In The
SUPREME COURT OF THE UNITED STATES

October Term 1954

OLIVER BROWN, MRS. RICHARD LAWTON, et al.,
Petitioners,

vs.

BOARD OF EDUCATION, TOPEKA, KANSAS, et al.,
Respondents.

- - -

FRANCIS B. GEBHART, et al.,
Petitioners,

vs.

ETHEL LOUISE BELTON, et al.,
Respondents.

- - -

SPOTTSWOOD THOMAS BOLLING, et al.,
Petitioners,

vs.

C. MELVIN SHARPE, et al.,
Respondents.

- - -

HARRY BRIGGS, JR., et al.,
Petitioners,

vs.

R. W. ELLIOTT, et al.,
Respondents.

- - -

DOROTHY E. DAVIS, et al.,
Petitioners,

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al.,
Respondents.

- - -

Washington, D. C.

April 11, 1955

WARD & PAUL
1760 PENNSYLVANIA AVE., N. W.
WASHINGTON, D. C.

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The above-entitled matter came on for oral argument at 12 noon.

PRESENT:

The Chief Justice, Earl Warren and Associate Justices Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton and Harlan.

APPEARANCES:

On behalf of the Board of Education of Topeka, Kansas:

Harold R. Fatzer, Attorney General of Kansas.

On behalf of Oliver Brown, Et Al:

Robert L. Carter.

On behalf of Francis B. Gebhart, Et Al:

Joseph Donald Craven, Attorney General of Delaware.

On behalf of Ethel Louise Belton, Et Al:

Louis L. Reading.

On behalf of Spottswood Thomas Bolling Et Al:

George E.C. Hayes and James M. Nabrit, Jr.

On Behalf of C. Melvin Sharpe, Et Al:

Milton D. Korman.

On Behalf of Harry Briggs, Et Al:

Thurgood Marshall, Spottswood W. Robinson, II;

On Behalf of R. W. Elliott, Et Al:

Robert McC Figg, Jr., and S.E. Rogers.

APPEARANCES - continued.

On Behalf of County School Board of

Prince Edward County, Virginia, Et Al:

Archibald G. Robertson, and

Lindsay Almond, Jr., Attorney General of Virginia.

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The Chief Justice. No. 1 on the Calendar, Alfred Brown, Mrs. Richard Lawton, et al, vs. Board of Education of Topeka, Kansas, et al.

The Clerk. Counsel are present, sir.

The Chief Justice; Attorney General Fatzer.

ARGUMENT ON BEHALF OF BOARD OF EDUCATION

By Mr. Fatzer.

Mr. Fatzer: Chief Justice and Members of the Supreme Court: I am Harold R. Fatzer, the Attorney General of Kansas and with me today is Mr. Paul E. Wilson, the First Assistant Attorney General who has previously argued the State's position when the question of the answer to Questions 1, 2 and 3 . was argued heretofore.

Today, we appear not as an adversary. We appear here to be of assistance if we can to the Court in helping it see that proper decrees are imposed and made.

Now in answer directly to the questions, your Honors, of Nos. 4 and 5 and the subsequent subsections, we want to say that traditionally in Kansas, segregation has not been a policy of that state, on a state level. We suspect that the Kansas case is probably the least complex of any that is before it. We wish to say that that has never been a matter of state policy. We believe that the decision of the Court has been received by the students, teachers, school administrators and by the parents of both colored and white

with approval.

In answering and assisting this Court, I shall be very brief in stating our position, what we believe should be done with respect to the case that is now before the Court, that is, the Topeka Board of Education.

Your Honors, we believe that 4-A should be answered in the negative. We do not believe that the immediate and forthwith admission of the Plaintiffs--although they may be in the school; I am not prepared to tell the Court that they are not, I suspect that they are--would, and as the Board of Education found, work a hardship, would impair administrative procedures, and so we would suggest to the Court that no decree be entered which would forthwith admit any student to the school of his choice. Rather, we believe that the Court should exercise its equitable jurisdiction at all times in these cases because of the public interest involved, notwithstanding the fact that the Plaintiffs in the case would undoubtedly have some present and immediate right and personal right of admission to the schools.

We believe, your Honors--and I want to make a brief report of a situation that has developed since the brief in the Kansas case was filed--we believe that this case should be reversed, that it should be remanded to the Federal District Court in Kansas. I should like to tell you and briefly review the efforts of the Topeka Board of Education to terminate

segregation in the public schools in that city.

It was commenced on September 3, 1953. The policy announced by the School Board was to terminate maintenance of segregation in elementary schools as rapidly as was practicable. Five days following that date, to wit, September 8, 1953, segregation was terminated in two schools in the city. It involved only approximately ten colored children, but they were living in the district. They were permitted to attend those schools.

Justice Burton. You referred to the termination of segregation in the elementary schools?

Mr. Fatzer. That is correct.

Justice Burton: Has it been terminated in the other schools?

Mr. Fatzer. There is none in Grades 1 to 6, Mr. Justice.

That was called the first step. The second step was made on January 20, 1954. And that was effective for the school term, current school term, 1954-1955.

At that time, and by order of the Board of Education, segregation was terminated in twelve school districts in the city and transportation was not provided to the Negro school children living in those twelve districts on the basis that the child could attend the school of that district but with the privilege, if he preferred, to attend the colored school

which he had been attending. This affected approximately 113 children, plus the ten that had been previously affected from Step 2--123 Negro children were placed in the integrated school.

Justice Frankfurter. What is the total of school population into which these 123 were merged, roughly?

Mr. Fatzer: I will have to refer--

Justice Frankfurter: What magnitude? Was it 10,000, or 50,000?

Mr. Fatzer: No, nothing of that kind. I think perhaps the school population in Topeka is roughly 8200, Mr. Justice.

Justice Frankfurter: So there was no problem of space and buildings, and none of those problems?

Mr. Fatzer: In one school there was. One school in which, in the so-called Polk School there was the space problem and I think three children were admitted to that school and others were not because of this space problem.

Justice Frankfurter: And there was no re-districting of the districts you have?

Mr. Fatzer: Not at that time.

Now I spoke to your Honors of a subsequent event that occurred subsequent to the filing of the State's brief here in response to the request of the Court, which occurred on February 23, 1955. We have with us today the minutes of the Topeka Board of Education adopted February 23, 1955, which

we have filed in the Clerk's office as a supplement to the brief filed in this Court in response to questions 4 and 5 propounded by the Court. We file it simply for informational purposes to show the good faith of the members of the Board of Education of Topeka in carrying out the previous announced policy of terminating segregation as rapidly as practicable.

Now this third step, your Honors, is effective September, 1955. It provides, (1) that segregation has been terminated in all remaining buildings; (2) That the McKinley Elementary School, one of the colored schools, be closed and that it be placed on a standby basis for the coming year; (3) That colored schools, Buchanan School, Monroe and Washington Schools be assigned districts within the areas of the city, the same as any other school area in the city and that any child who is affected by the change in the school district--I will go ahead--any child who is affected by the change in school district lines as recommended on a map which we did not attach hereto, be given the option of finishing the elementary grades in the school in which he attended in 1954 and 1955. That is, he could attend the school in the district in which he resided or, if the new district overlaps now into a district that formerly existed before the re-districting, he can attend the school that he attended last year. In other words, it is equally available to both the white and the colored students.

Justice Frankfurter: Have I missed a statement as

to the basis or the reasons for which this re-districting was done?

Mr. Fatzer: The basis of it was done, of course, Your Honor, on the Court's decision of May, 1954, to comply with the order of this Court that segregation, per se, was unconstitutional. That is the basis of it.

Justice Frankfurter: You mean there were exclusively Negro schools?

Mr. Fatzer: Yes.

Justice Frankfurter: And those were withdrawn from use by the City?

Mr. Fatzer: One was, your Honor.

Justice Frankfurter: One was. And the others are now available to children, intermixed, is that it?

Mr. Fatzer: Yes.

Justice Frankfurter: Was that districting a geographic districting?

Mr. Fatzer: Yes.

Justice Frankfurter: Was there any indication in the minutes of the Board or in any document you filed as to the exact geographic nature of this districting?

Mr. Fatzer: Unfortunately, your Honors, we did not have attached to this the map of the Board of Education which designated the particular districts of the City School System.

Justice Frankfurter: Could you supplement that later?

Mr. Fatzer: Yes, we would be glad to.

Justice Reed. Could you also supplement that by showing the percentage of actual white children in the districts?

Mr. Fatzer: I think that is set forth here in the figures of the Superintendent of Public Instruction and approved by the Board.

This shows roughly, your Honors, an estimation of--on the assumption of one-third of the children attending the strictly colored schools, Washington, Monroe and the Buchanan Schools, who would be given the choice to attend the schools which they attended last year, those three schools, or to go into the new district in which they might reside and attend the formerly all-white schools--one-third of the colored children will attend the school at which they attended last year or this present term.

Bear in mind this is effective in September of this coming term.

There is another provision in this resolution of the Topeka Board of Education and that is with respect to kindergarten children, that those children entering kindergarten in 1955-1956, September of this coming year, this coming September, those who are affected by the change in the school district boundaries as recommended, be given the option of attending the same school in 1955-1956 that they would have attended in 1954-1955 had they been opened up then.

It has been reported to the Attorney General's office that the purpose of this clause is that if a parent who had a child that would enter kindergarten this year formerly lived in a segregated district and as a result of the change of school district boundaries, a result of this policy, the parent can send his child to the school he would have attended last year or this current term if he had been old enough or he can always send him to the school in the district in which he resides.

It has been suggested to us that the purpose of that is to permit any parent to move from the area where he lives to some other area in the City.

Justice Reed: Have you indicated the number of each in each of these districts, the number of white and colored children?

Mr. Fatzer: Yes, if you have it, your Honor--

Justice Reed: I have it.

Mr. Fatzer: On page 2 it shows approximately the number of students changing from the four colored schools to the non-segregated schools.

Justice Reed: Those I suppose are the integrated schools?

Mr. Fatzer: That is correct. I used the term "non-integrated schools" as of the date of this order.

Justice Reed: It does not show the schools--under

paragraph 4, it does not show the number of white and colored in different grades?

Mr. Fatzer: Well, if Your Honors will go down to the last four schools listed in Paragraph 4--Buchanan, Monroe, McKinley and Washington, you will note the estimated total of attendance this year is considerably lower than the actual attendance on this present school term. Whereas, the reverse is true of the other schools affected.

Justice Clark: What was the attendance this past session, this present system?

Mr. Fatzer: In the whole school system?

Justice Clark: No, the last three schools?

Mr. Fatzer: Buchanan 110 Monroe, 181. No, I beg your pardon. Buchanan 136; Monroe, 256.

Justice Clark: That is these figures here, I see. I thought that was the next year.

Mr. Fatzer: No, this is the actual, 10-15-54, Mr. Justice Clark, turn to the right-hand side of the page.

Justice Clark. Yes, I see. Thank you.

Justice Reed: Are your opponents here? Are they going to argue?

Mr. Fatzer: Yes, they are.

Justice Harlan: Could I ask you a question?

Mr. Fatzer: Yes, sir.

Justice Harlan: Is the difference between these

two columns, for example, the difference between 110 and 136 in the case of Buchanan, is that a result of your redistricting?

Mr. Fatzer: That is the estimated result of redistricting.

Justice Harlan: Without regard to the possible exercise of the option that you referred to?

Mr. Fatzer: Well, that is taken into consideration on this estimate on the basis that one-third of the children attending Washington, Monroe, Buchanan , will remain. Two-thirds of them will go to some other school.

Justice Reed. Are all the schools under 4, are they colored, or only the last three?

Mr. Fatzer: The last 4 are, Buchanan, Monroe, McKinley and Washington.

Justice Reed: That is my understanding, but I still do not understand how many colored pupils are estimated to be in grammar school next year.

Mr. Fatzer: 58, your Honor, at the top of page 2.

Justice Reed: 58. That is the estimate for next year?

Mr. Fatzer: Yes, sir. Now, I am not quite sure that that takes into consideration, and it probably does not, the 123 students that have been integrated on Steps 1 and 2. This is an estimate of Step 3 to complete the program.

We believe, your Honors, that this Board has complied with the Court's decision in good faith. That it has done

everything it could as expediently and as rapidly as possible. It has taken approximately a year and five months of this willing Board to meet its administrative program and problems, to provide for teacher assignments, student assignments. The administrative intent of compliance has been declared. And we believe, your Honors, that the rule of Eccles vs. Peoples Bank in 333 U.S. 426 is applicable, that where the administrative intention is expressed but has not yet come to fruition, we have held that the controversy is not ripe for equitable intervention. We believe that the cause should be remanded but that this Board be permitted to carry out its orderly process of integration.

Now perhaps the Court might be interested in the other cities that are not affected by the decree in this case, governing solely the Topeka Board of Education. I shall briefly cover them.

In the first place, as I told the Court, this decision has received no adverse reaction from the people of our state. For instance, the City of Atchison, on the Missouri River, approximately 30,000 people, with about 10 per cent Negro population. On September 12, 1953 the Board of Education adopted a resolution terminating segregation in Grades 7 through 12, and so as to complete the plan, segregation is to be terminated in grades 1 through 6 as soon as practicable.

In Lawrence, the seat of the University, approximately

24,000 population, with about 70 per cent of Negro population, they have maintained segregated schools since 1869. That city and that Board of Education has terminated segregation in its system.

In Leavenworth, a city of approximately 20,000, there is a population, Negro population of about 10 per cent. The system was established, the segregated system was established in 1858 and has been maintained constantly since that time. They have adopted resolutions in that Board, in that city, and the first positive step was taken in the current year in which children of kindergarten and first-grade pupils were to be admitted to the schools nearest their residence and presumably in the ensuing school term it will be extended to Grades 2, 3 and perhaps higher.

I should like just briefly, your Honors, to quote from a report from one of the school authorities in Leavenworth with respect to the time that, in his judgment, they require to complete their voluntary program, because I think, in the first place, this man is one of the leading public school educators in Kansas, he has started the movement in Leavenworth to comply with the Court's decision and I would like, just briefly, to read part of his report to our office:

"In my judgment, the solution will have to be carefully and slowly introduced. You and I and most Board members will readily agree to the righteousness of the complete

integration from the standpoint of our established principles of decency, Christianity and democracy. However, there is a sufficient number of biased and prejudiced persons who will make life miserable for those in authority who attempt to move in that direction too rapidly. As a consequence, many of us will be accused of 'dragging our feet' in the matter, not because of our personal feelings or inclinations, but because, in dealing with the public, its general approval and acceptance is indispensable. One cannot force it. He can only coax and nurture it along."

In Kansas City, Kansas, with a population of approximately 130,000 persons, about 20.5 per cent are members of the Negro population. I should point out that this city has a greater per cent of Negro population than some southern cities, such as Dallas, Louisville, St. Louis, Miami, Oklahoma City, and only slightly less than in Baltimore.

Up to the present school term, including the present school term--excuse me--up to the present school term the City has maintained seven elementary schools, one Junior high school and one high school for its approximately 6,000 Negro students, while it had 22 schools which were attended by more than 23,000 white students.

Just briefly, the Board of Education of that city has adopted this resolution which provides substance to begin integration in all public schools at the opening of school on

September 13, 1954; second, to complete the integration as rapidly as class space can be provided; to accomplish the transition from segregation to integration in a natural and orderly manner designed, to protect the interest of all the pupils and insure the support of the community, and they seek to avoid disruption of professional life of career teachers.

So that city, although no limit is set, they are proceeding in good faith and with dispatch to end segregation.

Parsons, a city of 15,000, located in the southern part of the state, has less than 10 per cent of Negro population, and they have announced their policy to end segregation, effective last term with respect to all schools except one school, due to its crowded condition and the fact that there was a lack of adequate facilities and it required new buildings, and when those are completed, there will be complete integration in that system.

In Coffeyville, a city on the state line, the southern state line, approximately 60,000 to 70,000 people, approximately 10 per cent colored population, they adopted resolutions terminating segregation at the end of the school year.

Only one city that we have not heard from, Fort Scott. We have reports that in that city the only protest

against the proposed segregation was from Negro citizens. I am sure that we shall have no difficulty with that city. We, therefore, suggest to this Court that the case be reversed, that it be remanded to the District Court and that the Board of Education be permitted and allowed, without the interference of any decree, to carry out the program in good faith, subject to any objections that any person might have with respect to its completeness or with respect to its application, and that, at that time, notice be given by the Court to Counsel at which time those matters may be dealt with by the lower court.

Justice Frankfurter: May I ask whether, in Kansas, you have a centralized authority over the local school boards or are they autonomous?

Mr. Fatzer: They are autonomous. They are elected by the people. They are financed by the people locally, except with respect to state aid, but it is not conditioned upon local action. It is conditioned upon daily, average daily attendance.

Justice Frankfurter: And on the law enforcement side, does the Attorney General of Kansas, assuming that there is a statewide law or an order of this court, is the authority of enforcement vested over localities in the Attorney General?

Mr. Fatzer: With respect to state laws, I think that is correct, sir. I am doubtful if we would have any duty to enforce the decrees of this Court.

Justice Frankfurter: Who would? In a particular case you have Topeka. Suppose this Court enters a decree, assume we follow your suggestion of remanding the particularities to the appropriate district court of the United States and a decree is then entered, binding against the School Board of Topeka--I think it would be, would it not?

Mr. Fatzer: That is correct, the members of the Board.

Justice Frankfurter: --what would be the enforcing authority, the Federal authority--has the Attorney General of Kansas any responsibility in that regard?

Mr. Fatzer: In this case, when the three-judge court was convened, the statute was complied with with respect to notice to the Governor and the Attorney General of the State.

It would be my judgment, Mr. Justice, that the great inherent power of the Federal District Court, that it can enforce its own decrees.

Justice Reed: Mr. Attorney General, do you have in Kansas at present a law which permits segregation?

Mr. Fatzer: We do not now, no, sir. We have considered it to be declared invalid by decision of this Court.

Justice Reed. That is you have interpreted the decision as invalidating your law?

Mr. Fatzer: Yes, sir, we have.

Justice Reed: Therefore, you feel no obligation to

enforce the State law?

Mr. Fatzer: We feel any statute--

Justice Reed. You have no obligation to enforce that state law?

Justice Frankfurter: What were the sanctions of that state law, Mr. Attorney General, in connection with Mr. Justice Reed's question--what was the nature of that law?

Mr. Fatzer: Purely permissive.

Justice Frankfurter: Just authorizes local school boards to introduce it?

Mr. Fatzer: They could introduce it or reject it, which some of them did. One city in the state never even used it. Two cities in the state previously, which had segregation previously terminated on their own volition. It is a purely permissive. It was a purely permissive statute. We consider it without force and effect at this time.

Justice Frankfurter: And you are in this litigation by virtue of the requirement of notice to the Governor and the Attorney General under the three-judge court statute?

Mr. Fatzer: That is correct, your Honor. We felt that this system was apparently being maintained under authority of this Court, under authority of our Supreme Court, and other appellate courts. We felt that we owed a duty to uphold the decisions of our state courts with respect to this state statute and that is why we were here originally. And we are

here now not as an adversary but to assist the Court in any way we can in helping it arrive at a correct decree if any need be entered locally.

Justice Douglas: How many students are involved here in the Topeka case?

Mr. Fatzer: 8200, I think, your Honor, was the figure.

Justice Douglas: I mean in this litigation.

Mr. Fatzer: The whole school system was involved.

Justice Douglas. In Topeka?

Mr. Fatzer: My recollection is that there were 836 Negroes, 7,418 white children for a total of 8,254 children altogether, 836 colored children 7,418 white children, or a total of 8,254.

Justice Douglas: These appellants in No. 1 you say, you do not know whether they have all been taken into the schools that they sought to enter?

Mr. Fatzer: I can not tell you that, sir. I assume they have. I do not know.I am sure that counsel for the Appellant can advise the Court on that. I do not know.

Justice Douglas: I suppose, if there were just an application by one Negro student to enter the school that was closest to his home which happened to be a white school, and he was admitted, that that case would become moot then?

Mr. Fatzer: I assume, sir, that there are more children involved, all the children of the city school system are involved, in my judgment.

Justice Clark: Under the plan in Topeka, there will be no segregation, enforced segregation after when?

Mr. Fatzer: Commencing September, 1955, sir.

Justice Clark: That is this next September?

Mr. Fatzer: That is this next school term.

Justice Clark: There will be no enforced segregation?

Mr. Fatzer: No enforced segregation.

Justice Clark: Now skipping over to the city of Kansas City, what is the schedule there? I understood you to say they did now have a definite schedule, is that correct?

MR. Fatzer: Well, if I said that, I did not want to leave that impression, Mr.Justice Clark.

Justice Clark: I may have misunderstood you.

Mr. Fatzer: I shall read with some care here the resolution of this Board adopted August 2.

Justice Clark: Where is it? I can read that if you want to go ahead.

Mr. Fatzer: It is on page 20 of the Supplemental Brief of the State of Kansas as to questions 4 and 5 propounded by the Court.

Justice Reed. Going back to page 2 of what you filed here on April 11 on the schools, I may be stupid about it,

but in the fourth section, that refers only to Negroes.

Mr. Fatzer: That is Item No. 4, "The following is the estimate of the number of students in 1955-1956 that would be in the affected schools."

Justice Reed: Does that mean Negroes, too?

Mr. Fatzer: Yes.

Justice Reed: You don't know the percentage of Negro students in each school?

Mr. Fatzer: No. I am in error, your Honor. That is total enrollment.

Justice Reed: I understood you had a total enrollment of some 8,000?

Mr. Fatzer: Yes, that is correct.

Justice Reed: Then there is only 2750 accounted for here.

Mr. Fatzer: We would be glad, your Honor, to provide this breakdown with respect to these schools, with respect to whether they are white or colored in each grade.

Justice Reed: It would help me.

Mr. Fatzer: All right. In other words--

Justice Reed: You have redistricted and what I was interested in is to know whether the redistricting has resulted in essential--whether all the school population will be unsegregated, or whether you will have all of the schools in one section all colored population.

Mr. Fatzer: The colored schools are in the the areas that are predominantly through history, geographic residential colored areas.

Justice Reed: Very normal that there is a separation of population.

Mr. Fatzer: Now on the fringe, some of the colored students under this plan would go to the white schools, the white children that are in the new areas, new districts, could likewise complete their course. They can attend either school. It is a privilege that is given to either child.

Justice Reed: And we do not know how long that will continue, strictly speaking?

Mr. Fatzer: Well, from now on. I mean, segregation.

Justice Reed: The plan could result in not a segregated school, but an all-white school and an all-Negro school?

Mr. Fatzer: It is my understnding, sir, that that would not be the case. Now for the children, if you will note under No. 2-D, any child who is affected by the change in district lines as herein recommended, be given the option of finishing elementary grades. That would be, if he was in the first grade, he could finish the elementary grades 1 to 6 in the school which he attended this current year. Now that is equally available to both the colored and the white students.

Justice Reed: I understand that, but it is also

equally available that all the Negroes could go to one school and all the whites to another.

Mr. Fatzer: I am not prepared to say on that, sir, but my understanding is that that would not be the case. We will be glad to furnish the Court maps showing this area and we would be glad to show a breakdown under No. 4, Mr. Justice Reed, of the per cent and the number of the different white and colored students.

Justice Frankfurter: I would be grateful to you if you would add to that what is not fully clear in my mind and I do not want to take the Court's and your time--if you would be good enough to state why there had to be, in the judgment of the School Board, redistricting and the basis on which the redistricting was done.

Is my question clear?

Mr. Fatzer: Why redistricting--

Justice Frankfurter: Why was it necessary, in order to carry out the desegregation, the abolition of segregation, why was it necessary to have new or changed school districts and what were the considerations which led to the kind of districts that they carried out?

Mr. Fatzer: It is my understanding, Mr. Justice, that the reasons they required the redistricting of the schools, as this proposal would establish, is that colored schools did not have a district previously, that is,

in a general large way, that children living in this particular part of the city would attend this particular school.

Justice Frankfurter: They just took them by bus to schools set aside for colored children?

Mr. Fatzer: That is right.

Justice Frankfurter: I see.

Mr. Fatzer: They gathered them up. So that now they have definite proposed districts for each of these schools with definite geographic lines.

Justice Frankfurter: And your maps will show the nature of the districts, the contours of the districts, will they not?

Mr. Fatzer: That is correct.

Thank you, your Honors, very much.

The Chief Justice: Mr. Carter?

ORAL ARGUMENT ON BEHALF OF BROWN, ET AL

By Mr. Robert L. Carter

Mr. Carter: We are in accord with Mr. Fatzer that the case should be reversed and remanded to the District Court. We feel that the decree should be entered by this court declaring the Kansas statute by which power the Topeka Board proceeded to organize and have segregated schools, that that statute be declared unconstitutional and void.

Justice Frankfurter: I understood that the Attorney General had already expressed an opinion to that

effect.

Mr. Carter: He had expressed an opinion.

Justice Frankfurter: I am not saying what you said should not be done, but he has already announced that this Court's decision on May 17 of last year invalidated that statute. Is that a correct understanding?

Mr. Carter: Yes, sir. That is invalidated, that invalidated the statute but, as far as Topea is concerned, any power to organize and segregate a school must emanate from a specific statute or else, under the state law, there is no power to maintain segregation. Therefore, the invalidation of this statute means there is no power at all in Kansas to maintain and operate segregated schools as the law has been interpreted by the State Courts of Kansas.

Justice Reed: That was involved in the suit you brought here?

Mr. Carter: Yes, sir.

Justice Reed: What do you mean, you want a specific invalidation of this specific statute?

Mr. Carter: We think, your Honors, that such a decree ought to be entered, declaring the statute unconstitutional because as of now the implications are that the statute is unconstitutional by the May 17th decision, but the May 17th decision has no specific declaration or judgment or decree. And in the reversal, we think this should be set forth in

your reversal and remanding to the lower court.

Justice Reed: If we had said that in the opinion, then it would not be necessary in the decree, or would it?

Mr. Carter: I think it would in terms of the decree. It seems to me that is the thing that the lower court gets and acts upon rather than the opinion of the court.

Justice Reed: If a decree is reversing the decision of the court below to allow all children, a complete integration-- I do not just understand yourpoint.

Mr. Carter: We think that the May 17th decision in effect means that the Kansas statute which was here in this case is void. What we are asking for is specifically a decree, reversing and specifically saying the statute is unconstitutional and has no force and effect.

Justice Frankfurter: You would rather go to the decree, rather than the opinion?

Mr. Carter: Yes.

Justice Frankfurter: Because the decree is the thing that counts:

Mr. Carter: Yes. Secondly, we would like a decree that would indicate that an order to the Topeka Board to cease and desist at once from basing school attendance and admission on the basis of race so that as of September, 1955 no child in Topeka would be going to school on the basis of race or color. We would think that an instruction should be

issued to the District Court to hold jurisdiction and hold proceedings to satisfy itself that the school board of Topeka as of September, 1955, has a plan which satisfies these requirements in that the school system has been reorganized to the extent that there is no question of race or color involved in the school attendance in its rules.

We also think that the Court should hold jurisdiction, the District Court should hold jurisdiction to issue whatever other orders the Court desires.

We feel that everything that Mr. Fatzer has said argues for a forthwith decree in this case .

The plan which has been issued as the third step, is not one that indicates that there are any reasons why desegregation should not be obtained as of September, 1955. The plan says that desegregation will obtain as of September, 1955. We take objection to the plan. We think there are a number of points in the plan which will mean there will be a modified form of segregation being maintained for many years as the plan now operates, but we do not think that this is the place for us to argue about the question of the plan.

We think that if this Court issues a decree as we have suggested to the lower court, the school board and the attorneys for the appellants can argue as to whether or not a specific plan which is being adopted by the Board

conforms with the requirements of this Court's opinion and its decree, that segregation be ended as of September, 1955, which we think should be done.

Justice Frankfurter. As of September. Can you tell specifically when the classes are formed in the Topeka schools? When is the makeup of the classes affected in this litigation? When, in September, the first of September, or--do you happen to know about that? The point of my question is as to the time when this must be determined if it is to affect the entering classes in September, when it is that the district court will have to hear these things?

Mr. Carter: I do not have that information. I from one of the resolutions that school opened September 15, I think, this year. I do not know when they open in 1955.

Justice Frankfurter: The Attorney General will be able to tell us then?

Mr Carter: I would think that we would of course want to have a hearing before the District Court at as early a date as possible so that this matter could be settled and there would be no question but that the question in Topeka would be going to unsegregate schools on a plan which conforms to the court's decree in all its requirements as of September, 1955. With that we would be satisfied.

Justice Clark: Are the appellants segregated at this time?

Mr. Carter: Yes, sir. There are five who are in the junior high school who have moved out of this class because they are not in a non-segregated school. About six of them are attending Washington, Buchanan, and Monroe schools which are the segregated schools.

Justice Harlan: Is that the result of compulsion, or their own choice?

Mr. Carter: Well, your Honor, as a result of expulsion, this plan, what is known as the third step--there were 18 school districts in Topeka. The first six schools listed on page 2 of the Order, the papers which the Attorney General gave you, those schools are the remaining six schools in which segregation still obtains, the all-white schools. The lower four schools are the all-Negro schools.

In all of the other districts, that is approximately 12, Negro and white children are attending schools together, that is the Negro children are able to go to the schools that are nearest to their homes.

This third step purports to complete the integration of the system and to bring into the system the three Negro schools and make it a part of the total school system. Now instead of 18 schools, you will have 21 schools purportedly servicing every one. Our objection to this is the fact that in our opinion these three schools will remain segregated, all Negro children will be attending them for many years to come and

we think that does not conform to your Order.

Justice Douglas: Are those Buchanan, Monroe and Washington?

Mr. Carter: Yes, sir.

Justice Clark: Will that be on a voluntary basis, you think?

Mr. Carter: No, that will not be on a voluntary basis because the Negro children who now live in the District, as this thing is reorganized in the district serviced, for example, by Buchanan, as you will note, the children in this district have an option to go to a school outside of the District, but since the Negro children only had the option or the right before this thing was put into effect, to go to Buchanan, Monroe and Washington, they can not exercise an option to go to any other school than the Negro school. That means this, that the white children will go out of the district and continue to go to the schools they are going to and the Negro children will be forced to continue in Buchanan, therefore you will have segregated schools.

I think that is as much segregation as before the May 17th Order.

Justice Harlan: Do you attribute that result to the way the option system may work rather than the way the district is made up?

Mr. Carter: Yes, sir. I know nothing about the

district. I cannot say whether the districting is done fairly. I do not know anything about the matter. But on the face of it, this is my objection to the plan as it is given to us by the Attorney General.

Justice Clark: I thought all the students would be given a choice as to whether they want to stay there or go to another school under Section 3, page 1, the bottom of the page. It does not say all, but it says the estimated number of students who will transfer is indicated as one-third.

Mr. Carter: I know, Justice Clark, but if you will look on page 1, Item D on the third step, this is the option, that "Any child who is affected by change in the district lines as herein recommended, be given the option of finishing elementary grades in the school which he attended 1954-1955 and continue therein."

This is the option to be exercised and this is the option where the Negro child has no option and the white child in the District that is serviced by one of the former Negro schools, has an option to go out of the district and the Negro child has not.

The Chief Justice: Thank you, Mr. Carter.

Mr. Attorney General, can you tell us when the schools open in Topeka?

Mr. Fatzer: My understanding is, sir, that it commences on the second Monday in September and that the

enrollment of students is generally completed during a three-day period just about, just before the second Monday in September.

The Chief Justice: The determining as to where a child shall go is not made until in September?

Mr. Fatzer: I think that is true. I assume that it will be worked out under this plan. If the lower court would approve it or if it were to be modified by that date, surely the schools authorities want to know how many children are going to be in some school and whether facilities are going to be adequate and whether or not, under the program and the plan as proposed or as may be modified, that what children are going, whether they are eligible under the plan to go to this school and whether existing facilities are available to take care of them.

The Chief Justice: I think generally what this Court would be interested in knowing would be in the event there is a remand to the District Court, if it might be said when it gets there, that it was too late for next year.

Mr. Fatzer: No.

The Chief Justice: That it should have been there before some date, say, in July or August when those things are done.

Mr. Fatzer: I am sure that would not be the case, your Honors. I can tell this Court that I am pretty certain.

Justice Reed: From what you say, I take it that you consider it proper to allow an option to a child to go to another school, that is within the limits of the Constitution?

Mr. Fatzer: Bearing in mind, sir, that our understanding at present--

Justice Reed: Before you answer that, may I make another statement. I understand that normally a child in Topeka goes to the school in the school district in which he resides?

Mr. Fatzer: Yes, sir.

Justice Reed: Now, there is a variation from that which allows him to go to another school if he has been going there before. That is the 2-E section?

Mr. Fatzer: Yes. He can complete his elementary course in the other school, if he should be in another district.

Justice Reed: A child who goes to school for the first time, for the first year, in the first grade, may he choose a school to which he goes?

Mr. Fatzer: The first year only.

Justice Reed: And after having chosen the first year, then he continues there?

Mr. Fatzer: He must attend in the district in which he resides under Plan 2-E.

Justice Reed: If he attends in 1955-1956, you interpret that to mean only for 1955-1956, for that year?

Mr. Fatzer: That is the interpretation placed upon it by the attorney for the Board of Education to our office, yes, sir, that they only attend there one year.

If, in the area of the Monroe school, some child by geographic area would be within that boundary and within another district prior to this redistricting and could have attended last year if they had been old enough, they could attend the so-called white school for the one-year period on the basis that it would permit time for the parents to move if they so desired.

I am told that, very frankly, that is the purpose of the section.

Justice Burton: That applies to the particular year. In years to come there will not even be that option.

Mr. Fatzer: Just one year, the next school year, Mr. Justice.

The Chief Justice: Thank you.

No. 5, Francis B. Gebhart et al, Petitioners, vs. Ethel Louise Belton, et al.

The Clerk: Counsel are present.

ARGUMENT ON BEHALF OF GEBHART, ET AL

By Mr. Joseph Donald Craven

Mr Craven: Mr. Chief Justice and Members of the Supreme Court: The brief for the State of Delaware was filed by my predecessor, Mr. Young. I find myself in agreement with

that brief except for one modification which I will mention to the Court a little later, but we are before the Court asking for a firm answer of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware. That is based on two considerations. First, that the separate but equal doctrine under which these cases were brought here is, of course, no longer in effect in view of the Court's decision of May 17 and secondly, because these children have been integrated into the two school districts which were involved in those cases, that is, the Hockessin and Yorklyn school districts.

There have been no untoward events in connection with that integration and the state is asking for a firm answer.

Justice Frankfurter: You mean each one of these parties is now in a school or has been in a school in which segregation in any aspect has terminated?

Mr. Craven. Yes.

Justice Frankfurter: Are all these children now in school?

Mr. Craven. Some of them I think have been graduated, are through. This was back in 1952. But they are either all in--

Justice Frankfurter: What schools are we talking about?

Mr. Craven: Yorklyn and Hockessin.

Justice Frankfurter: What grade are they?

Mr. Craven: They are both elementary and high school.

Justice Frankfurter: Some of these children were in high school and are now out of high school?

Mr. Craven: Yes, some of them are still in high school.

Justice Frankfurter: Some of them are still in high school?

Mr. Craven: That is correct.

Justice Frankfurter: You say as to no child is there any question as to any aspect of segregation affecting that child?

Mr. Craven: In those two cases, in the two cases before the Court.

Justice Frankfurter: In your cases.

Mr. Craven: That is right.

Justice Douglas. In No.5?

Mr. Craven: In No.5.

Justice Douglas: So specifically, a decree as to some of these children is completely moot because the children are out of school?

Mr. Craven: Yes.

Justice Douglas: And as to some, the children are in a school as to which no order prohibiting something is real or practical or alive because the child is now enjoying

what he should?

Mr. Craven: That is correct.

Justice Douglas: That is your understanding?

Mr. Craven: That is my understanding, however, I would like--

Justice Reed: What decree do you recommend?

Mr. Craven: A simple affirmance of the holding of the Supreme Court of Delaware and affirm the Court of Chancery decision.

Justice Frankfurter: What did your court decree?

Mr. Craven: Our court decreed, Court of Chancery decreed that the children should be entitled to immediate admittance into nonsegregated schools on the theory that they had this present constitutional personal right and having found that the facilities were not equal in those two districts and that decision of our Court of Chancery was appealed to our State Supreme Court which affirmed and the State again appealed on the narrow question that the districts in question should have been given time in which to make the facilities equal.

Of course, that is no longer a matter for argument before this Court.

Justice Reed: The matter of constitutionality was not dealt with at all?

Mr. Craven: No, it was not. We did not come up here

on the question as to whether segregation per se was unconstitutional.

Justice Frankfurter: At the time the case was here, inasmuch as they were admitted by the decree of this Court, what was the thing that the parties asked that you resisted?

Mr. Craven: We took the appeal on the basis that our local court, our Court of Chancery should have afforded the defendants time in which to make the facilities equal and that by denying time, they erred.

Justice Frankfurter: I suppose that they would say the case is still alive inasmuch as their rights rested on not being equal rather than on the prohibition upon the states, equal or not equal, to make segregation?

Mr. Craven: We do not take that position. We think that is not before the Court. We think that is moot. We recognize the binding effect of the Court's decision in the other cases in which the specific question of segregation was raised.

I say to that extent I, as the present Attorney General of the state, am in accord with my predecessor in asking that the cases be affirmed. And it would seem to me that that is all that there is before the Court as far as Delaware is concerned, in the nature of the cases that come here.

However, my predecessor did argue at some length--

I will not argue at length but I feel in duty bound to have something to say about the situation in Delaware otherwise. I wish I were in the happy position of my friend Mr. Fatzer from Kansas, and to say that there is no problem as far as Delaware is concerned, but we are a border state and ever since the civil war, it seems to me, the border states have had their particular problems. I should be happy to be able to tell this Court that all is well and will be well whatever the form of the mandate of this Court is. That I can not, either in justice to this Court, nor in justice to the people of Delaware, say, because we are a divided and a troubled people in the face of the mandate of the Court.

That is where I depart from my predecessor who asked that this Court out of the bounty of its wisdom, set an ultimate date beyond which segregation would no longer be permitted. With the greatest deference in the world to this Court, I do not think that it has such wisdom. I think it would be presumptuous of me to come here and ask this Court to name a date which I could not name as a native of Delaware, who has lived there all my life and I say that it seems to me in order to implement the mandate of the Court, it is going to be necessary to remand the cases in question, because we feel of course that we are going to be bound by the action of the Court as well as where those particular issues have been raised, that the cases should be remanded to the courts of

first instance, with a direction that the suitable state authority, whether it be the State Board of Education or the local boards, submit plans under the direction of this Court, and that the local courts see that those plans are carried out. We have many problems in Delaware.

Justice Reed: You mean the specific precincts, school districts are involved?

Mr. Craven. Well, of course the Court has before it certain specific cases and I assume it will not reach out but will direct its mandate to those particular cases. We, in Delaware, as in all other states where segregation has had, we believe up to this time, constitutional sanction will naturally be bound by and will be interested in the form of that mandate because we assume--and I may say that those of us who are the attorneys general of our respective states and are conscious of our duty as constitutional officers to respect and carry out the mandate of this Court--recognize and feel that we have great problems coming before us. I can conceive of a plethora of suits in the State of Delaware involving a great many of the various school districts in which the attorney general or his deputies will have to,as we do represent the State Board of Education, unless some orderly process or plan can be worked out to see the spirit as well as the letter of the Court's mandate is effectively implemented.

Justice Frankfurter: Mr. Attorney General, may I interrupt you to ask whether, in Delaware, you have a centralized educational authority or is it decentralized as it is in Kansas?

Mr Craven: I think it is perhaps a compromise of the two, your Honor. We have a State Board of Education which has supervisory power of all the school districts of the State. Then we have special school districts which have a large amount of autonomy, and which raise their own taxes. Then we have what we call school districts that are entirely supported by the State, and which are more directly responsible to the State Board of Education.

Justice Frankfurter: In relation to a problem like that what is the diffusion or division of authority in your state? I ask it in view of the litigation you had in your state.

Mr. Craven: We have had some litigation. And I think I might say in passing, that I think the litigation that we have had is indicative of intent and desire on the part of both the people and the courts of Delaware to comply with the decision of May 17th and with the implementation which I assume will be forthcoming.

We have had one decision by our Supreme Court which has declared the provisions of the Delaware Constitution and the statutory provisions thereunder providing for segregated educations to be unconstitutional. That is a late case, 1955.

and is the case of Steiner vs. Simmons, found in 111 Atlantic 2d at 574, and I read from the Court's opinion. I have a mimeographed opinion so I think the page reference would not be very helpful. However, it is on page 11 of this mimeographed opinion and reads:

> "We think that the opinion in the segregation cases is a final one. Its necessary present effect is to nullify the provisions of the Delaware Constitution and statutes requiring separate schools for whites and Negroes."

And so far as Delaware is concerned, our Constitutional provisions and our statutes have been declared unconstitutional, the ones requiring segregation, in conformance with the opinion of this Court.

I will not pass on to some other litigation which perhaps is at the Court's notice, some of which is still pending. I am not asking the sympathy of the Court, but the Attorney General of the State has these problems to face, and I sometimes feel that the making of the decision and the implementing of the decision is not a matter of mandate, it is a matter of the local officers, their attitudes and their ability to cope with local conditions. And so I strongly urge the Court that it not set an ultimate date, that it not attempt to decide in 48 states how the thousands of school districts are going to conform with its mandate, but that it trust the local

judgments, and that under some general directions it refer these cases back to the local courts, assuming that the judges and the local officials and the attorneys general will do their duty.

Justice Harlan: There is one thing I do not quite understand, Mr. Craven. I understood you to say first because of the Delaware situation, that all that was required was a straight affirmance of this Court, no mandate, nothing.

Mr. Craven: That is correct.

Justice Harlan: Therefore, what you have been saying more recently relates to your views as to what decrees should be issued in the case of other states?

Mr. Craven. In the other states, others similarly situated.

The Chief Justice. Mr. Reading?

ORAL ARGUMENT ON BEHALF OF BELTON, ET AL

By Mr. Louis Reading.

Mr. Reading. May it please the Court, there are two important circumstances I believe which distinguish the consolidated Delaware cases now before your Honors from all the other school segregation cases. The Attorney General has alluded to both of those circumstances. He has pointed out that the Respondents here, the Negro school children who are respondents here, were admitted to the schools previously ascribed by the State Constitution exclusively for white

children, by the decree of the Court of Chancery, which was affirmed by the Supreme Court of Delaware in August, 1952, and except in three instances where those children have graduated from high school, they have been or they are now just about completing their third successive year of attendance on a non-segregated basis.

I should like to point out what is in the brief of the Attorney General to the effect that this attendance has been without incident and without social repercussion. The other circumstance to which Mr. Craven has alluded is the fact that the Delaware Supreme Court has had occasion to construe the effect of the decision in the school segregation cases on school segregation as it has been practiced in Delaware since May 17, 1954, and the Attorney General is, of course, correct in pointing out that the Supreme Court of Delaware has said in three places in its opinion that the decision of this Court on May 17 renders null the Delaware constitutional and statutory provisions providing for public school segregation. But the Supreme Court's opinion in this case to which Mr. Craven has alluded, Steiner vs. Simmons, 111 Atlantic 2nd 574, does create a peculiar problem in Delaware. The Respondents here, as we have already said, were immediately admitted by the Delaware Courts to the schools previously for white, and they were admitted to those schools because both the Court of

Chancery of Delaware and the Delaware Supreme Court interpreting this Court's opinions in the Gaines, the Sipuel and the Sweatt cases decided that this right to the equal protection of the laws in so far as that applied to public schools, was a present and personal act, and it was for that reason that it admitted Negro school children to the schools. However, in this opinion of the State Supreme Court, decided on February 8, this year, the Court seems to take another position. The Court says that, and I would like with the Court's indulgence, to read just a few lines of the opinion which Mr. Craven did not read, and the Court says: "The right to unsegregated education has been established. The Plaintiffs in the segregation cases and the Plaintiffs in the case now have that right. But as to the Plaintiffs in the segregation case, the enforcement of that right has been deferred. The Supreme Court of the United States has not entered a decree directing immediate admittance."

And a little further down, the Court says:

"Under such circum 'ances, can the right of the Plaintiffs"who were there respondents --"be considered a present and personal right?"

Justice Frankfurter: Those are different children?

Mr. Reading: Yes,sir, so that now we have the situation that in Delaware the persons who are now Respondents in this case have been recognized by the Court, the

Supreme Court of Delaware, as having a present and personal right to equal opportunity to a non-segregated education.

But children who have been segregated since that time do not have such a right. It is for that reason that I would like to advert, as Mr. Craven did, to the decrees which this Court will enter in other cases. We believe that those decrees should require forthwith desegregation. We are certain that if they do require immediate desegregation, the Delaware Supreme Court will regard the decrees as binding and will order immediate desegregation in the schools in Delaware, and thus relieve Delaware of this duality which now exists with respect to the constitutional rights of Negro school children.

Justice Frankfurter: Mr. Reading, in this case do you join the Attorney General of Delaware in saying that mere affirmation is required?

Mr. Reading. I do, sir, but only because the Attorney General addressed his remarks to the form of the mandates in the other cases.

Justice Frankfurter: I see. I quite appreciate your position. But one has to enter a decree in this case. Since this was not a class suit but appears to be a personal suit, you agree with the Attorney General?

Mr. Reading. Yes.

Justice Reed: By this recent decision in Delaware

they refused to direct the immediate entry of other Negro school children?

Mr. Reading: Yes, sir. If your Honor please, this is what happened. Ten Negro school children were admitted to the Milford High School in September of 1954. They were then ejected from the school. They obtained a preliminary injunction ordering their readmission, and the Milford Board of Education appealed to the State Supreme Court, and the opinion in Stanley vs. Simmons eventuated from that appeal. The Court reversed and the children are not now in the Milford High School.

Justice Reed: They did not direct their integration?

Mr. Reading: They did not, sir.

Justice Douglas: Counsel, you answered Justice Frankfurter --(unintelligble.)

Mr. Reading: If I did say that, I was, of course, mistaken. Of course, there was a cause of action.

Justice Frankfurter: Did you sue on behalf of others?

Mr. Reading: Yes, sir.

Justice Douglas: The decree that I read that the Chancellor entered, the relief runs, not only to the instant Plaintiff, but others.

Mr. Reading: Yes.

Justice Douglas: That is right.

The Chief Justice: Mr. Attorney General, did you

have anything further?

Mr. Craven: No, nothing.

The Chief Justice: You agree it is a class suit?

Mr. Craven: Yes, I do.

Justice Douglas: That all members of the class have been or should be integrated?

Mr. Craven: If not, they can be within a reasonable length of time. We do not wish to change our position because it is a class suit.

Justice Reed: What was the order in the Steiner case?

Mr. Craven: The Court of Chancery which had ordered the children back was reversed. However, I think the Court ought to know the reason for that. The State Board of Education had put out directions to the various school boards, saying that they should submit plans to the State Board of Education for approval, plans for integration, and in the Milford case, they did not submit the plan. Our Supreme Court held that the Director of the State Board of Education had the force of law and because the Milford School Board had not submitted a plan for the approval of the State Board of Education, it had not complied with the law and the children had not attained status.

Justice Reed: And, therefore, it did not direct immediate integration?

Mr. Craven: Did not direct the immediate integration.

Justice Frankfurter: Mr. Attorney General, as to Gebhart, these named children, the decree of your Court was immediate admission here which was done, is that right?

Mr. Craven: Yes.

Justice Frankfurter: Now, as I understand it, the latest pronouncement of your court does not call for immediate admittance of the children who were before the Court in the Steiner case. Therefore, the decree in the Gebhart case for immediate admission of all children similarly situated, the very problem which you ask this Court to consider in a different light is presented in a troublesome light, is it not?

Mr. Craven: Well, in the first place, there are two different questions and two different courts. That may offer some explanation. At the time our Court of Chancery ordered the children back on the basis of the facilities not being equal, we still thought that was good constitutional law in Delaware and the children went back. Now the appeal was taken by the State to our Supreme Court and we were still arguing separate but equal.

Justice Frankfurter: Yes, but the decree was immediate, was it not?

Mr. Craven: It was.

Justice Frankfurter: Thank you.

(Whereupon, at 2:00 p.m., a recess was taken.)

AFTER RECESS

2:30 p.m. 53

The Chief Justice: No. 4, Spottswood Thomas Bolling, et al, vs. C. Melvin Sharpe, et al.

The Clerk: Counsel are present.

The Chief Justice: Mr. Hayes.

ARGUMENT ON BEHALF OF SPOTTSWOOD THOMAS BOLLING, ET AL

By Mr. George E. C. Hayes.

Mr. Hayes: May it please the Court, this suit involves the District of Columbia, and as your Honors well know, integration has been started in the District of Columbia. With respect to the two questions that are being asked of us, I shall address myself to Question 4 and Mr. Nabrit, with whom I am associated, will address himself to Question 5.

By way of specific answer to Question 4-A, we answer by saying, yes, the question being, would a decree necessarily follow, providing that within the limits set by normal geographical school districting Negro children should forthwith be admitted to the schools of their choice.

And we take the position that in all of these cases since the rights are personal and present, that the answer to that question should be yes. With respect to the District of Columbia, there are additional reasons why that answer should be yes.

First of all, there are presently, as far as we know, no factors which would justify any request for a decree that is not forthwith. The President of the United

States by his own statement, has indicated that it is his desire that the District of Columbia should be a model, as far as the integrated school system is concerned. The Corporation Counsel of this District, as soon as the mandate came down, being called upon by the Board of Education, pronounced that in his opinion the decision of May 17 rendered unconstitutional the provisions of the DC Code that pretended to have our system a segregated one.

The Board of Education almost immediately after the decision came down came forth with a very forthright statement of policy, and because of the fact that I shall attempt to, in some measure, contrast a little further along as to what they said by way of policy and what has actually been undertaken by the Superintendent of Schools, I call the attention of the Court to the language of the Board of Education in its expression of policy. If your Honors please, on pages 8 and 9 of the brief for the Respondents on the formulation of the decree, they have set forth the expression of the Board of Education. I shall not read all of it to you but call your attention to the fact that in Section 3 they provide, "Attendance of pupils residing within school boundaries hereafter to be established, shall not be permitted at schools located beyond such boundaries except for the most necessitous reasons or for the public convenience, and in no event for reasons related to the racial character of the school within the

boundaries in which the pupil resides."

They end their statement by saying "In support of the foregoing principles which are believed to be cardinal, the Board will not hesitate to use its full powers. It is pledged to a complete and wholehearted pursuance of these objectives. We affirm our intention to secure the rights of every child within his own capacity to the full, equal and impartial use of all school facilities and the right of all qualified teachers to teach where needed within the school system.

"And finally, we ask the aid, cooperation and good will of all citizens and the help of the Almighty in holding to our stated purposes."

We read that to your Honors because we feel that is a very fine pronouncement of a policy. Pursuant to that, the Board of Education called upon the Superintendent of Schools to offer a plan, and in this regard, we addressed ourselves to what was done in the hope that the experience of the District of Columbia may be helpful to your Honors in arriving at conclusions as far as all of the cases may be concerned. In that situation what was done was for the--will your Honors indulge me just a second? After having gotten the pronouncement the Corning plan was asked to be put in operation. Mr. Corning, at that time, the Superintendent of Schools, indicated that he would find it impossible to give a zoning

map prior to September. The Board of Education, however, called upon the Superintendent to have that map by the first of July, and in spite of the fact that there had been suggestions of administrative reasons that would make that impossible by the first of July, this zoning map was produced. We call attention to that because, as I have indicated to you, we think it will be helpful, that sometimes when the Administrators in candor and in honesty think that something can not be done, that if there be an affirmative action taken, that ways are found to meet that situation, and that was done in the instant case.

Mr. Corning did furnish the zoning maps. Now, I have heard the question asked as I have sat here this morning, as to the reason why the zoning maps were necessary. In our jurisdiction they would be necessary because, prior to the time of the decision of May 17, there were schools designated for Negroes and schools designated for whites, and persons within the respective areas would go to the designated schools because of that circumstance. And when this Court, by its decision of May 17, struck down the segregated setup, it became necessary to have zones having to do simply with the geographic situation, rather than being based on the question of race or color. And that was undertaken. That is what was done by the first of July. And then with those zones set up, Mr. Corning, as the Superintendent, presented to the Board a plan

which, by various steps, would be carried forward until, according to the plan, in September of 1955, the school system was to be completely integrated.

I call your Honors' attention to the fact at the outset that there would be no need for anything beyond a decree saying what the Board of Education has indicated, what the Superintendent has set forth as a plan is to be envisioned for our schools as of September, 1955. That, according to the plan, is to be a complete integration. If that were all, we would ask nothing other at the hands of this Court, than a decree which would set forth that there should no longer be an administering of the school system in the District of Columbia where the question of race or color was in any sense involved, as a part of any administrative action, as a part of any attendance as far as school children were concerned, as far as teachers were concerned.

And be it said to the credit of the Board of Education in this jurisdiction, they have gone forward in the doing of all of that. They have gone forward in the matter of integration both as to pupils, and as to teachers and as to administrative officers.

However, we have concern, because as far as some of the plan, it lends itself as we see it, to the possibility of error. Even though, as has been indicated, the provision is that students--if I have not indicated to your Honors that this

is fundamental in it, I should perhaps first say that. That the suggestion is that students under the new zoning will have the right to go to schools of their choice within this area.

In other words, if I be in a given area, school area, I have the preferential right to go to that school that is in that area. But it allows the option of remaining at school until graduation is had if the individual desires to do so.

In other words, as we conceive it, a geographic school district which in, and of itself, would lay the proper foundation for the integrated schools is superimposed on a right that may be exercised by a student, the result of which is, as we see it, that race is still made the issue, and the question of the segregation is carried forward just as before, because by the exercise of this option, a child may continue to stay in the school until the time of his graduation.

Justice Reed: Is there more than one grade school in a school district?

Mr.Hayes: Yes, your Honor.

Justice Reed: They have several in a single district?

Mr. Hayes: Yes, your Honor, or there will be a number of elementary schools within each school district.

There would probably be not as many junior high schools but I venture to say there are some in which the district takes over one junior high school. If I be incorrect as to that, as I say that may not be. But the districting has to do with the question of the elementary school area, the junior high school area, the high school area.

Justice Reed: That is unusual in my thinking.

I was not aware that there was more than one elementary school in a district.

Mr. Hayes: I am certain, if your Honor please, that that is correct.

Justice Reed: In that district any white child or Negro child can select his own school?

Mr. Hayes: He goes to the school nearest to him in his own area.

Justice Reed: It is measured by feet or something?

Mr. Hayes: I do not think there are instances very often where there would be a question--

Justice Reed: It would be easy enough if you have one school in a district. If you had only one school, everybody closer to that school than any other, he would go then to that school?

Mr. Hayes: Yes, it is my understanding as I say, that a number of schools may be within a district.

Justice Reed: That was true before with segregation.

Mr. Hayes: I beg your pardon.

Justice Reed: That was true when you had segregation, you had overlapping districts?

Mr. Hayes: Yes, sir. Well, now, with the present school districting there will be schools still as I conceive it in so far as the the elementary schools are concerned as your Honor will see--in the junior high schools and it may well be that that is not true then, but I am relatively certain and as I say, my friends can give you the statistics actually with respect to that that there will be elementary schools, there may be other elementary schools in the same district but he goes to the one that is nearest to him.

Justice Reed: Is that in the statement?

Mr. Hayes: Well, there is nothing in the statement, if your Honor please, that breaks it down into whether one--

Justice Reed: Do you have a regulation? How do you know that the child is to go to the nearest school in the District?

Mr. Hayes: The only way I can say that to you , sir, is that that is a part of what I understand the Corning plan to be. The Corning plan would provide that the child shall go to the school nearest to him in his district.

Justice Burton: Mr. Hayes, you referred to the

right of a child to stay in a given school until his graduation from that school. I take it that this is merely a temporary measure, is it not, that has to do with the status at the moment and it will work out over a period of two or three years? That is not to break up the continuity of the course?

Mr. Hayes: It would presumably work out at the end of the graduation period through the intermediate grade from the time the child graduated from that to the junior high school, that would end his right to exercise his option.

Justice Burton: If so, the child last year, if he was in junior high school, he could complete his junior high school course without breaking into it and being forced to go somewhere else?

Mr. Hayes: That is what I understand the plan to suggest and the plan purports to suggest that immediately you go into the new area, in other words, when you go from the intermediate to the junior, when you go from the junior to senior high school, you have the right to stay until graduation is over.

Justice Burton: You are talking about matters of continuity for the child in a given school?

Mr. Hayes: That is what is urged as being the reason for the thing. I suggest, that it is the question of continuity within the graduation period of a child in a

particular school.

Justice Minton: You do not contend that it is done for any purposes of discrimination?

Mr. Hayes: No, the actual language, if your Honor please, would not result in discrimination. We are concerned as to whether or not the administering of it might not be distorted, and not in any sense saying that the present administration has done any such distorting. I am in no position to say that and would not say that. But we are concerned that the language of a decree which we are asking would be of such character as would render impossible the use of that device as a means of discrimination.

Justice Black: How would this be done?

Mr. Hayes: By leaving this option--

Justice Black: I mean how could the plan which you have just outlined that they are suggesting be used for discrimination?

Mr. Hayes: Well, this type of thing could occur as we see it, that a child who had a right to go to a particular school by reason of the geographic area might not be allowed to go to that school because in that school there was a child who exercised the preferential right to stay there until graduation.

Justice Black: I thought the plan provided that they were given a choice, some were given a choice and others had

to go to specific schools.

Mr. Hayes: If your Honor pleases, what the option is that is allowed is that, if I am in school "A", I can remain in school "A" until graduation unless--

Justice Black: You do not object to that, do you?

Mr. Hayes: Well, when your Honor says we do not object, we object to it simply because of the fact that we feel that the allowance of that is still the carrying forward of the old idea of the segregated setup, because the right to remain in that school was basically one of color.

In other words, the person went into that school because of this segregated setup.

Justice Black: You mean you want a decree that wil prevent an option being given to children where there are two or three schools to go to, to permit them to go to that one school?

Mr.Hayes: No, we do not think that the decree from this Court should do any forbidding. We think rather, that the decree from this Court should simply indicate that there should be nothing done where color was used as a criteria. Now we feel that this is a possibility and is a perpetuating of the old idea of color being the criterion.

Justice Black: Is it your idea that because there is a possibility that there should be no option left to the children of either race to select their own schools?

Mr. Hayes: No, we think rather, if the decree were to take the shape which I have suggested to your Honor, that then in the event that there were showings, flagrant showings of a violation of this right of option, that then there would be the right to go to the Courts without the establishing of a principle that we feel has already now been established.

Justice Black: I have not quite made my question clear. Can that come from mere option of the child to choose one school rather than another?

Mr. Hayes: Well, we feel--

Justice Black: Would you object to that under any circumstance?

Do you believe the parents of the child or the child would be left free to select one of the schools? I ask you that because I know that has been the rule all over the country where they have two or three schools.

Mr. Hayes: Well, if your Honor please, as we conceive it, as I have said to your Honor, in fairness so far as the District of Columbia is concerned, I do not find too much to give me concern. But I would be concerned since we have adjusted ourselves to other decrees, about a decree that left an option to the individual, himself, because, if that option were left, it seems to me that the very force of the decree might be obviated by that sort of a device.

Justice Black: Would you go then far enough to say that this Court should provide that the law is compelled to deny option of children to go to one school rather than another?

Mr. Hayes: No, I have said, your Honor, there should not be any such denial. I do not think this Court should undertake to say that. I think, rather, that a decree of the character which we have in mind would not require that at all. It would not estop the questions of options properly exercised, but may, as I say, give rise to the possibility of overcoming what might then become a flagrant violation.

Justice Black: You mean that coercion instead of option, freedom of choice, you would want that prevented?

Mr. Hayes: A number of things of that character might come in and might come in under the heading of "Option." And that is the reason I believe that I should bring these things up.

Justice Reed: Let me pursue that point.

Mr. Hayes: Yes, Mr. Justice.

Justice Reed: I am surprised to find there are two or more schools in a district in the District of Columbia, but let us assume that there are two schools. One of them used to be a Negro school and the other white. Now then you have an objection to allowing the students to choose which one they

go to?

Mr. Hayes: Mr. Korman has stated to me that what happened was only true in two instances where they were so close together that they could not draw two circles.

That may answer what was in your Honor's mind and may correct what is in my mind except for these two exceptions.

Justice Reed: Let us take those two exceptions. Do you object to a choice of schools in that one area or two areas when there are two in the same district?

Mr. Hayes: No, it is not that.

Justice Reed: The ultimate result would be one of them could be all Negro, the other could be all white?

Mr. Hayes: Well, with a small overlapping to which Mr. Korman makes reference, in a city such as ours, I do not believe that that would come as a possibility. It might be but I do not think by any type of gerrymandering or anything else, there could be any such situation that would end up with there being simply a white as against a colored school. Now there may be areas from a geographic districting which might end up in what your Honor says with respect to all white and all colored. That might be.

Justice Reed: Concerning Justice Black's questions, you have no objection constitutionally to the selection in the District by children?

Mr. Hayes: Well, when your Honor says it in that wise, I have a concern that I did not gather just what Justice Black's question was.

We do not think that this Court should say by its mandate that no one shall have the right to exercise an option. We do not think that that would be right.

Justice Reed: We do not say that. We say that they can exercise an option.

Mr. Hayes: No. If your Honor please, if your Honors would confine the decree to the language and character which we think ought to be, then we feel that abuse of the option period would fall within the purview of such a decree. And, as Mr. Justice Black has indicated, at some time further along the line, somebody says, "Oh, I am going to exercise my option," if you could go in and say this wasn't an exercise of option, if it was coercion or anything else, that is what we would be concerned with. May I call your Honor's attention to an example of something which has happened in our school system which gives us concern as to the actual putting into effect of the regulations as provided?

I just answered a question by saying that when you graduate from one level to another, that the person who goes into this new level, presumably then comes under this geographic condition. He does not have any right now to claim promotions or anything of that character. We had the

situation develop that there were, according to what we are advised, a graduation in which there were 1,018 junior high graduates entering the high schools, according to new non-racial boundaries. Of the students promoted, 571 came from schools of the old Negro division and 525 came from formerly white schools.

122 of the students from former all Negro schools were promoted to six former all-white high schools. One Negro boy moved from an integrated former white junior high into vocational high which had retained its Negro enrollment.

No white students were promoted to former Negro schools. Now, we call attention to that sort of circumstance, that it would be a rather unusual thing with the zoning change as has been indicated, zoning now without regard to color, new zoning with overlapping districts where, in one instance, there were certain Negro areas that now the new zone which is the unsegregated situation goes deep into that area, it seems to us a rather unusual circumstance that under those conditions 120-some Negroes would go, be graduated into a new area, to a white high school, and that there would be no whites, who, having been promoted, would go to a Negro school. It is the type of administering of that kind that gives us the concern.

Justice Frankfurter: May I ask you to what issue more readily you are addressing yourself? Is it to the kind of

decree this Court should fashion in directly greater detail than fashioned by the District Court or which?

Mr. Hayes: If your Honor please, just what I have in mind is the type of decree that this Court should pass in remanding the case to the District Court.

Justice Frankfurter: Do you think this court can go into particularities?

Mr. Hayes: No, sir.

Justice Frankfurter: As to what would or would not operate not as a fair opportunity for a fair choice but some kind of a "huggamugga", some kind of a manipulation whereby what is deemed to be a fair choice is not really a fair choice.

Do you think we could particularize that?

Mr. Hayes: No, I do not think you can. If your Honors please, we have attempted to draft what we think would cover the situation having to do with the question of the nonsegregated setup and that the defendants and agents and the like should be estopped from using race as a ceriteria.

Justice Frankfurter: Have you in your brief set forth a proposal for the kind of decree that you would like this Court to issue?

Mr. Hayes: No, your Honor, we have not.

Justice Frankfurter: Would that appeal to you or would it be agreeable to you?

Mr. Hayes: Yes, your Honor.

Justice Frankfurter: Perhaps I might suggest to other counsel that they take their hand in drafting the kind of decree they want this Court to consider -- not in generalities but in terms the kind of decree that they propose as is so often the case in chancery, proposed by the states -- specifically the kind of decree they want submitted for consideration by the Court, because generality of language easily evaporates in memory, let alone in speech.

Mr. Hayes: Yes, your Honor. I am appreciative of that. May I simply address myself and say in respect to 4-B, our answer to that is yes, that the Court does have executive power that is referred to in there and to say to your Honors that, as I indicated to you, Mr. Nabrit is going to talk to the Court about Question 5 and a part of that is the type of decree and I think you will have the specific answer to what your Honor is asking.

ARGUMENT ON BEHALF OF SPOTTSWOOD BOLLING, ET AL

By Mr. James M. Nabrit, Jr.

Mr. Nabrit: Mr. Chief Justice, if the Court please, I should like to add to what Mr. Hayes has said about the situation in the District of Columbia. There are 160-some odd schools in the District of Columbia and they were divided into two divisions, white and colored, prior to the decision May 17.

Essentially 17 of the schools that were formerly white, there are now only 11 elementary schools, no junior high schools and 1 senior high school and 3 vocational high schools which do not have Negroes in them.

In other words, Negroes have gone into all of the formerly white schools in the District except those indicated, a total of 16. In the case of those schools that were formerly all Negro schools, there are 15 elementary schools now with no whites, 9 junior high schools and 4 high schools. In the case of the teachers colleges they have two, Wilson, which was formerly all white now has 36 Negroes, and Miner, formerly all Negro, still has no white students.

Now we would be remiss in our obligations to the Court if we did not say and make it clear that the progress in integration in the District has been amazing since May 17, 1954.

We, also, feel that we would be remiss in our obligations if we did not point out to the Court some things which we think ought to be taken into account in deciding what disposition to make finally of this litigation which has now taken the greater part of five years, and also, if we did not suggest to the Court something which we think we have learned in the District of Columbia which might be of some aid in the resolution of the difficult problems inherent in questions 4 and 5 in the cases before the Court. We feel that we may do that since so many representatives of the various

states have been asked to give some aid to the Court, and two things we think may be helpful to the Court from our own experience in the District of Columbia. In the first place, implicit in many of the requests for delay and for a gradual effective desegregation process, inherent and implicit in these replies is that integration involves manifold administrative difficulties and that to do this short of a long delayed process may prove educationally unsound.

Now we concede that there is merit in both of those positions, but what we want to give the Court our experience as an aid in the view which the Court gives to these representations.

Now the experience which we have had in the District I think ideally illustrates it. When the decision was handed down immediately thereafter, thinking of all of the things that may stand in the way, the Superintendent announced that we could not take any steps toward a desegregation until this Court had handed down its decree.

But that was the first flush of an expression without having had an opportunity for conference. After a conference and study with other officials, the Board of Education of the District in cooperation with the Superintendent and the officers of the District decided upon instituting this plan for integration.

At the time that this policy that you have had

brought to our attention was adopted, the Superintendent presented a plan with certain graduated steps by which we would have gradual integration in the District.

And, in presenting his plan, he stated that the reasons for the delays involved in the various steps were administrative difficulties which stood in the way, and because of the rapid acceleration of this program, would be educationally unsound.

Now one of the things which was in that was a statement that in order to draw the educational boundaries for the new districting of an unsegregated system, the difficulties were so involved that it would be impossible to draw those boundaries until September, 1954, and that hence any steps towards effective integration other than a relieving of overcrowding would be impossible educationally.

The Board of Education did not agree with that. The Board voted that these boundaries be drawn by July 1, and that the program begin on September 1. The Superintendent proceeded to draw the boundaries by July 1, and to accelerate the program by September 1. Now the only reason I call that to the Court's attention is to say that the Court must be carefully observant of representations that long periods of time are needed for these integration steps, because we have found in the District that when a decision was made, the difficulties vanished, the administrative

difficulties, educationally questionable results did not come as a consequence of the action taken. As a matter of fact, the Superintendent himself has accelerated the entire program in the District of Columbia so that today he will be hard pressed to tell the Court what he purports to do in the future. So that it would appear to us that of all the cases before the Court, that is the case in which the Court can take the decision of May 17th, which reached such a high point in our democracy, and bring a fitting conclusion to this case by writing a decree that desegregation or integration shall be effective forthwith. Even the Corporation Counsel does not disagree with that. He does not agree to a consent decree, but that is beside the point.

He says that integration is progressing rapidly and will be completely finished by September 1. Therefore, he is in no position to object to a decree which says that that be done. Now it would appear to me that in these cases in order that there might not be the kind of confusion which seems to be inherent in the Delaware situation, ought not to be placed in the District of Columbia where this Court supervises all of our courts and where we have a school board that we can not elect and where the Judges of the courts below supervised by this Court in their judicial functioning operate administratively to appoint the School Board over which this Court has no jurisdiction, and thus place

us in a very uncertain position in the District. For example, the distinguished lower court Judge who is now the Chairman of the Committee to select the school board members, announced last week that there were three persons who would come to the end of their term this year, and that he wanted names submitted for people to be on the Board.

In quoting him, I think it would be a good idea to have somebody from Southwest Washington or Southeast Washington, and we have got a number of lawyers on the Board now, too many lawyers. Now we have nothing to do with that as citizens of the District of Columbia, so that when we deal with the policies which have been adopted by the Board, they get tangled in this administrative setup with our traditional judicial function. So that in this case, if ever the Court should make it clear that integration in education in the District of Columbia must take place immediately -- because if we go back down into the District Courts with any type of uncertainty, we run into that type of situation in our local courts, and that is not to question any philosophy, program, or integrity of any judge. It is simply to state a fact which is a part of our system.

Now, it would seem to me that this also could be of assistance to the Court in dealing with the question if, in a situation where the Court has as wide a supervisory power as in this, the Court directed the courts below here to

enter a decree which is in effect, Mr. Justice Frankfurter, this judgment reversed and cause remanded to the District Court for proceedings not inconsistent with this Court's opinion, and entry of a decree containing the following provisions:

(1) All provisions of District of Columbia Code or other legislative enactments, rules or regulations, requiring, directing or permitting defendants to administer public schools in the District of Columbia on the basis of race or color, or denying the admission of petitioners or other Negroes similarly situated to the schools of their choice within the limits set by normal geographic school districting on the basis of race or color are unconstitutional and of no force or effect:

(2) Defendants, their agents, employees, servants and all other persons acting under their direction and supervision, are forthwith ordered to cease imposing distinctions based on race or color in the administration of the public schools of the District of Columbia; and are directed that each child eligible for public school attendance in the District of Columbia be admitted to the school of his choice not later than September, 1955 within the limits set by normal geographic school districting;

(3) The District Court is to retain jurisdiction to make whatever further orders it deems appropriate to carry out the foregoing;

(4) Defendants are to pay the costs of the proceedings.

Now we would suggest that as a fitting climax to the District case. And we would like to say that the decision of the court in the District of Columbia case which bore out the hopes and expectations of the citizens of the District has carried the hopes of the Negro people of the United States to such a high point that it would be tragic indeed, in my opinion, if we should recede from that high point by not giving a decree and bringing to a decisive and final end the litigation in this case.

The Chief Justice: Mr. Nabrit, would you please make copies of that for the Court?

Mr. Nabrit: I shall be happy to.

Justice Frankfurter: May I ask you whether you have thought of considerations peculiarly relevant to the District of Columbia for what you call amazing progress that do or do not obtain in comparable states--by comparable, I mean the proportion of Negro to white population. You spoke with special emphasis of the progress of the District here. With your considerable thinking on this subject, have you any reasons why you think that is so in the District?

Mr. Nabrit: Well, I should think so, Mr. Justice Frankfurter.

Justice Frankfurter: So far as these things are

relevant as to what a court in its discretion may or may not do.

Mr. Nabrit: Precisely. I think there are several considerations. I think one, the Court may well be advised that in the District of Columbia there are approximately 104,000 pupils of whom the majority of these are Negroes, so that numerically, I doubt if there is a place in the South where, from that standpoint, this would not be a very excellent guideto the large number of children that may be integrated in a shorter period of time even when the Negroes outnumber the whites. So I think that is a relevant consideration. I think, No. 2, the fact that there was a firm administrative executive hand in the District of Columbia in support of integration even prior to the decision of this Court must be conceded to be a very effective element.

Justice Frankfurter: You mean the Superintendent?

Mr. Nabrit: No, I mean the Superintendent, the Board of Education, I was speaking about, the Board, the District Commissioners and the law-enforcement officers, the general theory that where that exists you have a much better situation in which to do it.

But the primary thing that this seems to me to show its relevance to the whole question before the Court is that firm action and firm decisions, and certainly here where both dovetail always improves the desegregation or integration

steps, so that in the District where we have all of these together, we have this extraordinary speed. But, even in the District we find that the very fact of firm decision in itself militated against ordinary objections.

Now, I think one further relevant consideration in the District of Columbia was the whole general community relationship. We would not be giving the Court all of the picture if we did not say that.

Justice Frankfurter: You mean this in the Nation's Capital with all its concentrations and influences that that implies?

Mr. Nabrit: Precisely and I think I should say that. And I also ought to say to the Court that in our opinion in thinking about this problem in the Deep South, where it would seem to me we have so many things that may appear to be different, that there has always been in our philosophy, in our system, the notion that our law is supreme and that we are a nation of laws rather than of individuals, and that although we may have had attitudes which differ -- and in some instances violently -- with the decisions or with laws, that we are, after all, governed by them, and two cases illustrate it to me. One is the case of the National Labor Relations Acts, the Wagner Act, the Taft-Hartley Act. The other is income tax,

where the attitude of many people is just the same.

They do not want to pay minimum wages, they do not want to pay this, they do not want to have that; but the law is there; they keep the attitude but they obey the law.

The same thing with income tax. Everybody is worrying now for a few days that they are going to have to pay income tax. Very few people are running around happy over it. The attitude is not good but all of them pay it. And therefore, I say, it seems to me that in this area a firm decision calling for forthwith integration will be accepted and will be complied with by the South where I have lived all of my life and that thus, in spite of all their protestations and the attitude which many of them generally genuinely have, they will follow a decision of this Court just as other Americans follow the law.

Justice Reed: Mr. Nabrit, before you sit down I do not understand this language of your proposed decree, giving a choice. I have asked questions about it before. Are you familiar with the problems of choice that came up?

Mr. Nabrit: Yes, I am and I would like to address myself for a moment if I may, to that. In the District of Columbia there is a system of administration and operation of the school which is known as the Districting Plan. Now there are different plans educationally in the United States

that you are familiar with. In some places, there are no districts. You just go to whatever school you want to until that school is full, and then you find another one and go to that. Baltimore has a system something like that.

In other schools they have the boundary system, the districting, and you go to the school in your district except as--and all of them have this which relates to Mr. Justice Black's question--all of them have some ground upon which they will excuse you from going to a particular school. There are many grounds of hardships, where they will do that, in the sibling case and others. In the District of Columbia, however, we have this system based upon districting. That is the basis on which the school board says children shall be assigned, and they voted a policy that it would be done, and only the hardship or necessary situation of overriding necessity would permit any departure from that.

Now that was the policy.

Justice Reed: The Board policy?

Mr. Nabrit: Yes. Now when the plan was proposed which the Board adopted, there was a difference between the policies and this plan, and it is that difference to which we call the Court's attention, that is, that in this plan which provided for this forthright imposition of the boundary or district system, there was set up inside the system, a system which provided that all of the pupils in all of the schools could

stay right where they were until they graduated, unless--and you should know this because this even weakens the position still further, we want you to know that--unless your remaining there prevented a student who lived in that district from getting into it.

So that takes some more of the sting out of it. But we consider that had because, looking at the Labor Relations cases and others, where this Court has said where you have a choice regarding a union or not, here is a company union, here is another union, that the choice is not a choice. You do not have freedom of choice. And where you come out of a segregated system where everybody in the system is segregated and you say to the Negro child, sure, you have a choice and to the white child, you have got a choice, I mean that is not choice. So that we simply point it out because it goes for five years and there is nothing that we have found that indicates that at the end of the fourth year the Board would adopt another plan with that in there.

Justice Reed: That is in it--

Mr. Nabrit: I think it is on page 10 of our brief, Mr. Justice Reed. It is on page 10, No. 3 in the next to the bottom paragraph, "All pupils at present enrolled in a given school may remain until graduation provided the school is not overcrowded and provided the priority rights of pupils within the new boundaries of the school are not denied."

Justice Reed: There is another angle to that same choice. In your own decree, you provided a choice.

Mr. Nabrit: Now in ours, we said,do not deny any child the right to go to the school of his choice on the grounds of race or color within the normal limits of your districting system.

In other words, you have this districting system here. Now, we say in that system, let children go to the schools of their choice within that system.

Justice Reed: Within that district.

Mr. Nabrit. That is right.

And do not assign them on the basis of race or color, and we have no complaint. If you have some other basis, all boys, all girls, 16 or 14, any other basis, we have no objection. But just do not put in race or color as a factor. And on that basis, we do not complain. But I do not think that it will be found to help the Court very much to try to look at a system where nothing existed by choice, and contrast it with the districting system in which there is this type of choice.

The Chief Justice: Thank you, Mr. Nabrit.

Mr. Korman.

ARGUMENT ON BEHALF OF SHARPE, ET AL

By Mr. Milton D. Korman.

Mr. Korman: Mr. Chief Justice, may it please the

Court. I am in hopes that we could come here today without any controversy between the Appellants and the Respondents, and indeed, now that almost an hour has been spent by my adversary addressing the Court, I still see no reason for being here opposing each other. The only reason I can assign to it is that apparently my friends on the other side are determined that there must come from this Court or from the District Court some directive by which they can point in the future to the proposition that they have forced the District of Columbia to do certain things, and that is not the fact. These are the facts.

May 17, 1954 this Court declared "We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution."

The next day, May 18, the members of the Board of Education and the Commissioners of the District of Columbia, met with the Corporation Counsel in private session at which time the Corporation Counsel of the District advised them that that language from this Court had effectively and forever struck down the validity of any laws on the books which provided for separate schools for whites and Negroes in the District of Columbia. And on the following day, May 19, the Board of Education met and appointed a committee to draft a set of principles. On May 22, three days later, that committee

met and drafted a statement of policy.

May 25, three days after that, the Board of Education adopted that statement of policy and it appears in the Appendix to our brief. And in that same statement of policy they said that they thereafter proposed to so integrate the schools of the District of Columbia as quickly as it could be done.

On June 2, seven days later, or eight days later, the Superintendent of Schools, having working on the matter for a year or more, presented to the Board of Education a complete plan for the desegregation of the schools of the District of Columbia. That plan is set forth in the Appendix to our brief.

Incidentally, that plan which was submitted by the Superintendent was approved by the Board of Education. On June 23, the Superintendent presented to the Board of Education a schedule of dates for putting into effect that plan, and the final date for anything to be done was September, 1955. Before schools opened on September 13, 1954, an attack was made upon that plan sponsored largely by the Federation of Citizens Association. The case was Saiborne and others, vs. Sharp and others. It was heard by Judge Schweinhaut of the United States District Court. We presented to the District Court the proposition that the decision of this court of May 17 had struck down all requirements for

segregated schools and that the Board of Education was entirely within its rights in providing for the integration of schools to commence at the first opportunity, the opening of schools in the fall of that year. Judge Schweinhaut sustained the position we had taken and dismissed that suit, so that we have a determination by our District Court that our interpretation of this Court's decision was correct. The schools opened on September 13, 1954 as an integrated system, and it is completely integrated today and I do not know what my opponents point to in all these things that they have talked about here. What are the options that they talk about? Let us read them. They appear in the Appendix to our Brief, and this is the Superintendent's plan.

Justice Reed: What color brief?

Mr. Korman. This is the one here. I suppose that would be called buff. And it is entitled, I think, somewhat differently than the other briefs of respondents, on formulation of the decree.

On page 13, the last paragraph, we find this from the statement of the Superintendent, "In order to provide stability, continuity and security in the educational experience of pupils during the transition period, it is agreed that it will be educationally sound to permit pupils at present enrolled in any school to continue in that school

even though they are not living in the new boundaries."

If I may interject there, the plan proposes to set boundaries for each individual school in the District of Columbia, except in one or two instances where there were two schools so close together that two circles could not be drawn for them and one circle was drawn around the two buildings as the district for that school.

All others have a single area to be served by a single school.

Going on, "By this means immediate displacement of unnecessarily large numbers of pupils will be avoided. Progressively with the establishment of new boundaries, all children will attend the schools serving the areas in which they live."

"The following procedures will be needed to carry out this plan:

"1. Fixed zones are to be established for each elementary, junior high and senior high school to insure balanced use of school facilities.

"2. All pupils new to the school system or to a particular school level will be assigned to the schools designated to serve the zones in which they live.

"3. All pupils at present enrolled in a given school may remain until graduation provided the school is not overcrowded and provided the priority rights of pupils within

the new boundaries of the school are not denied.. If they prefer they may transfer to the school serving the zone in which they live. Elementary school pupils who change residence will be transferred to the school assigned to the area of the new residence.

"4. Transfers from one school to another will be required when necessary to relieve overcrowded conditions."

And then on the following page, I skipped one paragraph, there is an example of what takes place:

"These must attend School 'A'," that is a school formerly in Division 1--

"1. All children living within the new boundaries who formerly attended School 'A.'

"2. All children living within the new boundaries who are entering a school of that level for the first time.

"3. All children who are newly residing in the area served by School 'A.'

"4. Children now attending School 'B' but living within the boundaries of School 'A' if School 'B' becomes overcrowded."

Now, on that, who may attend School A--not who must but who may:

"1. Children now enrolled in School A whether or not their residence is within the boundaries of School A may continue to attend until their graduation subject to the

following conditions:

"a. If school A becomes overcrowded, pupils previously attending School A who live in the area now served by School B or any other school will be transferred to that school.

"b. If further relief from overcrowding is necessary after all children not living in the area served by School A have been transferred, it will then be necessary to provide additional relief by further changing the boundaries of School A."

Can anything be clearer?

Wherein, my friends, can you read race into that? How you do it is beyond me. Yet they say we must have a decree which enjoins us from putting race into this arrangement.

This plan, incidentally, has been mentioned by the Attorney General in his brief before this Court. May I read to you what he has to say of this plan in the District of Columbia. I read from a footnote in the brief of the United States on page 20 of their brief. In presenting his program for integration for the approval of the Board of Education, the Superintendent of Schools of the District laid emphasis on the consideration of the educational growth and welfare of the school child. Thus, in justification of the proposal that each presently enrolled pupil be granted a limited option to remain in the school he now attends even

though he does not reside within its new attendance boundaries the Superintendent enumerated the ways in which this would provide stability, continuity and security in the educational experiences of pupils during the transition period.

While we do not describe the District of Columbia program in detail here since this is undertaken in a brief for the respondents in No. 4, we think it reflects credit upon those responsible for its formulation and execution.

"In every significant respect the plan evidences painstaking care on the part of school officials to realize the expressed objective of a speedy transition calculated to make the best use of the total resources of the school system in plant and personnel to serve the best interests of all the pupils and to promote the general welfare of the community."

That is an evaluation which we did not write. The only ones, or largely the only ones in point of fact who are taking advantage of the option are children in the junior high schools and the high schools where they have elective subjects and where those children have mapped out a course of education for themselves, they have made selections, they have adopted certain courses and they want to continue and they have the right to remain in those schools until they have completed the particular level at which they are going to school. If a child is going to a particular

junior high school and the boundary of that school leaves out his residence as it is finally fixed, and he wants to stay in there, he should have that right, whether he is white or colored.

This is not a question of race at all. It is a question of the continuity of education of that child, the security he has, the right to continue to go to school with the pupils that he has come to know, the right to continue with the teachers that he has selected to instruct him until he graduates from that particular level.

That is all that the plan provides for.

Actually, the plan has been stepped up and there remains at this time nothing to be done so far as integration of the schools of the District with the exception of putting into effect finally the boundaries of the senior high schools which have not all been fixed, and not all pupils have been required to go to the particular high school in which they reside, in the boundaries of which they reside.

Except for that one point, the schools of the District are completely integrated. Mr. Nabrit gave you the figures showing that only a comparatively few schools have no pupils of both races on their enrollments, and he points to the fact that only 122 or some number like that, out of a graduating group of some 500 went into schools formerly occupied by other races. He is mentioning the white students--

let me see whether I made a note of that when he gave it. Out of 525 who came from Division 1 schools, that is the white schools, 122 went into Division 1 schools and one went into a Division 2--that is, a formerly colored vocational school, but no white children went into a formerly colored school.

Obviously, the reason is that whether we like it or not, when they change, they have been changing from white to colored and not the other way, so when neighborhoods change, there are no longer white children going into the neighborhoods where colored now live, but colored children are coming into the neighborhoods that were formerly occupied by white.

So, it is only logical that, when people graduate from one level of a school, we find that colored children may go to schools formerly occupied by white but it is not likely that the others will occur, that the white children will go into schools formerly occupied by colored because the neighborhoods have been changing the other way.

That is the only answer to that. We can not read race into that as something that the school system is putting on for these children. It is just not so.

Justice Reed: What is your explanation for several all-white schools?

Mr. Korman. Just that in certain areas in the District, there are no Negro residents and in certain areas of

the District there are no white residents.

Justice Reed: How big is a school district? How large? How many districts have they in the District?

Mr. Korman: How many?

Justice Reed: Yes, are they on the basis of areas?

Mr. Korman: They are on the basis of the size of the school building. Some have very large areas and others depending upon how many pupils the school can accommodate.

Elementary schools are organized on the basis of 36 pupils per class at present. The Board of Education has recently decreed that that shall be reduced to 30 pupils per class as money and teachers and class rooms are available. But, up to now the norm has been 36 pupils per class. I have forgotten what it is for junior high schools. In the senior high schools, it is 25 pupils per class.

It depends entirely on the size of the building, the area which it can serve. There are actually in the District 120 elementary schools each with its own district large enough to accommodate the size of the building. There are in the District 21 junior high schools each also with an area that it serves just large enough to accommodate the size of the building and the teachers and so on, and so it is with high schools. There are 11 high schools and there is one building which is a combination senior and junior

high schools and we have two teachers' colleges. Those are now open to pupils of both races.

Justice Reed. Take the elementary schools. They go up to the 8th grade?

Mr. Korman. No, sir, it means up to the 6th grade. It used to be up to the 8th grade, when I went to school--I suppose when you did, too.

Then we even went from elementary to high school but in the interim they have introduced the junior high school which takes in the 7th, 8th and 9th grades, the last two grades of what we used to think of as elementary school, and what we used to call the first grade of high school.

Justice Reed. So there would be several first grade rooms in each school?

Mr. Korman: Yes, sir, in the particular school where my children attend, there are some four first-grade classrooms. That is true of many schools.

Justice Reed: The total number is what in an elementary school building, is that several hundred?

Mr. Korman: Yes, sir, it varies. In the particular school I know about it runs between 800 and 900 children. As I view this case, this proceeding is really moot. There is nothing here to enjoin. And if this court found that this situation in the District presented a moot proposition, it would be entirely within not only its rights, but within the

framework of decisions which that has laid down heretofore. I refer to the case --the opinion which was written by Mr. Justice Clark just two years ago next month -- the U.S. vs. W. T. Grant, where it was held specifically where there is no reasonable expectation that the wrong will be repeated, the case is moot. Here is that situation.

I hope the Court may not think I am using undue levity when I say that if anyone should attempt to disintegrate the local schools, if we had, the local school board would promptly be disintegrated.

There is no chance whatever in this District of Columbia that we should have a return to the segregated schools. I say that this proposition is completely a moot one. This is not a case where the Respondents have violated the law and by reason of a decree of a court, are required to do something.

I think that the Court must know that long before this case came on for hearing there was a pronouncement at the suggestion of the President of the United States by the Governing Authorities of the District of Columbia that segregation should be cast out in all of the various fields that the District had any supervision of, and they have been doing that and are practically complete in having eliminated any vestige of segregation or discrimination in any of the areas of the District Government that the District has any

supervision over and indeed, some of the members of the school board, I think perhaps it probably engendered some of the discussion they had when I rose to address the Court last time, had expressed themselves rather forcefully that they wanted to have integration in the schools but they were not able to because the law then forbade it.

But within two or three days, as I pointed out to the Court, we had this--when this Court said those laws were unconstitutional, they put into effect a system of complete integration of the schools. That system is in effect now because they wanted to do so not because they were compelled to do so.

I say to you, gentlemen of the Court, that there is no need for any decree in this case, requiring anyone to do anything. If the Court sees fit to remand to the lower court with the suggestion that the lower court enter a decree for a declaratory judgment, which is the first prayer of the complaint that was filed, that the laws which required segregation of schools are unconstitutional, I would have no objection. I see no necessity for it. That has been established. The matter is, in fact, moot.

I would like to see this court declare it moot, because that is the situation.

Unless there are questions from the Court, I have nothing further.

The Chief Justice: Mr. Korman, in the event the Court does not determine to declare it moot, would you prepare the form of the decree that you think would be appropriate? Would you do that?

Mr. Korman. I would be glad to do that, and unless I am directed to do otherwise, I would like to limit it to a direction that only a declaratory judgment be entered based on the decision of last May. That would be my preference.

The Chief Justice. Whatever you think might be reasonable.

If there are two or three alternatives, would you suggest them?

Mr. Korman: Yes, sir.

Justice Clark: Mr. Korman, do you know of any protest with the Board, Superintendent Corning, by parents or children, students, as to their assignments to schools in the District under this new plan?

Mr. Korman: I now know of none with the exception that there was a provision approved by the Board of Education that so-called hardship cases might be specially dealt with. Out of the 105,000 children approximately, there were 377 such so-called hardship cases. Many of them were accompanied by physician's certificates that it was needful that a child should go to some other school than the one he would normally be assigned to. In many of them the change was made as I

understand it by the sibling rule.

That is, that a family had a child going to one school because he was transferred there, he was in the higher grade and another child would enter the school system during that year and they wanted the older child to take the younger one by the hand to that school. But only 377 so-called hardship cases out of 105,000 children. Other than that, there have been no protests and so far as I know, everyone is content here except my friends.

Justice Black: Was there a hardship rule of that kind in effect before?

Mr. Korman: I do not know of any. That was especially set up for this transition period. If we had the hardship transfers, they were only for this particular year and would have to be reviewed again and application made again next year.

Justice Black: You mean there is a rule in the District, come what may, however much that it may be thought necessary for one person to go into another district, the District has a rigid rule that it is never done?

Mr. Korman: That has been the rule in the past when we had a segregated system and I assume that will be the rule in the future with the integrated system.

I do not think it was for economical reasons. It was not called or thought valid in the Division 1 schools. There

was a great deal of laxity in the Division 2 schools. I think it was largely because of instances where parents of children were working and wanted to take the children to certain schools on the way to work. I know it was not adhered to as strictly in the Division 2 schools, the colored schools, but it was in the white schools.

If you lived in a particular district served by that school, you had to go there. That was to prevent parents selecting certain schools for their children to go to. What the reason for selection was, I do not know.

Justice Black: Can you offer any explanation for that?

Mr. Korman: No. Some schools had more of a social cast or something of that sort. I do recall I was, in one instance in the office of the superintendent discussing some business and a rather poor individual called up and said he wanted his child to go to a particular school as they lived a half block over the line of the other area, and the Superintendent said "That is the rule, we cannot break it, even for you."

Justice Frankfurter: To what particular virtues do you attribute this progress that has taken place in the District?

Mr. Korman: Well, I think, for one thing, it is entirely within the scope of the program of the President of the United States. I think for a second thing, it is entirely

in the program of the thing.

Justice Frankfurter: Does that mean responsiveness or respect for the great office or because in the District people are without any other political loyalties to worry about, they are appointees?

Mr. Korman: No. I do not think so. Because, while there has been a great deal of criticism of our Board of Education, the Board of Education are not appointees of any political party.

Justice Frankfurter: I understand that. The Commissioners are. The atmosphere is different than we find with elected officers.

Mr. Korman: I do not think so.

Justice Frankfurter: You don't?

Mr. Korman: No.

Justice Frankfurter: I thought there was a good deal of excitement about no voting in this District?

Mr. Korman: There is, in some quarters.

But I think that possibly there is a general awareness that the time has come when some change must take place and some thought this would come sometime ago. Others thought it was a little too soon. The argument, it seems to me, was always just who should make the decision.

Justice Douglas: Of course, you had in the District -- I do not think you have mentioned it in your brief --

But you had in the district a pretty high standard and quality of teaching staff.

Mr. Korman. Yes. We have always had a school system which largely, though in two halves, was perfectly equal side by side.

Justice Frankfurter: Is that an established fact, that the standards of teaching in the District are higher than in some of the other states?

Mr. Korman: I would not say that.

Justice Douglas: I was thinking of the standard of teaching in Negro schools before the desegregation.

Mr. Korman: All of the courses of instruction in our teachers colleges, all of the books that they used, all of the criteria that were laid down for instruction on both sides of the dual school system were identical.

Justice Douglas: That was part of the case, they were separate, equal.

Mr. Korman: Yes.

The Chief Justice: Thank you, Mr. Korman. Do you have anything further, Mr. Nabrit?

Mr. Nabrit: No, thank you.

The Chief Justice. May I revert for a moment to No. 1, the Kansas Case. I see General Fatzer is here and Mr. Carter is here. Gentlemen, would you, if you wish, present the form of decree that you think would be appropriate in your

case? I believe it would be helpful to the Court if you did.

Mr. Fatzer: We shall be glad to.

The Chief Justice: Thank you. I do not know whether counsel in the Delaware case are here or not.

Mr. Korman: I think they left.

The Chief Justice: Mr. Reading, if you would care to, I believe it would be helpful for you to propose the kind of decree you believe would be appropriate and we will have the Attorney General do the same.

No. 2 and No. 3 , Harry Briggs, Jr., et al vs. R. W. Elliott, et al, Dorothy E. Davis, et al. vs. County School Board of Prince Edward County, Et Al.

Mr. Robinson.

ARGUMENT OF HARRY BRIGGS, JR., ET AL

By Mr. Spottswood Robinson.

Mr. Robinson: May it please the court, as the Chief Justice has already indicated, the arguments in numbers 2 and 3 are being combined and it is principally for that reason that at the outset I request the indulgence of the Court to first outline the argument that will be presented in these two cases on questions 4 and 5 and the part of the argument that Mr. Marshall will present.

And I think that perhaps this can be best done by starting with the specific answers to questions 4 and 5 that

we suggest to the Court.

As to question 4, we submit that a decree should be entered which would require desegregation of the public schools involved as soon as the necessary administrative and mechanical procedures prerequisite to such desegregation can be accomplished.

We do not feel and therefore we submit that the equity powers of this Court should not be exercised so as to delay relief in these cases beyond the time that is essential for the taking of the administrative steps essential to desegregation.

In Answer to No. 5, on the assumptions on which that question is predicated, we would submit in answer to part A thereof that this Court should not formulate detailed decrees in these cases which in our opinion makes it unnecessary for us to submit an answer to Part B of that question.

In answer to Part C, as to whether or not this Court should appoint a special master to hear evidence with a view to recommending specific terms for such decrees, we would suggest an answer in the negative. And in answer to Part B, we submit that this Court should remand these cases to the courts of first instances with directions to frame decrees in these cases in accordance with the mandate of this Court; the decree entered by this Court, however,

to contain certain provisions that Mr. Marshall will outline in his portion of the argument.

We think that beyond those considerations, the lower courts may, by the exercise of ordinary procedural devices reach such further provisions in the decrees as might be necessary.

I will undertake to present our argument on question 4 and Mr. Marshall will undertake to present our argument on 5.

In the normal course of judicial procedure, the decision of this Court that was entered on May 17, declaring that racial segregation in public educational facilities afforded by a state is a violation of equal protection of the laws secured by the 14th Amendment, would have been followed by decrees which would have forthwith enjoined the continuation of the practice that this Court at that time found to be unlawful.

As a matter of fact, in a somewhat analogous situation that this Court found itself presented with in Sipuel vs. Board of Regents, where an effort was there made to secure a postponement of the rights that were involved, this Court not only refused to delay the relief sought but accelerated the granting of the relief by directing that its mandate issue forthwith.

If that course of procedure had been followed, if

that course of procedure is now followed, it would mean a disposition in these cases which would require we think, two principal things, first, the initiation immediately of the administrative procedures and steps that are necessary in order to desegreate the public schools in question and secondly, the admission at the commencement of the school term of the Appellants and others who are similarly situated.

Justice Black: May I ask you who would that include, those similarly situated?

Mr. Robinson: Mr. Justice Black, I would answer that question by suggesting that it would include all Negroes who are residents in the Virginia case of the County of Prince Edwards and in the South Carolina Case of District No. 1.

Justice Black. Mr. Robinson, it is relevant to point out in view of your remarks that in the Delaware case, in order to avoid loose talk about class suits, the decree merely related to the specifically named pupils and others seeking admission in that school.

Mr. Robinson. In the Virginia case there are actually three schools involved.

Justice Black: In the Delaware complaint -- I do not know whether you have seen it--

Mr. Robinson: I have not.

Justice Black: The schools are mentioned by name.

One is a high school and the other an elementary school--by name.

Mr. Robinson: I do not know whether, in the Delaware case, the prayer for relief in the complaint was the admission of the named plaintiffs to a particular school.

Justice Frankfurter: That was the complaint and all others similarly situated seeking admission as pupils in the Claymont High School and in the other case in the Hockessin school No. 29. The class suit was not class-at-large, but class defined with reference to that particular school.

Mr. Robinson: In both the Virginia and South Carolina cases, however, the suits were brought as Class actions under Rule 23 of the Federal Rules of Civil Procedure and in these cases there was a prayer for admission to a specific school as distinguished from a prayer for declaratory relief and also for an injunction which would prevent the use of race in the assignment of pupils to schools.

Justice Frankfurter: Why restrict it to a county, why not to the whole state?

Mr Robinson: I answered Mr. Justice Black's question in the fashion I did, that in Virginia we have a situation in which our local school communities possess such a degree of autonomy that I do not believe that a decree

that this Court would enter in the Prince Edward County case would be binding except of course as a matter of stare decisis in some other county for the simple reason that we do not have the school authorities who operate those other school units before the court in this litigation.

Justice Frankfurter: What is the relevant school population in the suit now?

Mr. Robinson: At the time we filed the suit--your Honors will understand in Prince Edward County the litigation embraced only the high schools -- there were 451 Negro high schools and 384 white high school students in the county over-all according to the 1950 census.

Justice Frankfurter: Your suit does not cover it?

Mr. Robinson: No. I have the informatim if you want it.

Justice Frankfurter: Well, when one talks about class suits it is important to determine the content of the class. In your case, the content of the class is what, 700, all told, 800--

Mr. Robinson: Approximately 800, I should say.

Justice Black: Why do you say it includes the entire county?

Mr Robinson: In Virginia, unlike the situation, Mr.

Justice Black, in other states the entire county is one school unit. In other words, in school terminology, one school district or one school division, there are no subdivisions of a county geographically or otherwise for school purposes.

Justice Black: You mean they can be sent to any school in any county?

Mr. Robinson: In terms of this situation under a segregated system there would be no choice with respect to Negro students because there is only one Negro high school and with respect to white students there would be very little choice. While there were two white high schools, one was really a small high school department of essentially an elementary school accommodating something like 75 students and as the testimony in the record of the case indicates, was being maintained primarily for reasons of convenience of some of the people living in that neighborhood and, as a matter of fact, was a school that we understood at that time probably was slated for abolition at sometime in the near future.

Justice Black: Did the petitioners ask that these students be sent to a particular school?

Mr. Robinson: No. In our complaint we did not.

Justice Frankfurter: Did the state or county give bus service to all the high school students in the county?

Mr. Robinson: Yes, all those who required it, both white and Negro.

Justice Reed. (Unintelligible.)

Mr. Robinson: Very definitely.

Justice Reed: That is not involved?

Mr. Robinson: Yes, I think that it is.

Justice Reed: I do not recall the specific situation.

Mr. Robinson: I cannot say that it has been. I will direct your Honors to the fact that within the District Court's decree which was an equalization decree, the Court continued the provisions with respect to school bus transportation.

Justice Black: If there is a decree such as you suggest with reference to all the people in the county, what statutory sanctions could be invoked for enforcement of a decree of that nature if it were violated?

Suppose we entered a decree requiring that all the colored children in the whole county must be admitted into the county schools of a certain type and suppose someone violated that, what sanction can be imposed under the statute?

Mr. Robinson: I am still not sure that I am clear.

Justice Black: How would you enforce the order?

Mr. Robinson: Through the normal contempt procedures --

Justice Black: Anything else?

Mr. Robinson: -- very definitely involved.

Justice Black: In other words, you would have to

try contempt procedures for everybody in the county that violated the order?

Mr. Robinson: I would say that would be available, yes.

Justice Black: Any others?

Mr. Robinson: I cannot recall that there is.

Justice Frankfurter: You mean contempt in the District Court in the Federal Court for violating the decree?

Mr. Robinson. Yes, in whatever court it emanates.

Justice Frankfurter: In this case. This is in the District Court. Assuming such a decree as you would like to have were entered, ther obedience to it would be by the contempt process for disobedience?

Mr. Robinson: Yes.

Justice Reed: And contempt would be the process against the parties in this case?

Mr. Robinson: In the Prince Edward County case, yes.

Justice Reed: The school board?

Mr. Robinson: In this situation it would be the school board which is a corporation under Virginia law and the Division Superintendent of Schools.

We have a situation in which, back in 1948, there was an instance of a violation by school authorities of a federal court decree. It was the same court in which we took this appeal except that it was a single.

rather than a three-judge district court. That is a case which was referred to in the first brief we filed for Virginia on the first appeal. The case is Ashley vs. the School Board of Gloucester County. That was a situation in which the district court entered a decree, an equalization decree and after the expiration of a certain period of time contempt proceedings were initiated predicated upon the basis that the decree provisions had not been complied with. The district court found that the school authorities were in contempt. It imposed a fine upon the members of the Board and the Division Superintendent as well as I can recall. There were no subsequent contempt proceedings because shortly after that at least a measure of equalization was forthcoming in that county. That is the only instance to which I might direct your attention.

Justice Black: With reference to the scope of your decree, the number of people involved, it would be important to state, would it not, as to what sanctions the law provided, or whether we would be entirely dependent upon contempt proceedings, and so forth, statutory or common law?

Mr. Robinson: I would volunteer this, but readily confessing I would not be in a position to argue that point: Whether or not now that the law has been made plain as to what the rights of these people are, a school official who declines to afford constitutional rights of this character at the time

they are applied for does not violate one of the federal statutes having to do with activities under authority of the State law which are in deprivation of rights secured by the Constitution.

Justice Black: I was thinking that there was a federal statute which made it criminal contempt--that general safeguard. I had an idea without looking at it, that there was some kind of a provision made for civil action for damages.

Mr. Robinson: Well, yes, there is a section to which your Honor refers, Section 1983 of Title 42, it is the old Section 43 of 8.C.

Justice Black: Civil Rights Act.

Mr. Robinson: Yes. We had some amount of discussion about that the last time we were here.

In this situation we submit if there is any --if there is going to be any postponement of relief beyond the date we suggest the burden is on these Defendants to state what they propose to do and establish, as a matter of fact, that the postponement they seek has advantages which are judicial, cognizable and outweigh those which are inherent in the prompt vindication of the appellants' constitutional right.

Justice Frankfurter: You suggested a terminal date but did not give a date in your sketch of proposed decree, but you

also gave a consideration, namely, administrative requirements.

Mr. Robinson: Yes, that is right.

Justice Frankfurter: Since that is a criteria, that is a condition which you take into account, have this Court take judicial notice relevant to the enforcement of the decision we made last May, can this Court take into account that that would be satisfied, that requirement, that would be fulfilled by September, 1955, if not this Court, could the District court take notice or if it is not one of those things that either court can take into account, doesn't that require determination with evidence and testimony and so on?

Mr. Robinson: I think that speaking as of this moment, it is a matter of which this Court could take judicial notice.

Justice Frankfurter: This Court could take judicial notice of the conditions in Prince Edward County with regard to relevant administrative considerations in the disposition of plant, personnel, and so forth?

Mr. Robinson: Not quite in that fashion, sir. This Court has before it the case in which argument was just completed, involving a much larger and a much more complicated school system than exists in Prince Edward County. The Court has had before it the School systems in two other states now absent any showing of judicially

relevant considerations that would administratively delay the accomplishment of desegregation beyond September of 1955. We feel that this Court, on the basis of the experience had in those instances which we think has now been had by the Court and certainly is a matter of which the Court could take judicial notice, would fully justify this Court in fixing as the terminal date of the desegregation process September 1955.

Justice Frankfurter: We have heard from both counsel that the District represented some very special considerations.

Mr. Robinson: I think, Mr. Justice Frankfurter, that the considerations which are really important to the question which is now before the Court -- and that is ways and means and particular time of accomplishing desegregation -- are considerations which obtain in Prince Edward county as well as in the District of Columbia and in these other areas.

Justice Frankfurter: Maybe so, but my attitude and mind do not necessarily lead to that conclusion.

Mr. Robinson: I am sure our opponents will urge considerations to the contrary. Mr. Marshall proposes in his presentation to go fully into those. If your Honors want me to--

Justice Frankfurter: No, no, divide your time as you please.

Justice Reed: The only problem that we suggest that is the burden of your opponents is to show that here in Court.

Mr. Robinson: I think so.

Justice Reed: Just tell us what they think about it.

Mr. Robinson: No, I think they should come forward in this Court and demonstrate--

Justice Reed: Demonstrate how, by evidence?

Mr. Robinson: Yes, by evidence. I suppose that is the only way we can formulate--

Justice Reed: Or their statement that it would be difficult as part of the school situation, because of the attitude of the people, because of lack of bus transportation?

Mr. Robinson: I do not think that, sir.

Justice Reed: Because of lack of schools of adequate size.

Mr. Robinson: If there were a fact that was brought to the attention of the Court, I should think that would be one way of doing it.

Justice Reed: Perhaps that would be better to take up in the District Court.

Mr. Robinson: We feel when it comex to the question of fixing the terminal date, that here we have a consideration that is so all important in so far as the realization and satisfaction of constitutional rights may be

concerned, it is a matter that occupies just that degree of importance that the thing is a matter which should be fixed by this Court, assuming that there is no lack of basis upo which this Court can proceed to that conclusion.

Justice Reed: How would you find that, according to the percentage of the minority race there maybe in a particular county?

Mr. Robinson: No, without undertaking how much time this particular activity would take or that would take, this Court would be justified in concluding that if a school system like the District desegreated in the space of time it did, that a school system far less complicated and far smaller in size than the District could desegregate in an equal space of time, absent any showing by our opponents that an additional period of time would be needed.

Justice Reed. Before you make that, that carries the connotation to me that every place in the country is just alike. There would be no difference in the time that would be required in the District; if they may do it that quickly, in a certain time, every other place should do it.

Mr. Robinson: As I say, that is a consideration that Mr. Marshall is directing his argument to. We think the burden on our opponents is increased by reason of the fact that the rights that these appellants seek to postpone are rights which have been characterized in a number of cases by this

Court as personal and present. We think that that consideration is a measure --a consideration of the appellees and makes it even more difficult.

Then there are two additional considerations that we submit here. In the first place, as this Court has pointed out, the continuance of racial situations in public education is a matter that causes irreparable harm and damage to the students. Every day that this illegal system of racial segregation continues, it would mean that we have not one child but a multitude of children who are really being seriously injured. Additionally, the rights asserted by the appellants in these cases are the rights of the children and if they are ever going to be satisfied they must be satisifed while they are still children, and the period for attendance in public schools is a short period.

We think they are important considerations that must be weighed in making any determination as to whether the burden upon our opponents of demonstrating a justification for the delay has been met.

I would like to look first at the precedents because we have some and they have some, that are specifically urged upon the Court as decisive of this question. I would like to call attention first to the Youngstown case, a decision by this Court in which the Court even in the face

of the gravest of public emergencies, declined to delay the satisfaction of the rights involved.

The case of course is familiar to the Court. Preliminary injunctions had been entered by the District Court against the enforcement of a Presidential order involving a seizure of steel mills. The appeal was taken here and among the arguments to this Court was the argument that the public interest in the uninterrupted production of steel which was so closely and so necessarily connected with the production of sensitive and essential war materials was superior to the constitutional rights of the owners of the properties that had been seized to the immediate return of their properties, and out of the seven opinions that were filed by this Court, no one apparently saw any merit in that argument.

We submit that, if in a situation of that kind, equity could not appropriately exercise its broad discretion to withhold an immediate right of relief, then such a postponement would be completely inappropriate in these cases where no consideration that even touches the magnitude of the one there involved is present here.

I would like to make reference to Ex Parte Endo, that I think is much more closely related to these cases than the cases upon which our opponents rest. That was the case in which the government argued that disorder and hardship

and community hostility and prejudice that was supposed to flow from the unsupervised release of a loyal American citizen of Japanese ancestry; in other words, the argument there was made that even though the detention of the party in that habeas corpus proceeding was illegal, that there was such a hostility, there was such a prejudice in some areas, that it was necessary for the detention to be continued at least temporarily in order that the relocation program of our government could be successfully continued but this Court, in a unanimous opinion, there being in addition to concurring opinions, held that notwithstanding this, the party must be given her unconditional release. The court said that here the petitioner had one of these rights in that sensitive area of rights specifically guaranteed by the Constitution, and notwithstanding the weight in a time like that, that the Government's contention was bound to carry, nevertheless concluded that she must be immediately released.

Justice Reed: That follows the Hirabayashi case, which said that they could be and only after Miss Endo had demonstrated her loyalty.

Mr. Robinson. But when her loyalty -- when we got to that point -- had been demonstrated to us, her right to constitutional freedom was clear.

Justice Reed. Yes.

Mr. Robinson: I think the significance of the

Endo holding is that once we get to that point, she could not be illegally detained. In other words, the postponement -- there could be no postponement. There was no justification for postponing or delaying her constitutional right to freedom just like that of any other American.

Justice Reed: In the Hirabayshi case we did not have that.

Mr. Robinson: In the Hirabayshi case we had a situation until there had been an opportunity to make a determination as to who was loyal and who was disloyal, we would not be in a position to know who had the right and who did not have it. I think that is the difficulty.

In answer to the Court's question for in our efforts to get the thing answered, we have made a very extensive study of the cases and we have come up with no case, we have come across no case wherein this situation, this case, where it is found that there is a violation of a constitutional right, nevertheless, has postponed relief or satisfaction of that right on the ground that, because of some local community hostility or prejudice or customs, delay in effectuating that right is justified.

As a matter of fact, we think that it would be strange in these cases for this Court to conclude that here we have a situation where for the first time it may now be

decided that the enjoyment of such fundamental and basic human rights may be justifiably delayed. These are rights asserted in these two cases that are secured by the 14th Amendment and as a matter of history, that amendment was designed to protect these rights against the same type of local hostilities and prejudices and customs and all that our opponents rely on.

Not only do we have the Amendment itself but we have Congressional legislation that was designed for the very purpose of affording protection to the enjoyment of rights of this kind when their infringement, predicated upon local customs, was forthcoming. We can not find any situation anywhere in the cases nor do we think that the principle should be established here that rights of that character should be enforced at a pace that is geared down to the very customs and practices and usages that the Constitution and Federal legislation were designed to protect against.

I would like to get into the cases which are relied upon by our opponents and I would like to have the opportunity to distinguish them. They rely upon a number of decisions of this Court and other courts as well in which there has been some measure of delay in the absence of rights but are cases that involve totally different considerations.

We find upon our examination of these cases that they fall principally into two groups: First, they make reference to the nuisance cases, the situations in which delay

and enforcement of a right, usually a property right against conduct that is essentially commission of a tort, has been forthcoming. They also rely upon a number of decisions of this Court and a trust litigation in which, because of some phase of the activity which was to follow this Court's decision, some measure of time was afforded.

The Chief Justice: We will recess now.

(At 4:30 p.m. the hearing was recessed.)