the Court:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."



cc: Art Quern

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

OFFICE OF THE
GENERAL COUNSEL

June 2, 1976

MEMORANDUM FOR HONORABLE JAMES M. CANNON

Subject: Draft Legislation on Desegregation

In Secretary Mathews's absence, I am forwarding to you a paper which amounts to the Department's preliminary reaction to the draft legislation prepared by the Justice Department (Tab A). I understand that the Secretary will be attending the meeting to discuss this matter this afternoon. He has not had an opportunity to review the attached paper.

As you may know, the Department has had only a few hours to review the legislation and message. The Secretary has had even less time. Our initial reaction is that the proposal is hastily conceived and inadequately drafted. Many of the provisions of the draft bill are unclear in their intention and, we suspect, unpredictable in their application. Where the message speaks of ambiguity in the existing law, it seems to us that the proposed legislation would further complicate, not clarify, the situation.

Secretary Mathews has proposed an approach to the problems involved in school desegregation which does not rely on further law-making, whether by the Congress or the courts. Experience has taught that the specific requirements of the law are but one factor among many which determine whether a school system is peacefully and successfully desegregated with a minimum of busing. The Secretary believes it is essential now to focus on the other factors. It is not clear how this legislative proposal would relate to other efforts, such as the one proposed by Secretary Mathews, and whether, indeed, those other sorts of efforts could be successfully pursued at all in an atmosphere where a particular legislative proposal had previously commanded public attention.

I would be pleased to elaborate on any of the points in the attached paper, which is necessarily preliminary, should you or your staff desire. I am also attaching a list of possible appointees to the Commission proposed by Secretary Mathews for your review (Tab B).

William H. Taft, IV
General Counsel

Attachments (2)

A

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THESE SEPARATORS

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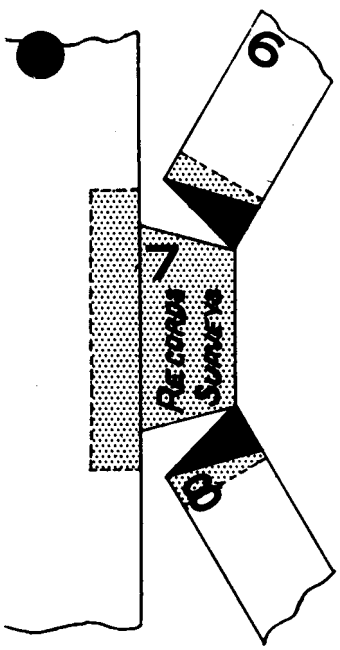



TABBED SEPARATOR SHEET
Form HEW-69D
(3-56)

# DRAFT LEGISLATION FOR THE ORDERLY ADJUDICATION OF SCHOOL DESEGREGATION SUITS

A review of the proposed message and legislation in the time available suggests to us a number of significant questions that need to be answered. Drafting defects -- e.g., the draft's persistent reference to orders for the "transportation" of students, where orders uniformly deal with "assignment", not "transportation" -- can be handled at the staff level, if this particular legislative approach is adopted; at the outset, however, many questions must be resolved concerning the desirability of a legislative approach at all and the appropriateness of this one.

The questions raised below are suggested by the draft message and bill. They are grouped in several categories. Taken together, however, they amount to more than a series of questions. What they add up to is a demonstration that this proposal is at this time incompletely presented and in need of further careful consideration and review.

## The Legislative Approach

Does previous legislation in this field, particularly the Esch Amendment, suggest that further law-making can successfully address the fundamental problems of court-ordered desegregation?

We cannot avoid a Congressional debate on this subject. Should we precipitate one? Is a Congressional debate the most effective way to approach this problem at this point -- particularly where at least four committees will be involved (both Judiciary and Education Committees)?

Once legislation is proposed, will the Administration be able to influence the ultimate product effectively? Unconstitutional legislation, not an unlikely result, could leave the situation worse off than presently. Under existing law (Esch and Byrd Amendments) HEW may no longer require busing in any situation. No challenge to this position appears likely. New legislation may well provoke a successful constitutional challenge to all these restrictions, forcing HEW back into busing.

General Questions about this Legislative Proposal

Is the fundamental distinction the bill seeks to make between current acts of unlawful discrimination and the effects of past unlawful acts a constitutionally valid one? The question addressed by the courts is whether for whatever reason individuals are being deprived of their civil rights now. Legally, this question is indistinguishable from the question of whether individuals continue to be deprived of their civil rights because of a present failure to remedy the effect of a past unlawful act. It is the right, not the nature of the wrong or its timing which dictates the remedy.

How would this proposal interact with existing legislation, particularly the Esch Amendment? Section 104 appears to repeal Esch, while 105(b) and 105(e) seem to amend it.

Is this proposal intended to deal with all forms of illegal discrimination and remedies for them or simply student segregation and busing? Section 102(c) suggests that all forms are addressed.

Isn't the Esch Amendment's approach the most appropriate conceptual basis for dealing with busing? It deals cleanly with remedies rather than with rights.

Specific Questions about this Legislative Proposal

Section 101: In presenting the question as one involving a remedy -- busing or not busing -- for different kinds of wrongs instead of one to vindicate identical kinds of rights does the legislation operate on a sound conceptual base?

Is the application of this law intended to be prospective only? How many school districts will be affected?

Section 104: Is the authority of the court to provide "any other relief that, in the Court's judgment, is necessary to prevent such act or acts from occuring" intended to be used as a blank check?

What is meant by the last phrase here? Why the emphasis on "particular individuals" and "acts specifically directed at them"? Is this to prohibit class actions and remedies? This would be inconsistent with the very concept of racial discrimination.

Section 105: The Esch Amendment is here mentioned, but the interaction of the two provisions of law is far from clear. Section 203 of the Esch Amendment -- the Scott-Mansfield proviso -- is particularly troublesome in this connection.

What is the purpose in 105(b) of making findings first with respect to schools and then systems? How will this operate in practice? Are either of the findings distinct? What kind of evidence would be needed to support them? Would not a plaintiff always be able to adduce "some other circumstance" to evade the first part of the finding? Wouldn't there be an incentive to do so? In what way, if at all, would the second finding referred to here differ from what is now typically shown and found?

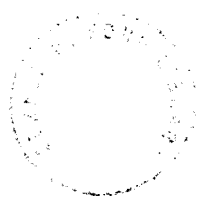
Does 105(c) acknowledge a distinction between a presumption and an inference supported by evidence?

What standard would be used in 105(b) and 105(e) to determine whether findings are feasible or useful? Could the plaintiff control this finding by his litigation strategy? 105(e) needs considerable clarification.

Section 106: This provision's purpose is not apparent. How can a court decide whether school officials are doing voluntarily what they are ordered to do? Or, is it suggested that a court only order an incomplete remedy and rely on voluntary actions to achieve full results?

Section 107: What is meant by the requirement for "a specific finding of extraordinary circumstances" before extending an order beyond five years? Is the violation of civil rights an extraordinary circumstance? If not, will the courts countenance the failure to vindicate constitutional rights because of extraordinary circumstances?

Title II: The mere existence of the authority in this title will exert great pressure for its exercise. What purpose is served by formally involving the Federal Government in these cases?



Is the concept of a mediator consistent with the idea of securing the exercise of constitutional rights? How would the mediator interact with the committee contemplated in Section 203?

Would the five-year plan to be proposed by the committee in Section 203 meet constitutional requirements? Why should the Federal Government or its agents return to the function of drafting plans which it gave up in 1971?

B

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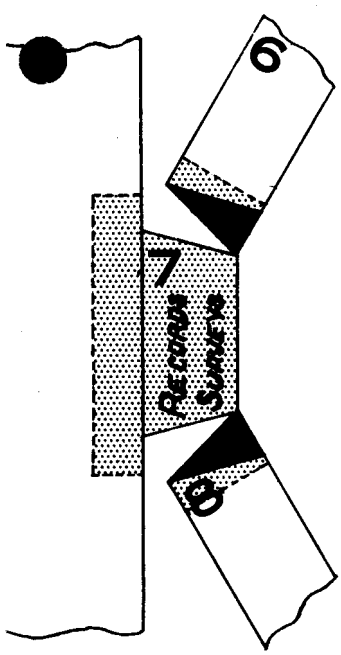


TABBED SEPARATOR SHEET
Form HEW-69D
(3-56)

# LIST OF POSSIBLE APPOINTEES

MOSES C. BURT, JR., Alexandria, Virginia; graduate of North Carolina Central University with a law degree. He is Director of Professional Development, National Association of Housing and Redevelopment Officials, Washington, D. C. Dr. Burt is one of the most respected leaders in community housing and community development that includes housing, schools, and economies. He is a well balanced individual in his views and is always constructive. He is highly respected by both black and white and has been elected to many national boards and committees. He is 44 years of age and a Democrat. He is black.

CLIFTON CAMERON, Chairman of the Board of Cameron Brown, a large banking, real estate and insurance corporation in North Carolina. Mr. Cameron is Chairman of the Board of New Dimensions of Charlotte Mecklenburg, a community wide organization for the social, economic and political development of that part of North Carolina. He was very active in leading Charlotte to peaceful desegregation following the Swan Case that led to the first major court ordered busing. He is by far the most popular individual in Charlotte among blacks and whites, conservatives and liberals, labor and business. He is a Republican.

MAC HOLLADAY, Vice President for Member Relations, Memphis area Chamber of Commerce; accepted special assignment to work with school and business leadership to effect peaceful compliance with Memphis school court orders. He is probably a Democrat, white, and about 40 years of age.

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20201

OFFICE OF THE
GENERAL COUNSEL

June 2, 1976

MEMORANDUM FOR HONORABLE JAMES M. CANNON

Subject: Draft Legislation on Desegregation

In Secretary Mathews's absence, I am forwarding to you a paper which amounts to the Department's preliminary reaction to the draft legislation prepared by the Justice Department (Tab A). I understand that the Secretary will be attending the meeting to discuss this matter this afternoon. He has not had an opportunity to review the attached paper.

As you may know, the Department has had only a few hours to review the legislation and message. The Secretary has had even less time. Our initial reaction is that the proposal is hastily conceived and inadequately drafted. Many of the provisions of the draft bill are unclear in their intention and, we suspect, unpredictable in their application. Where the message speaks of ambiguity in the existing law, it seems to us that the proposed legislation would further complicate, not clarify, the situation.

Secretary Mathews has proposed an approach to the problems involved in school desegregation which does not rely on further law-making, whether by the Congress or the courts. Experience has taught that the specific requirements of the law are but one factor among many which determine whether a school system is peacefully and successfully desegregated with a minimum of busing. The Secretary believes it is essential now to focus on the other factors. It is not clear how this legislative proposal would relate to other efforts, such as the one proposed by Secretary Mathews, and whether, indeed, those other sorts of efforts could be successfully pursued at all in an atmosphere where a particular legislative proposal had previously commanded public attention.

I would be pleased to elaborate on any of the points in the attached paper, which is necessarily preliminary, should you or your staff desire. I am also attaching a list of possible appointees to the Commission proposed by Secretary Mathews for your review (Tab B).

William H. Taft, IV
General Counsel

Attachments (2)

# DRAFT LEGISLATION FOR THE ORDERLY ADJUDICATION OF SCHOOL DESEGREGATION SUITS

A review of the proposed message and legislation in the time available suggests to us a number of significant questions that need to be answered. Drafting defects -- e.g., the draft's persistent reference to orders for the "transportation" of students, where orders uniformly deal with "assignment", not "transportation" -- can be handled at the staff level, if this particular legislative approach is adopted; at the outset, however, many questions must be resolved concerning the desirability of a legislative approach at all and the appropriateness of this one.

The questions raised below are suggested by the draft message and bill. They are grouped in several categories. Taken together, however, they amount to more than a series of questions. What they add up to is a demonstration that this proposal is at this time incompletely presented and in need of further careful consideration and review.

## The Legislative Approach

Does previous legislation in this field, particularly the Esch Amendment, suggest that further law-making can successfully address the fundamental problems of court-ordered desegregation?

We cannot avoid a Congressional debate on this subject. Should we precipitate one? Is a Congressional debate the most effective way to approach this problem at this point -- particularly where at least four committees will be involved (both Judiciary and Education Committees)?

Once legislation is proposed, will the Administration be able to influence the ultimate product effectively? Unconstitutional legislation, not an unlikely result, could leave the situation worse off than presently. Under existing law (Esch and Byrd Amendments) HEW may no longer require busing in any situation. No challenge to this position appears likely. New legislation may well provoke a successful constitutional challenge to all these restrictions, forcing HEW back into busing.

## General Questions about this Legislative Proposal

Is the fundamental distinction the bill seeks to make between current acts of unlawful discrimination and the effects of past unlawful acts a constitutionally valid one? The question addressed by the courts is whether for whatever reason individuals are being deprived of their civil rights now. Legally, this question is indistinguishable from the question of whether individuals continue to be deprived of their civil rights because of a present failure to remedy the effect of a past unlawful act. It is the right, not the nature of the wrong or its timing which dictates the remedy.

How would this proposal interact with existing legislation, particularly the Esch Amendment? Section 104 appears to repeal Esch, while 105(b) and 105(e) seem to amend it.

Is this proposal intended to deal with all forms of illegal discrimination and remedies for them or simply student segregation and busing? Section 102(c) suggests that all forms are addressed.

Isn't the Esch Amendment's approach the most appropriate conceptual basis for dealing with busing? It deals cleanly with remedies rather than with rights.

## Specific Questions about this Legislative Proposal

Section 101: In presenting the question as one involving a remedy -- busing or not busing -- for different kinds of wrongs instead of one to vindicate identical kinds of rights does the legislation operate on a sound conceptual base?

Is the application of this law intended to be prospective only? How many school districts will be affected?

Section 104: Is the authority of the court to provide "any other relief that, in the Court's judgment, is necessary to prevent such act or acts from occuring" intended to be used as a blank check?

What is meant by the last phrase here? Why the emphasis on "particular individuals" and "acts specifically directed at them"? Is this to prohibit class actions and remedies? This would be inconsistent with the very concept of racial discrimination.

Section 105: The Esch Amendment is here mentioned, but the interaction of the two provisions of law is far from clear. Section 203 of the Esch Amendment -- the Scott-Mansfield proviso -- is particularly troublesome in this connection.

What is the purpose in 105(b) of making findings first with respect to schools and then systems? How will this operate in practice? Are either of the findings distinct? What kind of evidence would be needed to support them? Would not a plaintiff always be able to adduce "some other circumstance" to evade the first part of the finding? Wouldn't there be an incentive to do so? In what way, if at all, would the second finding referred to here differ from what is now typically shown and found?

Does 105(c) acknowledge a distinction between a presumption and an inference supported by evidence?

What standard would be used in 105(b) and 105(e) to determine whether findings are feasible or useful? Could the plaintiff control this finding by his litigation strategy? 105(e) needs considerable clarification.

Section 106: This provision's purpose is not apparent. How can a court decide whether school officials are doing voluntarily what they are ordered to do? Or, is it suggested that a court only order an incomplete remedy and rely on voluntary actions to achieve full results?

Section 107: What is meant by the requirement for "a specific finding of extraordinary circumstances" before extending an order beyond five years? Is the violation of civil rights an extraordinary circumstance? If not, will the courts countenance the failure to vindicate constitutional rights because of extraordinary circumstances?

Title II: The mere existence of the authority in this title will exert great pressure for its exercise. What purpose is served by formally involving the Federal Government in these cases?

Is the concept of a mediator consistent with the idea of securing the exercise of constitutional rights? How would the mediator interact with the committee contemplated in Section 203?

Would the five-year plan to be proposed by the committee in Section 203 meet constitutional requirements? Why should the Federal Government or its agents return to the function of drafting plans which it gave up in 1971?

# LIST OF POSSIBLE APPOINTEES

MOSES C. BURT, JR., Alexandria, Virginia; graduate of North Carolina Central University with a law degree. He is Director of Professional Development, National Association of Housing and Redevelopment Officials, Washington, D. C. Dr. Burt is one of the most respected leaders in community housing and community development that includes housing, schools, and economies. He is a well balanced individual in his views and is always constructive. He is highly respected by both black and white and has been elected to many national boards and committees. He is 44 years of age and a Democrat. He is black.

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