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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 14, 1955

WARD & PAUL

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WASHINGTON, D. C.

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## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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OLIVER BROWN, MRS. RICHARD LAWTON, ET AL	:	
vs.	:	Case No. 1
BOARD OF EDUCATION, TOPEKA, KANSAS, ET AL	:	
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FRANCIS B. GEBHART, ET AL	:	
vs.	:	Case No. 5
ETHEL LOUISE BELTON, ET AL	:	
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SPOTTSWOOD THOMAS BOLLING, ET AL	:	
vs.	:	Case No. 4
C. MELVIN SHARPE, ET AL.	:	
---	:	
HARRY BRIGGS, JR., ET AL,	:	
vs.	:	Case No. 2
R. W. ELLIOTT, ET AL	:	
---	:	
DOROTHY E. DAVIS, ET AL	:	
vs.	:	Case No. 3
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.	:	

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Washington, D. C.

April 14, 1955

P R O C E E D I N G S

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The Chief Justice: Mr. Solicitor General, will you proceed, please?

ARGUMENT ON BEHALF OF THE UNITED STATESGOVERNMENT (Resumed)

BY: SIMON E. SOBELOFF

Mr. Sobeloff: If it please the Court, my attention has been called to the answer I gave to a question by Mr. Justice Minton.

Mr. Justice Minton asked me, "Would you put a deadline in at all," and I replied, "I don't think I would put a deadline in the more complicated situations."

That answer is not clear. What I wanted to say is that I would not have the Supreme Court put in any deadline. I thought that the whole tenor of my argument yesterday was that there should be no opened orders by the District Courts, that they should have deadlines but with freedom in proper cases on a proper showing of facts requiring further time to grant further time.

Justice Reed: You mean you would start with a deadline?

Mr. Sobeloff: I would start with a deadline first as to the requirement -- we suggest 90 days for a plan to be submitted.

Justice Frankfurter: Are you now speaking of the



decree to be entered by this Court --

Mr. Sobeloff: No, sir.

Justice Frankfurter: -- or by the District Court?

Mr. Sobeloff: What I said in answer to Mr. Justice Minton applies to the decree of this Court. I would not attempt the deadline in the decree of this Court.

Justice Frankfurter: So I understand. But I am wondering considering the reasons that make that undesirable for this Court to fix a deadline, the reasons that compel remission to the District Court to formulate a more detailed decree, whether we should be here considering what deadline the District Court should have. Are we not anticipating the very consideration that would urge a deadline?

Mr. Sobeloff: I don't think you ought to tie the hands of the District Judge but I think it would be useful to the District Judge if you were able to say to the parties, I am required to ask you, to require you, to produce a plan within 90 days.

See what you can do in the 90 days. If anybody comes before me and shows that there has been a good faith attempt to produce the plan but cannot be done within the time limit, I will entertain an application for further time.

There is the merit of requiring motion. That is also the saving grace of not tying people to a time limit that may prove in actuality unworkable.

Justice Frankfurter: There are various ways of suggesting motion without being explicit about it.

Mr. Sobeloff: If the Court can devise any way that would suggest motion and require motion and encourage motion and without, however, restricting unduly that discretion which is necessary in the administration of this business, that is the thing that the Government would like to see.

Justice Frankfurter: The point of my remark is that the wisdom which directs you to suggest this Court should not go into certain definitiveness or peculiarities is the wisdom that, for me at least, carries beyond guessing what actualities and definitiveness the District Court should go into.

Mr. Sobeloff: On the other hand the District Judges might appreciate some indication of a tentative limit with the knowledge that on a showing to them of the necessity for more time they can grant more time.

I think it is arguable and may work differently in different situations but in general I think two things are to be avoided.

One, a fixed and inflexible limitation. On the other, no limitation at all.

I think that while this Court does not fix the time, the District Courts ought to be required to fix some time in the knowledge that they can, on a proper showing, grant more time.

but the thing ought not to be left hanging in the air indefinitely.

The Chief Justice: Mr. Solicitor General, this may be an appropriate time for me to ask if you would be willing to prepare a proposal for a decree as the other parties have. It would be helpful to the Court if you would do that.

Mr. Sobeloff: We will be very glad to do whatever the Court thinks would be helpful. I want to call attention to the fact that on pages 27 and forward from that point in that brief, we have with particularity set forth provisions which we think appropriate for the decree.

All that would be required would be the formulation of the words, It is hereby decreed and the provisions themselves are set forth.

The Chief Justice: Thank you.

Justice Frankfurter: Plus such further thoughts as you may have had since November 24, 1954.

Mr. Sobeloff: Yes, sir.

Justice Harlan: For example, your item 1, Mr. Sobeloff, on page 27 is a fixed deadline of 90 days. I take it you are now suggesting flexibility there?

Mr. Sobeloff: Yes. Elsewhere we do speak of giving the court discretion to give further time but if that leaves in doubt the right of the Judge to do that, that doubt ought to be resolved now, and there are two other matters that will not

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detain me very long that I should like to mention before I come to the question that the Chief Justice asked as we were -- and others -- as we were about to adjourn.

First, with regard to the time limit for the execution of a plan not for the formulation of the plan -- my attention has been called to the fact that in the Government's brief in last year, that is in 1953, it was suggested that one year should be allowed, whereas in the present brief we do not make that recommendation.

The inconsistency is more apparent than real because even in the 1953 brief, where one year was suggested, it was stated that it should be one year plus such other time as on a proper showing may be found necessary.

The important thing, whatever the Court does is to make it clear to the lower courts and to the parties that there must be a bona fide advance toward the goal of desegregation. That doesn't mean that people ought to be ridden over roughshod; it doesn't mean that conditions ought to be ignored.

Adjustments have to be made and allowance should be made for the time. Time ought to be allowed for those adjustments. But it does not mean that the matter ought to be left hanging in the air. And it is between these two extremes that we think that the Court should go and because of the familiarity of the lower courts with their particular conditions we think that the time limits can best be set there.

pd7  
If, however, this Court thinks it would be wiser to suggest one year, with the opportunity on proper application for an extension, we have no objection to that.

Now, another detail that has not been mentioned in any of the discussions but is proposed in our brief that in a very hypothetical way we say that the Court may wish to appoint a special master to review such reports, that is the reports which will periodically be required of the lower courts to this Court and to make appropriate recommendations through to this Court and to the lower courts.

Now, we are not recommending that a master be appointed to take testimony.

We are not recommending that he function as a director over the local school authorities.

We have in mind that the volume of these reports may be such that this Court could not effectively deal with them and this court might find it desirable to have someone who will receive these reports, digest them, present the essence of them to this court for consideration and from time to time perhaps consult with the lower courts and impart to the judges the reactions of this Court and the suggestions and recommendations, because these things can perhaps be handled better by that informal method than by a series of decrees.

Justice Reed: Do I correctly understand then that this Court is to retain these present cases here?

bd8  
Mr. Sobeloff: Yes, sir.

Justice Reed: And what is then to be sent to the District Court?

Mr. Sobeloff: It sends the cases back to the District Court for the further proceedings for the framing of decree.

Justice Reed: Then the cases can be in two courts at the same time?

Mr. Sobeloff: The court can send that back and yet retain jurisdiction for future purposes if conditions arise that make it, in the discretion of this Court, necessary to intervene, to give direction, you could still do it.

I see no inconsistency between that and these further proceedings in the formulation of decrees.

Justice Clark: Did we do that in the Terry Adams case? That is the election case down in Texas a few terms ago.

Mr. Sobeloff: I don't know. I am not familiar with the situation there. I think it would be a very wholesome thing for this Court to do, so anybody who has the occasion to see a more specific direction from this court could do it and it would not involve the delay of starting all over again.

Now, with regard to the question --- I may add in respect to this master that our view is that he should not be expected or perhaps not even be permitted to volunteer

1049 suggestions and certainly give orders to the parties though he perhaps should be permitted if called on to advise.

There may be certain plans that are under consideration which an educational unit, school board, might be in doubt about.

They may want to know what is being done in other jurisdictions. This master would be in a position to give them valuable information.

In that spirit rather than the imposition of a command from him, he might be able to render valuable service.

Now on the question of the class action, of course, the concern of the United States in this case is not primarily with a few individuals.

The importance that attaches to these cases is because we all realize that we are dealing here, not with named plaintiffs alone and not even with individuals who, by any interpretation of the rule, might be regarded as members of the class in the particular case.

We are dealing here with great populations, both white and negro. It is an important principle.

So it is not the fate of a handful that is involved here.

The question is what is the procedure to be followed in resolving a much larger problem.

Now it seems to us that this massive litigation

bd10 which has taken a number of years already would be ineffectual if the effect were limited to a few.

We think that the Court could at least embrace within its decree more than the named plaintiffs but members of the classes in those communities who are in the same situation as the named plaintiffs and of course the effect under the doctrine those cases would have upon other future cases is obvious.

From the standpoint of the plaintiff, it would seem to me that the admission of a few might disappoint what they are really after. From the standpoint of the defendants too I don't think that they would consider that this case was as vital as they do consider it if they thought it would only affect a few.

But if this Court should not take the view which I am about to elaborate as to the class nature of these actions, if you should decide that these are not class suits and that your relief has to be limited to the few, then neither side can have that both ways. On the one hand the plaintiffs can't expect that the decree will run in favor of people who are not before the court.

On the other hand, the defendants, if they insist that the decree can only affect a few, can't say that the rights of those few shall not be fully adjudicated because there may be others that will be affected.

On the other hand, if you take the view that this case, for instance the case in South Carolina, involves only



bdll  
11 high school students and not a greater number and it seems to me to be consistent, you can't say these people ought to have their rights postponed, because there may be others.

Either you take into account the others and ask the District Court to consider the whole group or if you take the opposite view and say we are only going to consider the 11 who are named plaintiffs then you have to give them, it seems to me, the rights which the decision of May 17 entitles them to have.

Justice Black: If that should be done, would there be any possible necessity of the machinery which you suggested, which would be pretty large, of having masters and reports from all over the country?

Mr. Sobeloff: If you should take that view and terminate the suits in that way, I don't think you would have to do any more. But there might be the danger of a volume of litigation that could perhaps, if you take the other view, be averted.

Justice Black: What view is that?

Mr. Sobeloff: If you take the class action you don't have to have new suits. These other people can have their rights determined in these very proceedings.

Justice Black: Beyond the Clarendon District?

Mr. Sobeloff: Obviously no. Under no view of the class action rule can people in other districts be affected,

either entitled to relief or bound by the proceedings in these cases.

Justice Black: Then, even then litigation would continue, would it not, in other parts of the country?

Mr. Sobeloff: It might. Although as I say, that the prestige of this Court is such that people will be disposed to abide by the law and not invent spurious reasons for delay.

Justice Black: Do you think they would be any less inclined to abide by that if there was a direct immediate order that these individuals should be admitted in these schools and nothing more?

Mr. Sobeloff: I don't think I know that they would be less disposed to obey, but you would be settling a much narrower question.

Perhaps from one point of view, that is desirable. But I think both sides want to have the situation settled in the light of these administrative problems, which they say and which we all recognize will happen if a great number will apply.

So far as these few are concerned, the problem may be resolved without great administrative difficulty. But what happens tomorrow?

The problem may come up in a milder form. I don't know. My guess is not any better than any other man's about that.

b413 All I am suggesting to the court is that if you should take the view contrary to what I suggested yesterday that these are class actions, and that other people in Clarendon County besides the named plaintiffs are to be entitled to the relief under the decree.

If you take the view that only the 11 are before the Court then it would not be consistent to say that these 11 should not have their constitutional rights because administrative problems may arise in the future with respect to plaintiffs who have not yet declared themselves and have not yet been intervened.

Justice Harlan: On the other hand, there would be no reason for delay as far as these plaintiffs are concerned, in that view?

Mr. Sobeloff: Not in that view. If you take that view in the nature of these actions.

Justice Douglas: The question of the 11 might not raise administrative problems.

Mr. Sobeloff: That is right. At what point it is simple and raises no administrative difficulty, nobody can say abstractly. You would have to examine the record and satisfy yourself whether or not you can pass a fair judgment on this record.

Justice Clark: What happens to the other 2500?

Mr. Sobeloff: That is just it. If it is a class action, then the 2500 are all considered as part of the class.

Justice Clark: I mean, assuming it is not. You say there are only 11. Originally it was 31 but now there are 11 to consider.

Mr. Sobeloff: If you consider the rights of the 11 in this individual action, the rights of the 11 are adjudicated. They get their relief. The others may or may not intervene in this case according to the rule I will discuss presently or they will have to start new actions.

Generally that has been held. This Court has never passed on this question but the lower court decisions generally hold that there can be intervention at any time before judgment. There is one case that goes even further and says that a person who is covered, who is included in the class although not named as a plaintiff can come in and claim his relief, even after judgment.

----- Theirs would be cases in which such a person came in and demanded a citation for contempt against the plaintiff for not complying with the Court's injunction although he had not theretofore declared himself and intervened as a plaintiff.

Justice Clark: Do you have a brief on this problem?

Mr. Sobeloff: We will be very glad to submit a brief to the Court.

Justice Harlan: The Fourth Circuit has even gone further. They have held you can have a class action without intervening at all.

bd15

Mr. Sobeloff: In what case is that?

Justice Harlan: I forget the name of it. It was in a suit to enjoin the enforcement of an alleged unconstitutional tax and the court in its opinion held that the decree could run for the benefit of all the class irrespective of joining.

Justice Frankfurter: Mr. Solicitor General, there are other problems involved in this other than the mere question of who are the technical parties to the litigation.

Whoever writes the decree must write it in the context of what will actually happen and what could happen.

It is hard for me to believe that if this Court ordered 11 children to go to a school in a county in which there are 2800 children -- that is the figure -- in the same situation, that somehow or other, the others will not manifest the desire for the decree, and therefore merely writing a decree for the 11 may amount to nothing except the ink that is written on a piece of paper --

Mr. Sobeloff: In answer to the question yesterday I think I indicated in answer to Mr. Justice Harlan that I think you have to remember that hovering over these few are a great many others who will be affected, but I don't know what conclusion the Court will come to.

If you come to that conclusion of course it is obvious that this is a class action, then you have to consider the effect on the whole area.

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Justice Frankfurter: My suggestion is I don't have to get into the fog of class action and spurious class action to consider the consequence of rights for 11 what might be called fungible subjects in relation to the 2800.

Mr. Sobeloff: On the other hand, there is this to be said. You have here not a case where the orator in favor of these necessarily displaces other people. What the plaintiffs here are asking is not to be admitted to white schools. Technically what they are asking for is to go, to be permitted to attend schools that are non-segregated.

That does not mean that all 2500 will be in white schools. They are to go to schools in which they are admitted regardless of color.

The problem may not involve a complete redistribution of all. This Court might consider it wiser to defer dealing with the rest.

Justice Frankfurter: But it may involve -- and I do not see easily how it can avoid involving -- considering the educational system of that county and the administrative problems.

Mr. Sobeloff: I am inclined to sympathize with that view. I point out if you take the other view it does not necessarily follow that you have to consider the whole picture. You may say sufficient unto this case is the litigation that is actually before us.

We are going to decide it with respect to the named

plaintiffs and we are going to see what happens.

You may take that view. I am not urging that it is the better view. But I say that there is something to be said for the consistency if you limit it to the 11 of giving them their rights as they would appear if there were only 11.

If, on the other hand, you want to consider it in determining the relief for the 11 whether there are others, the whole scene, then you have to include the whole group.

Justice Frankfurter: It is not a question of wanting, exercising, a preference for this or that. I may speak for myself, the first requisite of a decree of equity is that it be effective and not be merely a piece of paper.

Mr. Sobeloff: I had intended to discuss this Rule 23 (a). I see my time is up and I will be very glad to submit a memorandum.

The Chief Justice: Would you do that, please?

Mr. Sobeloff: Yes, sir.

23(a) which deals with representation is not too long and I think it would be well to have it before the Court by reading it.

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the Court, such of them, one or more, as will fairly ensure the adequate representation of all, may on

bd18  
behalf of all, sue or be sued when the character of the rights sought to be enforced for or against the class is.." -- and then there are three sub-paragraphs 1, 2, and 3.

"One: If the right to be enforced is one joint or common or secondary in the sense that the owner of the primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it."

I think the classic example of that is a stockholder's suit where the officers and directors of the corporation refuse to vindicate the right of the stockholder which he holds derivatively as a stockholder, under certain conditions he may come in and stand in the place of the corporation of which he is a stockholder. I think that is the typical case under one.

"Two: Where the rights sought to be enforced are several and the object of the action is the adjudication of claims which do or may affect specific property involved in the action."

For instance where there is a suit over a common fund or a creditor's action.

And the third, which I think would cover this case:

"Where the rights sought to be enforced are several and there is a common question of law or fact affecting the several rights and a common relief is sought."

This Court could very well say that in the case that we



have been talking about, the South Carolina case, these 11 are representatives of the larger group.

They profess to come in on behalf of others and that these others have with them a common question of law and fact, affecting the several rights and a common relief is being sought.

Here there is no attempt to recover separate damages. It isn't even a case where there is a common disaster and a number of people in an accident have sought relief.

There the Court could adjudicate at one time the question of liability and then have the measure of damages which would make the difference in different cases, determined separately.

Here what they are asking for is a declaration of the law. And an injunction. Now there is no practical impediment imposed here to adjustment that will apply to the whole class. The class at large has been adequately represented, fairly represented.

The unnamed plaintiffs as well as those who are separately, specifically named.

There have been a number of cases. The Court called my attention yesterday to two. I don't think that they are cases that fall within this group 3. The Hansbury case is a case involving a racial covenant on land. It is a case that arose of course before Shelley, and Kramer. The plaintiffs were not litigants in the first case, but they come in a later case

and they say we are entitled to the benefits of the adjudication of this case in which we were not named parties. It was a class action and we are in the same boat.

The answer of this court through Mr. Justice Stone was that the people who sold the land to the plaintiffs in the second case, they had rights which would be affected by the decree and they were not parties in the first suit, so therefore it was not really a class action.

That the sellers of the land whose rights would be determined here were not parties to the so-called class action in the first case and therefore their rights ought not to be determined.

So it was not only the plaintiffs having their rights adjudicated but their grantor. For that reason, the case was not considered a proper class action.

That is readily distinguishable from this situation. The other case that was mentioned, the Ben Hur case.

Justice Reed: There would be a good many defendants that are not present here.

Mr. Sobeloff: I don't know whether that could be said here or not. It may be because of the division of authority in the school districts.

Justice Reed: Yes. Also because this class suit for the benefit of all the children in South Carolina.

Mr. Sobeloff: Is it for the whole of South Carolina?

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Justice Reed: That is my understanding.

Mr. Sobeloff: It is just for those in the school districts. I will check on this.

Justice Reed: The defendants are in only the school districts.

Mr. Sobeloff: They could not possibly hope for the children in another district to be admitted in the schools of this district it must be limited to this district.

Justice Clark: They allege South Carolina.

Mr. Sobeloff: I think in the classical joke, they cover too much territory. I think obviously they can't maintain an action against the school authorities in one district to admit all the children of South Carolina.

Justice Reed: I was just thinking of some possible defendants that were not before the Court.

Mr. Sobeloff: Of course a more serious problem would be where the authority or jurisdiction is fractionated, whether you have in a particular case all defendants before the court that ought to be there.

Justice Frankfurter: You certainly haven't gotten the defendants in the other counties before the Court --

Mr. Sobeloff: Absolutely. That is not even debatable.

Justice Frankfurter: -- If you enter a decree in this litigation unless they want to come in.

Mr. Sobeloff: I don't see that it would avail anybody to

bd22  
get a decree. I don't think the plaintiffs would seriously insist on it.

But it does seem to me that this question never having been decided by the Court, that there is room for holding under this subsection (c) of 23 of Rule 23(c), that this is a class action and you could treat it that way and declare the rights of all these children --

Justice Reed: Even though they have not personally come in.

Mr. Sobeloff: Even though they have not personally come in.

Justice Clark: Could they come in?

Mr. Sobeloff: Even though they have not personally come in, you could say "We will not include those who will come in and wish to come in but we will make provision in the district court to give them an opportunity to come in."

Justice Reed: Would you set a time on that?

Mr. Sobeloff: I think there ought to be a reasonable time like any order of the court that allows people to intervene. It is customary to have a reasonable time, 30 days, 60 days.

Justice Reed: Before judgment or after judgment?

Mr. Sobeloff: Generally the rule as stated applies before judgment. But as I indicated before, there is one case where even after judgment a party was allowed to intervene only

bd23 for the purpose of seeking enforcement by way of contempt against a violator against the injunction.

So the matter is entirely open in this Court. There are decisions both ways in lower courts and we will prepare a memorandum so the Court will have the cases before it.

The Chief Justice: Mr. Solicitor General, we thank you for your cooperation and for your helpfulness in these very important cases.

Mr. Marshall, you may close the argument.

REBUTTAL ARGUMENT ON BEHALF OF HARRY BRIGGS

ET AL

BY MR. THURGOOD MARSHALL

Mr. Marshall: May it please the court, at this stage of the case I would like permission of the Court to break what I have to say into two points.

One, there are some things that I think should be commented upon as to the several state attorneys general and as in our brief we found there are certain general points that run through all of them.

I would like to reserve this time and take the specific ones first and then get to the general ones.

The Attorney General of the State of Florida, for example, had a pretty long argument on the point of leaving this to the local community and what would be done, pointing out the several areas where it had been done and I think at that

stage it should be significant that in the State of Florida, right now, some five years after the decision in the Sweatt and McLaurin cases we still have a case tied up in the Florida courts that has been up here twice, back in the Florida Court and is still there seeking only to break down the exclusion of negroes from the law school of the University of Florida.

That has taken them five years and they have not gotten around to that yet. I think it is quite pertinent to consider how long it would take, without a forthright decree of this court to get around to the elementary and high schools.

This same is true for North Carolina. Even after the Sweatt case it was necessary not only to go to the District Court in Durham for a judgment seeking admission of negroes to the law school of North Carolina. It was not only defended by the attorney general's office. We had to appeal to the Court of Appeals for the Fourth Circuit, which reversed the District Court and ordered the negro admitted.

The State then petitioned this Court for certiorari. So in North Carolina it took quite a bit of time to get around to the Sweatt and McLaurin decision.

It is significant that Arkansas, while waiting to see what happened in this Court, I think their good faith can be shown in two points, where, one, they adjourned the present session of the legislature and they won't be back until 1957, I assume to get around to then begin a discussion of the May 17th

decision.

Oklahoma, it is significant that whereas most of these states complain about the terrific legislative problem involved in changing statutes to finance their schools as a result of whatever decree might come down from this Court, that Oklahoma in a few months not only passed necessary legislation but amended their constitution to do it and I think that pretty well takes care of the argument about the state being unable through its legislative machinery to make its necessary adjustments.

Justice Frankfurter: Doesn't that indicate variations in state conditions?

Mr. Marshall: It involves variations, Mr. Justice Frankfurter, but I think they are immaterial.

Justice Frankfurter: Maybe they are immaterial, but if they are necessary then since I cannot, with every respect to Oklahoma, attribute very special biological virtues to the inhabitants of that state, can only draw a conclusion that there must be some other factor.

Mr. Marshall: I think you are right, Mr. Justice Frankfurter, and I think at that state I should remind the court that the State of South Carolina folks in *Smith against Allbright*, the primary case in sight, had no trouble in calling a special session of the legislature to repeal all of their primary laws to circumvent the decision of this Court, and I

326 would assume that all of the states could equally get a meeting of the legislature to comply with this Court.

And as for the argument of the State of Maryland, my native state, I think I should say in the beginning that the comment made by Attorney General Sybert that all of the thoughtful negro and white people in the State of Maryland are for this long, prolonged, gradual business, I am afraid that as a Marylander I am in the thoughtless group, because there is no question in my mind about that.

And it is significant that the Attorney General of Maryland in asking for time, for unlimited time, based it on the fact that they were making such terrific progress on race relations to the point that this year, last year in 1954 they abolished the scholarship provision to send negroes out of the state which was declared unconstitutional by this Court in 1938, and by the Court of Appeals of Maryland in 1936.

So that it took them 16 years to catch up with the law of their own court of appeals and the law of this Court and use that as the basis for saying that because of their good faith we should work the problem out.

As to the state of Texas, we pointed out in our reply brief something that I think is very significant.

That Texas poll, the exact same agency that took a poll in the Sweatt case, and they found in the Sweatt case an even larger number of people that were bitterly opposed to



negroes being admitted to the University of Texas.

And yet when we know that negroes were admitted to the University of Texas, they are going there now, and our brief also points out that negroes are attending parochial schools throughout Texas on a non-segregated basis, and that many, more than half of the junior colleges in Texas, the municipal junior colleges, have been desegregated since this case has been pending.

The points I am only trying to make there is this leaving out what I consider to be important points. And throughout all of this, it is very significant that the State of Texas had great difficulty through its representative here admitting that in these counties within this area with this very small number of negroes, that they could not take some courage from what happened in Arkansas in those two counties.

I can see no reason that makes Texas so different from Arkansas. And finally as to the specifics, as I understand the position of the United States Government on this one point of time, the original position was one year, then you could come in and ask for more time, and in the brief they filed just last November they take the position that they would not like to see a time limit fixed because what would be a minimum time limit might actually become a maximum time limit, that the school board might tend not to start work until the end of the year.

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Well, so far as the appellants in these cases are concerned, if we could get the time limit on the year we would be willing to take our chances that it would not be done until the end of that year, we would be perfectly satisfied.

So there I think the Government's position gets back to its original position of one year.

The only thing we don't agree on is the question of extension of time.

As to what runs through all of these arguments of the states, if I remember correctly, practically every Attorney General who appeared before this Court and those representing the Attorney General either began or some time in the argument said there was no race prejudice involved, there was no racial hatred involved, there was no bitterness involved.

And then I think you can take the balance of each argument made by the State Attorneys General and find out whether or not that is true.

Most if not all of them said that it was all right, there were very few negroes involved like in Arkansas, that it is possible they could be integrated, that there might not be friction.

And then they said "However, where there are a large number of negroes involved and only a small number of white people involved, that is the most horrible situation."

So on the one hand they say that where the majority,

the big majority are white, a very small minority is negro, you can do it, that is the most feasible, the nicest problem.

And the other is the reverse. Well, the only way to understand that is that in one category you have a small number of negroes and in the other category you have a small number of white students, and the only difference between the two is negro and white, and if that is not race I don't know what race is.

And that is the argument that is made throughout these cases.

I think that we should keep coming back to this point. That we look at this case as a regular legal proceeding. And then we look at that in the broader perspective. The decision on May 17th, forthright straightforward position of the law of this country as pronounced by its highest Court, since that time, partially because of the leaving open of these two questions, but throughout areas of this country, stimulated by statements of state officers, attorneys general, governors, et cetera, the whole country has been told in the South that this decision means nothing as of now.

It will mean nothing until the time limit is set. So when you conceive of it in that framework, this time limit point becomes a part of the effectiveness, forthrightness if you please, of the May 17th decision.

That is why yesterday and the day before this Court was

bd30 told over and over again that these states were not moving at all until they found a time limit.

So to my mind whereas in an ordinary case the question of details of decree are more or less minor matters -- or there are exceptions to it that do not reach the level of high constitutional principle, but in these cases they do reach an equal level with the forthrightness of the May 17th decision.

And when we take that position, at least we urge upon the Court, there is considerable difficulty in getting to the other problems.

One side, for example, of course, no court I am certain would agree, as was suggested by one of the Attorneys General, that in deciding as to the time for enforcement of a constitutional right the Court would hit a middle ground between two positions.

We are not in this Court bargaining on a negligence case or something like that.

It is significant -- I might be wrong. I know it has happened in cases involving statutes, even Federal statutes, even anti-trust, for example, statutes.

But I don't believe any argument has ever been made to this Court to postpone the enforcement of a constitutional right. The argument is never made until negroes are involved.

And then for some reason this population of our country is constantly asked "Well, for the sake of the group

that has denied you these rights all of this time", as the Attorney General of North Carolina said, to protect their greatest and most cherished heritage, that the negroes should give up their rights.

If by any stretch of the imagination any other minority group had been involved in this case, we would never have been here.

I just cannot understand at this late date why we constantly are faced with that. But we are faced with it and we have to meet it as best we can.

The next point I want to make on the general side is what I made before, and that is the need for uniform application of our Constitution and all of its provisions throughout the country so that freedom of the press won't mean one thing in one state and another thing in another state, so that all of these rights in the Constitution -- it has never been said on any other right that I know of that special exceptions should be made as to one state or the other.

And as of this stage of these arguments, there is the real possibility that in Claxenden County, South Carolina, for example, we could have three different rules in the same county because there are three school districts there, and the same of course would be true on and on.

To my mind that is not the way that our Constitution is to be applied. Local option I still say is what is urged.

And it is not local option even statewide, because each Attorney General said it is going to be different from one area of the state to the other, and Texas went so far as to bring in maps to show that it would operate from one area to the other in a different fashion.

I am sure that the State of Texas does not even administer their own constitution in varying areas of various sections of the country.

But they want the Federal Constitution. And the most significant comment made over and over again was that the difference between acceptance and rejection of a constitutional position depended on whether it was pronounced from within or without a state.

I think maybe that is the best answer I know to any claim that this is not local option.

While I am on that point I would like to come back to the class action point which I was asked and which has come up again. It is true that in both of these cases the class was made for all of the negroes in the category of school age within the state.

We expected at any time that that would be limited. The idea was to make the class as broad as possible and when it got limited, we would not be down to nobody.

Obviously I agree with the position that has been made here this morning by several of the Justices. Obviously

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we can get relief from nobody who is not in court, and there is no intention on our part to bring in any defendants from any other counties when we get to the district court.

We would not think of doing such a thing. It applies only to the negroes in school district number one in Clarendon County who are of school age, resident, et cetera, in school district number one. In the present posture of this case it does not, could not even include the entire county.

The largest group it could cover would be those in school district number one. The largest group it could possibly cover in Prince Edward County would be the negroes of high school age in Prince Edward County and it could apply to no one else.

Justice Frankfurter: In numbers, how many would that be?

Mr. Marshall: In Clarendon County I think it is 28 and in Prince Edward it is 800.

Justice Frankfurter: With reference to the high school age, 800 would be involved?

Mr. Marshall: Yes, sir, a total of 800. I understand it is 863 white and colored, 400 and some negroes.

Justice Frankfurter: The question is intermixing these students, allowing them free access, not allowing any students to be barred merely because of color?

Mr. Marshall: Yes, sir, it would only apply to that number, 400.

Justice Frankfurter: And numerically would that cover 400 or absorb 400?

Mr. Marshall: It would be 450-some.

Justice Frankfurter: That is 400 are now excluded merely because of color?

Mr. Marshall: That is right, and the only thing we want is to say that you can't exclude that many which is all of the negroes involved.

Justice Clark: How many are named in this case in Virginia?

Mr. Marshall: I can tell you in Virginia it was 45, in the Clarendon County case that number is much smaller.

And I may say, Mr. Justice Clark, that after the questions yesterday I made every effort to get some of our people in Clarendon County on the phone to find out how many were actually in as of today, and I could not get ahold of anybody.

Justice Clark: How many in Prince Edward are named in the case?

Mr. Marshall: There are 119 named. 119 named plaintiffs.

Justice Clark: The Courts named them in that county?

Mr. Marshall: Yes, sir.

On that particular point, if the court please, I think we ought to emphasize the fact that this is an action



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under the three-judge statute aimed at having declared unconstitutional a state statute of statewide application, and the constitutional provision obviously, and that the class action is merely a procedural device that instead of naming 5 or 6 thousand people or what have you, instead of putting all of them down, it is just merely procedural.

But that the effect of a statute being declared unconstitutional by this Court does at least have statewide significance as witness the fact that the statute requires you to notify the state attorney general that you are about to attack his statute.

And so that so far as the basic issue in this case is concerned, it is to have the statute declared unconstitutional

Once the constitutional provision in the statutes are declared unconstitutional, then we come up against the problem as to whether or not a state officer is going to operate under a statute that is unconstitutional.

Insofar as the district involved in this case is concerned, we, the negroes not named, we are certain as our research will show that they can intervene any time before judgment and merely show that they are within the class involved.

Once they do that, they can take the same position that a named plaintiff would have.

The Chief Justice: Mr. Marshall, are your authorities on that subject in your brief?

Mr. Marshall: No, sir.

The Chief Justice: Would you furnish them to us?

Mr. Marshall: We will be very glad to, sir, but I say in all frankness that they are pretty much the same as the Solicitor -- there is really very little dispute on it.

It has not been decided by this Court, but the thing I want to say is aside from these cases, that it is the most difficult problem if every negro in the South has to go to court to get the rights that everybody else has been enjoying all these years.

I grant that it is not before the court. But we thought the class action was this procedural device so that when it comes down to the district court, I mean when the judgement comes out of the district court, that whoever is administering that policy will recognize the law and not just admit McLaurin into the University of Oklahoma or Sweatt into the University of Texas but let all negroes who are qualified in.

Justice Frankfurter: If it would not interfere with the course of the argument you ultimately have in mind, would you care to sketch what you see to be the sequence of steps of events if there were a decree in terms, say, that not one of these 400-odd, whatever the number may be in the school districts, including the ones in Clarendon County,

not one of these children should be excluded from any high school in that district for reason of color.

Suppose that were the decree, what do you see or contemplate as the consequence of that decree?

Mr. Marshall: If that decree were filed with nothing more then I would be almost certain that the school board through its lawyers would come into the district court either before -- this is a possibility that I have to put two on.

If they don't admit them and we file a suggestion of contempt with the District Court --

Justice Frankfurter: Before you get to contempt there must be some action which would be the basis of contempt. What do you think it would involve as the consequence?

Mr. Marshall: They refuse.

Justice Frankfurter: That is that the hundred, or four hundred students would knock at the door of the white schools.

Mr. Marshall: Oh, oh, that, no, sir, not necessarily because there is not room for them.

Justice Frankfurter: I should like to have you spell out with particularity just what would happen in that school district.

Mr. Marshall: Well, I would say, sir, that the school board would sit down and take this position with its staff, administrative staff, superintendents, supervisors,

et cetera. They would say "The present policy of admission based on race, that is now gone. Now we have to find some other one." The first thing would be to use the maps that they already have, show the population, the school population, then I would assume they would draw district lines without the idea of race but district lines circled around the schools like they did in the District of Columbia.

That would be problem No. 1.

Problem No. 2 would then be "What are we going to do about reassigning teachers?"

Now that there is no restricting about white and negro it might be that we will shift teachers here or shift teachers there.

Third would be the problem of bus transportation. We have two buses going down the same road, one taking negroes, one taking whites.

So we might still do it that way or we might do it another way.

Justice Frankfurter: Throughout all this period, I wouldn't know how long that would be, there would be no actual change in the actual intake of students, is that right?

Mr. Marshall: I would say so, yes, sir.

Justice Frankfurter: All right.

Mr. Marshall: I would say so. That was the point I was going to get to.

And assuming that they are doing that and the time is going on, they might come into the district court and ask for further relief, which would be to say "We are working in good conscience on this. We just can't do it within a reasonable time." Or, "We would go into court and say they are not proceeding in good faith," either way the district court would at that stage decide as to whether or not they were proceeding in good faith, at which stage the district court would have the exact same leeway that has been argued for all along.

Justice Frankfurter: Now as to primary schools, that is if that is what they are called.

Mr. Marshall: Yes, sir.

Justice Frankfurter: The problem would be a little different because the number makes a difference.

Mr. Marshall: Well, it would be different because of numbers. The figure shift would be the shifting of the children.

Justice Frankfurter: I am assuming that under the responsibilities of the law officers in various states, there would be a conscious desire to meet the order of this Court. I am assuming that this process which you outlined would proceed, wouldn't that be a process in each one of these school districts?

Mr. Marshall: That would be and I think that that is the type of problem.

The only thing is we are now on this do-it-right-away point.

Justice Frankfurter: Your analysis shows that do-it-right-away merely means show that you are doing it right away, beginning to do it right away.

Mr. Marshall: I take the position, Mr. Justice Frankfurter, this has been in the back of our minds since Question 4 (a) and the others all along, as to whether or not we will be required to answer this in the context which we have been answering this, or whether it was not the question of contempt, that it would never come up except on contempt.

Justice Frankfurter: That is the way it would come up.

Mr. Marshall: The way you put it.

Justice Frankfurter: The school authorities would say we have not got the room or we have not got the teachers or the teachers have resigned or a thousand and one reasons or 20,000 reasons, that develop from a problem of that sort; you couldn't possibly proceed in contempt, could you?

Mr. Marshall: I doubt that we would even move for contempt.

Justice Frankfurter: Except there might be different difficulties of interpretation as to the reasons for delay.

Mr. Marshall: And for example we would not recognize as reason for delay the waiting for those attitudes to catch up

with us. We would not recognize that.

Justice Frankfurter: Well an attitude might depend on the non-availability of teachers. That might be an attitude.

Mr. Marshall: There would always be availability of competent capable negro teachers, always.

There is no shortage. And I think it is very significant in New York --

Justice Frankfurter: I am not sure why you say that with such confidence. In different localities established as you well know, better than I --

Mr. Marshall: Yes, sir.

Justice Frankfurter: Why do you make such a statement?

Mr. Marshall: Well, there are so many that are in areas that don't want to leave because of home ties or what have you, and because they are so well trained there are school boards that won't hire them because they don't want them, and those are very available, I mean well-qualified teachers, sir.

North Carolina, they take a most interesting position: They say the negro teachers have more experience, more college training.

Justice Frankfurter: You have heard that the bar of this Court with considerable pride stated those standards of negro teachers.

Mr. Marshall: Yes, sir, and it was followed by the

fact that they would deprive the white children of the benefit of superior teachers and fire the negro teachers.

Justice Frankfurter: I merely suggested in the areas of education that I know something about a plethora of well-equipped teachers is not there.

Mr. Marshall: Well, it is on the broad general figures, Mr. Justice Frankfurter, but on the negro side we are producing them and in all frankness as the Attorney General of North Carolina, Mr. Lake, said in the South that is about one of the few places they can get work.

And you have maters, M.A.s, that are unemployed.

The other point that I would like to come back to is to continue this class point as I see it affects these cases.

The named plaintiffs, I think there is no question they are entitled to relief. And on some of the questions it seems to me that if the named plaintiffs in such a small number are admitted, I would not have the real physical difficulties if you only admitted, if the school board only admitted those named plaintiffs.

However, it seems to me we have to be realistic, and most certainly by the time the case, before the case gets to judgment, many if not all of the other negroes will have intervened when they find that they are not protected and the only way they can get protected is to intervene.



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The only thing it seems to me is this, that it is going to be difficult to consider this in the narrow named plaintiff category without the understanding that the whole class will eventually be in it.

That brings me to the next point, which is that I hope the Court will bear in mind the need for this time limit, which I come back to, because in normal judicial proceedings in these and other cases, there will be so much time lost anyhow.

We have to go before the local school board, we have to exhaust our remedies before we can go into court, there is no question about that.

Then we get into court and then unless we have this time limit, we most certainly will have this terrific long extended argument and testimony as to all of these reasons for delay, which I or any lawyer would be powerless to stop.

It would depend of course on the district judge.

But as of this time, the only valid reasons that have been set up have been the reasons set up relating to the physical adjustments and not a single appellant, appellee and not a single Attorney General has said one thing to this Court in regard to physical difficulties which could not be met within a year.

I come back to our original position as to why we picked a year.

3d44 We picked a year because we talked with administrators, school officials and we just could not find anything longer than a year. I submit that the American Tobacco Trust case, which we have on about the next to the last page of our brief, which involved a dissolution of this trust, this Court said that because of the involved situation and everything, a time limit had to be set, and this Court set a six months' time limit and told the district court that you can give them an extension of 60 days if they show valid reasons.

However, if you are convinced they can do it in less than 6 months, see that they do it in less than 6 months. Now that is at least one case in which this Court did do it on the basis of whatever material was before them, and the material you have before this Court at this time shows that we certainly have a right, if nothing else was shown, we would have a right to this immediate action, the time to take care of these administrative details, and that you have nothing else to go on.

The other side has not produced anything except attitudes, opinion polls, et cetera.

On the basis of that, it seems to me we get back to the normal procedure which would be the type of judgment from this Court that would require them to be admitted at, let us say, the next school term, and the contempt side, as I mentioned before.

Or what I consider to be the more realistic approach,

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which would be to let the other states involved know and the other areas know that it will not do you any good, if there were no time limit fixed the school officials in the other states that will follow whatever this Court will say, if they knew that they had a chance, just a chance of getting interminable delay from the District Court after the lawsuit was filed, then I would imagine that they would not begin action until after the lawsuit was filed.

However, if they knew that if a lawsuit was filed they would have to either desegregate immediately or would get no more than a year, they would start working.

So it seems to me that if I am correct in that, then this time limit gets so involved with this constitutional right that so far as not the plaintiffs in these cases are concerned but insofar as precedent, effect and so forth in the country is concerned, that now this time limit is involved with the constitutional right and that the statement on time should be just as forthright as the statement was made on the constitutional position taken in the May 17th decision, and so we submit to the Court that on behalf of the appellants and petitioners we have been appreciative of all of this time that has been given.

The last thing that I could possibly say is what I said in the beginning. That in considering problems as tough as these, and they are tough, that what I said before is

apropos now. It is the faith in our democratic processes that gets us over these, and that is why in these cases we believe that this Court, in the time provision, it must be forthright and say that it shall not under any circumstances take longer than a year.

And once having done that, the whole country knows that this May 17th decision means that the protection of the rights here involved of any person in the category, any negro, will get prompt action in the court.

Once that is done, then we leave the local communities to work their way out of it, but to work their way out of it within the framework of a clear and precise statement that not only are these rights constitutionally protected, but that you cannot delay enforcement of it.

Thank you very much.

The Chief Justice: Attorney General Almond, do you have any rebuttal to the argument of the amicae?

REBUTTAL ARGUMENT ON BEHALF OF PRINCE EDWARD  
COUNTY, VA.

BY MR. ALMOND, ATTORNEY GENERAL

Mr. Almond: Mr. Chief Justice, I thank you for that. We feel in Virginia that we have said all we could say in support of our contention before the Court.

I do not know that we could add anything further unless there were some questions which the Court wished to propound

to us.

Otherwise I thank you.

The Chief Justice: Thank you very much.

Is counsel for South Carolina here?

The same opportunity would be tendered to them, of course, if they were here.

(At 1:15 p.m. the oral arguments were concluded.)

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