Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

BEATRICE ALEXANDER, ET AL.,

Petitioners

vs

HOLMES COUNTY BOARD OF EDUCATION, ET AL.,

Respondents

Docket No. 632

Place Washington, D. C.

Date October 23, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

****

BENHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

BEATRICE ALEXANDER, ET AL., Petitioners	
vs	No. 632
HOLMES COUNTY BOARD OF EDUCATION, ET AL., Respondents	

The above-entitled matter came on for oral argument at 12:30 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

JACK GREENBERG, ESQ.
10 Columbus Circle
New York, N. Y. 10019
Counsel for Petitioners

LOUIS F. OBERDORFER, ESQ.
Washington, D. C.
Counsel for Lawyers' Committee for
Civil Rights Under Law (amicus curiae)

JERRIS LEONARD,
Assistant Attorney General
Department of Justice
Washington, D. C.
Counsel for the United States

A. F. SUMMER,
Attorney General of Mississippi
Jackson, Mississippi
Counsel for Respondents

JOHN C. SATTERFIELD, ESQ.
Yazoo City, Mississippi 39194
Special Counsel for Respondents,
other than the U.S.A., associated
with other attorneys of record in
each of the Consolidated cases.

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: You may proceed whenever you are ready.

MR. GREENBERG: Mr. Chief Justice, and may it please the Court: These cases are here under a writ of certiorari to the United States Court of Appeals for the 5th Circuit. They involve the issue of the timing of desegregation of 14 Mississippi School Districts and the procedure by which this is to be accomplished.

The basic issue here is how much longer Negro school children in these cases in 14 Mississippi School Districts, must wait to realize their constitutional right to attend desegregated school systems required by this Court more than 15 years ago.

MR. CHIEF JUSTICE BURGER: Mr. Greenberg, I overlooked advising you and co-counsel and friends that Mr. Justice Brennan was unavoidably detained, but he will participate in the case on the basis, of course, of the entire record; the briefs and the tape recording of the oral arguments. Excuse me for hot having clarified that previously.

MR. GREENBERG: Thank you, Mr. Chief Justice.

The basic issue here, as I said a moment ago, is how long Negro sdhool children in these districts must wait to realize their constitutional rights to attend desegregated schools decreed by this Court more than 15 years ago.

The law has been disobeyed by Respondent Districts and the courts below have not required obedience. We submit that the issues must be seen in historical context, for only in that context is it apparent why that we urge that this Courts expression on timing must be unequivocal and furthez, why particular procedures which we will describe below are called for torachieve compliance with the Constitution.

The Plaintiffs in this case live in school district in a state whose resistance to the 14th Amendment that is second to none. From 1954 to 1964 there was no school desegregation in Mississippi; instead the state passed doctrines of interposition and nullification.

Indeed, the University of Mississippi desegregated not until more than a decade after this Court's decision in Sweatt against Painter; only after what can be called resistance with the quality of rebellion and that at the cost of life.

Not until 1964 did the Mississippi Federal Courts acknowledge that children of that state were subject to the requirements of Brown against Board of Education and the first case was Evers against Jackson Municipal Separate School District. Shortly after the filing of that case, Medgar Evers, the Plaintiff, was shot and killed, a fact which bears upon Respondent School Districts continuing to adhere to freedom of choice and the legality in Mississippi.

But the sorriest part of the story lies in the exercise of discretion by some United States District Judges in that state. That discretion, which in ordinary cases is necessary and salutary, has been as to the setting of the hearing; the time it takes to render judgment; the refusal to file the claim attendant to the proceedings of this Court, the Court of Appeals; and the exploitation of ambiguity -- real ambiguities and fancied ambiguities in the decisions of this Court and the Court of Appeals.

The District Court has commenced disciplinary procedures against a civil rights lawyer, R. Jess Brown, merely because he filed a Leake County case which is here as part of these proceedings, and sought to keep out-of-state civil rights lawyers from handling cases in the state, only to be reversed by the Court of Appeals.

All of this has had the effect of perpetuating the status quo, pendente lite and so far in Mississippi the status quo pendente lite has been racial segregation or minimal token desegregation. Indeed, in these cases the delay of the District Court became so great that the Court ofAppeals was requited to take the unusual step in an order of August 20, 1968, setting a deadline for hearing in the District Court.

Titus and the United States had appealed the District Court's refusal to set an early hearing on motions, following this Court's decision in Green versus New Kent County. The

Court of Appeals set November 4th, 1968 as the deadline for hearing on Titus' motions and it directed the District Court to enter an order granting relief within the 1968-69 school year.

The District Court did neither, notwithstanding the Court of Appeals' November 4th deadline. The District Court failed to render an appeal for five months and this precluded any relief for the '68-'69 school year.

By May 13, 1969 it entered an order upholding the same old freedom of choice plans on a totally unsupported assumption that freedom of choice might work in the future.

The District Court here, astoundingly enough, consisted of over 3,000 pages of testimony, most of which was devoted to the asserted proposition that Negro school children are the inferiors of white.

The May 13th District Court Opinion reaffirming the freedom of choice plans, justified their failure to have desegregated because they do not think school boards should proselytize in the Negro community and urge Negro children to go to white schools.

The Court of Appeals reversed on July 3, 1969.

Q Pardon me, Mr. Greenberg. Could you tell me what you mean about your sentence about proselytizing?

A Yes. That's an opinion.

Q I missed what you said; could you repeat it?

A Well, the reason why they said freedom of choice might work -- why freedom of choice had failed to work was because the Court of Appeals Jefferson Order says that school districts could not go out into the community and urge children to attend certain schools -- prohibiting them from doing that. And they said that is why it didn't work.

The Court of Appeals on July 3, 1969 announced its timetable which gives rise to the instant petition. The Court of Appeals requested the Department of Health, Education, and Welfare to draw up desegregation plans for the Respondent District and present those plans to the District Court by August 11'69 for hearing on August 23rd, if there were any objections in the Respondent School Districts.

September 1st, eight days later, was the deadline for implementation of the plans and the Court of Appeals Order used the term "immediately." Accordingly, a team of 77 educators from the Department of Health, Education, and Welfare, with distinguished credentials that appear in the record and are reproduced in the Appendix to our petition, paid a series of visits to the school districts in question and produced detailed plans.

Now, we have filed with the Court sets of these plans here, a sufficient number for each Justice to have a set of plans; detailed plans for the desegregation of the school districts in question.

One is inspections and plans compared to numerous other plans which have found their way to the courts, and to this Court I only find that they are as careful and detailed as one might hope for -- the mechanics and logistics and number of students and number of rooms and the drawing of zone lines, in addition to which they go into something which they have made much of on and off again in various parts of the proceedings below: the whole question of human relations and announcing the necessity of obedience to the law and setting up training sessions and training teachers to work in teams and so forth and so on.

On August 19th, however, the Secretary of Health, Education, and Welfare wrote a letter to the Court of Appeals and the District Judges withdrawing these plans. The letter stated that as the Officer of the United States Government with the ultimate responsibility for the education of pupils in this nation, he concluded that time allowed for development of this plan was too short. His letter appears in the Appendix to our petition on Page 64(a) and we quote: "As to the reasons sketched, the administrative and logistical difficulty which must be encountered and met in the terribly short space of time remaining must surely, in my judgment, produce chaos, confusion and catastrophic educational setbacks to 135,700 children, Black and white alike who must look to the 222 schools of the 32 Mississippi Districts for their only

available educational opportunities.

I might add that of the 14 cases appealed of the 32 districts, it was only the private plaintiffs that have taken this case to this Court and the Government, which is the only Plaintiff in the remaining cases, has not.

The Secretary's letter mentioned no particular facts concerning any particular district. In view of the letter the circumstances of some of the district which had only two or three schools, with only a few hundred pupils, were indistinguishable from districts with thousands of pupils. Enrollmentsin the districts varied from 720 in one district to 11,000 in another. As calculated, the median figure was about 2700 children per school district.

Not a single unit of the statistical factors mentioned a time for the particular school; a time for the period of time, much less described -- no time was described at which the new desegregation plans were to be complied with or to be done. The letter was completely open-ended, only proposing resubmission of some plan by December 1st.

Having seen this letter, the Court of Appeals asked the District Judge to hold a hearing on the Secretary's request to withdraw plans, which the District Court did. The Secretary's letter was filed by motion of the Department of Justice, I might add.

At the District Court hearing, which was the hearing

of August 25th which appears in this particular court reporter's transcript here, several facts appeared to which I make contradiction. One is that no particularly difficulty, administered or otherwise, with respect to any particular school system was identified. The sort of things that were said about these schools could be said about any school in any condition, whether in the process of desegregation or not.

Second, in all likelihood it is quite clear that the existing plans will be brought back again with no difference or any material difference; and on our brief on Page 21 as we said before, from testimony that occurred -- this is in the brief on the petition -- some testimony which occurred in the trial court here and Mr. Leonard interrogated one of the witnesses from the Department of Health, Education, and Welfare, Mr. Jordan:

"Q Mr. Jordan, I want to clarify to be sure the Court and Counsel all understand your position with respect to the delay. Should the Court grant the delay, am I clear that it is your position that even with the delay that in all likelihood the plans will be very much similar."

"And these officials of the school boards have said, who work at the Office of Education now, in fact, October 1st to prepare for the movement from a dual to a unitary system. Is that true?"

"A That is correct."

And there is no evidence that there is going to be -- and, incidentally, I might say that two witnesses testified; one in respect to three school districts. He said that two of the districts were practically identical. As to the third, he was not aware; he did not identify any particular change.

Third: The matter of timing, which is, of course, one part of -- a crucial part of the issue here. A -- contemplating and drawing up of plans originally -- when the Court of Appeals gave a mandate or presented a question to the Department of Health, Education, And Welfare, it requested the Department of Health, Education, and Welfare to draw plans of what is the certain timetable. That timetable was that those plans might be worked into effect on August 23rd and if ordered into effect on August 23rd they were to be plans which between August 23rd and September 1st would become operational.

Now, Mr. Andry, who was the Chief of all the experts who examined the school systems. Mr. Andry wrote a letter which is in the record here at Page 44a of our Appendix in which he addressed himself not only to the substance of the plans, but the timing. On Page 44a of our petition, is a rather lengthy letter that discussed in critical detail how these plans were developed. He says:

"I believe that each of the enclosed plans, educationally and administratively, both in terms of substance and in terms of timing --"

Q May I ask you a question? Did the original Court of Appeals contemplate that the filing of objections to the plans, the hearing in the District Court on any objections review in the Court of Appeals and the possible petition to this Court for certiorari would all take place between August 11 and September 1?

A It did not express itself on all aspects -- I imagine that one of the problems would be -- he did contemplate there would be objections and he issued a -- on the issue as to stays and so forth. But it did contemplate that there would be objections. If there were no objections the plan would go into effect; if there were objections they might go into effect, nevertheless. He did not discuss the timing of any review that any party might seek.

Q Let me see if I get that latter part of your response here in mind. Did the Court of Appeals' opinion either contemplate or can it reasonably be considered so that a plan submitted in that latter week could have been put into effect, either before or during the period when objections were being found to it and executed, pending any further reviews in this Court?

A The Court of Appeals Order did not address itself to what was happening between the time of the entry of an order for putting plans into effect, in any review which any party might seek. It did not address itself to that, in spite

of the fact that we wanted the plans to go into effect on September 1st.

Q If the report submitted to the District Court was accepted by the District Court and ordered him to -- into execution at that time, that is to say in time for September 1st or thereabouts, would you think this would have been within the power of the Court of Appeals to let that plan be carried out, pending any appeal and further proceedings?

A Oh, certainly, Mr. Chief Justice; and that has occurred on other occasions. And in several cases in this Court at this time such as the case of Oklahoma City and Denver there are plans in effect pending review.

There is a paragraph on Page 37a of the Court of Appeals' Order which I think partly answers the question explicitly and partly indicates the Court of Appeals' attitude to such a proposition; that is what shall happen to a review. If I may, I would like to read it.

"To determine the urgency of formulating an approved plan to be implemented in the 1969-70 school terms, it is ordered as follows: the mandate of this Court shall issue immediately and will not restate any petitions for rehearing certiorari." Now, that's the mandate ordering these studies to be made and the aspects of which we were talking about.

One might assume the same attitude would carry over subsequently, of course.

Q Where were you reading from?

A Page 37a, paragraph 8.

Q Of what?

A I'm sorry; of the Appendix to the Petition for Writ of Certiorari.

The mandate of --"because of the urgency" -- the record's urgency -- "of formulating an approved plan to be presented for the 1969-70 school term is ordered as follows:

"The mandate of this Court shall be issued immediately and will not be stayed pending motions for rehearing of certiorari. This Court will not extend the time for filing petitions for rehearing or briefs in support of or in opposition thereto. Any appeal for orders or decrees of the District Court on remand shall be expedited. The record of any appeal should be lodged with this Court and Appellant's brief filed all within ten days of the date of the Order of the District Court from which the Appeal is taken. The Court will determine the time and place for oral argument, if allowed -- The Court will determine the time of briefing and for oral argument, if allowed." That's a repetition in there.

"No consideration will be given to the fact that interruption of the school year in the event further relief is indicated." I would say that indicates an attitude of urgency which makes it exceedingly unlikely that the Court of Appeals would stay any order that there might be as to

desegregating these schools.

So, it does not address itself specifically to the question of that.

Now, the objection that -- to implementing the plans which were brought out in the testimony of the District Court in the hearing of August 25: Not linked to any district; not linked to any educational, administrative or logistical factor; not linked to any particular time for any generalized objections; do not even begin to approach the requirements by the showing prescribed by the second Brown decision, much less by the attitude of urgency that has been expressed by the Courts in recent decisions in which, as Mr. Justice Black has said in his Opinion in Chambers, the Court has expressed the view that the time is now.

The District Court, following the hearing, recommended that the delay requested by the Secretary be granted. And the Court of Appeals, in citing what occurred -- what had occurred, without comment or explanation did just that.

Petitioners, after having asked Mr. Justice Black to vacate the Court of Appeals' amendment concerning the Order, brought the case here on certiorari and this Court has granted a review, according to an accelerated schedule.

We submit the Order of the Court of Appeals, as amended, be vacated and urge that this Court do two things: First, we submit that the history of southern school

desegregation in certain areas, such as these here today, calls for a declaration by this Court, in the words of Mr. Justice Black, "that petitioners are entitled to have their Constitutional rights indicated and now, without postponement for any reason," or as he put it otherwise: "There are no longer statistical issues in the question of making effective, not only promptly, but at once, now, orders sufficient to vindicate the right that any pupil in the United States would effectively be excluded from a public school on account of his race or color. No delays should be permitted for administrative or any other reasons."

Second, and we think this is perhaps more important because we think the Court has -- well, not entirely explicitly, very explicitly indicated the former that we asked. We asked for the institution of procedures which will make this declaration effective. The nature of the procedures we suggest derive from the problem presented by maintaining segregation as the status quo pendente lite, So long as that is the case, there is a premium on litigating ad infinitem. There used to be a motto: "Segregation forever;" now it's become "litigation forever," making thousands of pages of record on such things as the intelligence of Negro children, delaying the setting of hearings and the entry of orders and effective dates and plans.

We urge that the plans of the Department of Health, Education, and Welfare, are filed with this Court; that these

plans here be put into effect immediately.

We urge, therefore, that this Court issue its mandate forthwith in the Court of Appeals, directing that it requires the District Court to put the HEW Plans on file in this case into effect immediately. To that there is one exception: the plans for Holmes County and Meridian in these 14 cases are written to take effect in 1970 and '71. HEW or some other agency designated by the Fifth Circuit should be directed immediately to revise those plans to take effect at once; not in 1970 or 1971.

All hearings should be held on an expedited schedule to be set by the Court of Appeals.

Now, I'd like to say a word as to what we mean by "immediately." Obviously, some time is required to take care of the mechanics of calling children to classrooms and telling them of new assignments and notify bus drivers and so forth. The existing plan calls for the Court of Appeals -- called by the Court of Appeals on July 30 to compensate for a period of eight days, from the period of August 23rd to ending date of September 1st.

The plans were drawn to be implemented within that period of time. It was designed with that in mind. We submit that no more than that amount of time is necessary, and probably less, although the schedule should be explicitly set forth in the Order.

Q What is the time situation at these schools?

A There is no mid-semester break. There is no mid-year break; the year continues --

Q Is there a Christmas break?

A There is a Christman vacation.

Q How long?

A I am not certain, Mr. Justice Harlan. I would assume it is the typical Christmas vacation.

Now, I would like to point out --

Q And they are not semesters or trimesters?

A I made a great deal of inquiry about that and the uniform reply is "no."

I would like to point out that we have had some difficulty in formulating this portion of our argument -- that portion which defines the word "immediately," in terms of, as we put it, "now; eight days or less." And there is a reason for that, because we fear that any expression by the Court authorizing even such limited delay will be exploited by the Defendant school boards in these cases and the other cases as theoretical justification for further delay.

A fixed time deadline, we have finally concluded, is vastly preferable to reiteration of principles about de-segregating as soon as possible and which will result in further litigation.

I'd like to elaborate somewhat on the reasons for

these two requests made --

Q Before you get to that, Mr. Greenberg, does this mean that a good many children would change schools and teachers, I suppose?

A Yes.

Q And the faculty would be reassigned?

A In some cases; yes, sir. Yes, they would do that; yes, certainly.

Q What would it do or how would it say if the child is going to one school and then under this plan would be going to another school with a different teacher. What would be -- would that pose any difficulty at all in terms of his completing his work that year or --

A Well, I think it would pose some difficulty, yes. I think the difficulty, however, would not be great. It is not more difficult that what occurs in some districts -- I can think of/right offhand where there have been teacher three or four strikes; where there was a hurricane in Mississippi, they can put their schools back together pretty quickly. They -- it would be some difficulty. We say, however, that that difficulty is preferable to suffer than the difficulty of having the Constitution --

Q What percentage of the children now going to the schools in these districts would be changing schools and teachers? More than 50 percent?

A I would hesitate -- I have not analyzed the figures in that sense. However, they are all in this book, set up in tabular form, and in some instances there is more changes; some instances there is less. I --

Q A large number -- a large percentage.

A There would be a substantial number of children changing schools.

Q And would teachers likewise, be changing?

A Well, I -- the districts are relatively small so the number of teachers wouldn't be very great, but in certain proportion -- it would be proportioned also by the size of the district.

Now, an effort to elaborate on why we have asked for the relief that we have requested. As to our first request for the rights to be declared effective as of now. The purpose is not merely rhetorical. There is no particular satisfaction that Plaintiffs or the children in this district, when, if their lawyers would take out of the declaration by this Court saying: "Now, this Court hasn't said virtually that,"or, as Mr. Justice Black has indicated, there perhaps might be some uncertainty about it.

So long as there are administrative reasons for delay recognized the certain consequences follow. First, disruption and threats of disruption; threats of chaos and confusion, to borrow the language of Secretary Finch, are at

a premium anyone. Someone in an official capacity or unofficial capacity who believes that resistance will stimulate an administrative issue which will lead to resolution in the Courts, is given an incentive to make or threaten trouble.

While in Aaron against Cooper and Buchanan against Walter in the cases of this Court traditionally have held that resistance and violence are no grounds for delay. Resistance and violence translate into administrative problems and then there is the question: Is that the kind of administrative problem that warrants delay? We say that that kind of incentive for those who would provoke delay, should be removed.

Secondly, litigation over administration takes time. Litigants and Courts with a disposition to delay, will explore the issue of administration at very great length, even when they don't exist, the administrative considerations promoted by hostility. Indeed, when there are no administrative reasons at all, this avenue should be foreclosed, as Mr. Justice Black suggests, by making the rights effective instantly.

Third, and this is less concrete, but I think more important: Any pretense of legality should be stripped from those who are violating the Constitution by continuing to segregate. They should not be able to parade respectably under the cloak of complying with the so-called "deliberate speed" doctrine. It should be indubitably clear that they are law-violators, and I think in this country lawfulness counts for something.

Administration is not the only thing that can be litigated. Even if the Courts were to say the rights must be realized now, some parties would litigate on forever, particularly if they are spending public funds -- public tax funds contributed by Negro and white alike.

In the case at Bar there could be no credible reason to believe that litigation of the intelligence of Negro children could make the slightest difference in the outcome of this lawsuit, yet there are thousands and thousands and thousands of pages of testimony occupying large carboard boxes on file with this Court, which has been taken down on that issue.

There is no reason to believe that after this Court's decision in Green, an/uniquivocal declaration by the Court of Appeals in these cases, that freedom of choice plans could be sustained. Tons and tons of litigation on the validity of freedom of choice. And no one could have anticipated that the Secretary of Health, Education, and Welfare would have injected himself into this case and take the position that he took.

The profit in delay for those who would maintain segregation is that the status quo, pendente lite is one of segregation. We propose that in this case this Court reverse that presumption that the status quo, pendente lite be one of integration.

In this case, fortunately, that resolution is simple

enough. Where there exists plans, more detailed and more of them available than any school desegregation case, have been put together with consideration --

Q Are you proposing a different rule for this section of the country, or is your proposition go to all future school cases, no matter what part of the country they arein?

A The rule does not rest on the part of the country, Mr. Justice Harlan; I would say it exists and would come into play in a variety of circumstances. The first would be, of course, where there has been a system of segregation maintained by law and this has beenestablished. And I think that has been established in a case like Carr and Green and the other cases before that.

The second is that where the history of the case demonstrates that protractive and interminable litigation is a means for maintaining racial segregation, because it stays in effect, and this litigation goes on and on, forever and ever some sort of relief in the nature of temporary relief must be given. This is not unknown to the law. The law knows temporary restraining orders; it knows injunctions pending appeal; it knows the use of the various writs to change the status quo in the situation. When the law is absolutely clear and the facts absolutely --

Now, if we turn out to be wrong, which I would

submit is very, very doubtful in this case --

Q All right. You recognize that 15 years is the same interval of time all over the country. And as I asked you whether you are limiting the proposed rule that you are talking about --

A If one looks at the report of the United States Commission on Civil Rights on the implementation of the Brown decision, one does not find this degree of resistance all over the country; one finds it in several states; one finds very considerable compliance in many places and particularly since this Court's decision in Green, as the report of the United States Commission on Civil Rights shows, there has been a very marked increase in desegregation, but not so in districts such as these.

And that's why the normal, judicial principles of entering interlocutory relief on a not-yet fully litigated case, came into play here.

We have these plans here. They have as much details as any plans implemented in any case have had. We don't insist that they are perfect. I don't think one could insist that about plans which have even been fully litigated, but they are better than what exists. Because what exists is racial segregation contrary to the Constitution of the United States.

We urge this Court to direct the Court of Appeals to

require the District Courts to institute these plans, pendent lite, except for the plans for Meridian and Holmes to take effect now. And/further litigation, including appeals, should take place with these plans in effect not over a period of years. This would only place responsible districts at the risk, as in the entry of any temporary restraining order, that having desegregated, later they might prevail on the merits that some court might hold that segregation is permissible or that freedom of choice such as they proposed, is permissible.

We say there is a very slight likelihood to the point of insignificance that either of those occur.

To institute these plans pendent lite, places Respondents in the situation where it would interrupt the school year. Now, as Mr. Justice White suggested in this question, and we don't view that lightly -- but school years have been interrupted for a variety of reasons I stated in response to his question.

The National Educational Association who is held to know a thing or two about education, has filed a brief as Friend of the Court in this case and said there is no reason why the desegregation should not occur immediately in the Respondent school districts. And, indeed, there is some considerable educational gain to be achieved by showing children that the laws cannot be flouted with approval.

In this case I was reminded in preparing the argument, that the argument of the Solicitor General in the case of Aaron against Cooper in the Little Rock School case. And this morning in the library I took a look to see whether or not it was indeed, apposite, and I would like to quote fromwhat I think was one ofthe great oral arguments in this Court which some Members of the Bench have heard.

Mr. Rankin said, and I think it bears on the question of the interruption of education:

"If out of this difficulty and undesired situation, the people of Little Rock and these children who shouldn't be hurt by these problems, learn that Constitutional rights in this country are precious; that they have a duty to these Negro boys and girls in this community to help them get their constitutional rights and this constitutional rights happens to be the right to enter a school that isn't segregated. But, someday they will want other constitutional rights and be able to exercise freedom of speech and the press and everything elsethat we consider so wonderful in our form of government. And you can't tear down a part of those rights without losing others in the process, and there isn't any part of this country that doesn't have a tremendous stake in maintaining each and all of those rights for all of its people."

I would like to say just a word or two about our

view of the Government's position in its brief. Now, the Government's position in this case has changed considerably, having favored litigation. As finally formulated in the brief on file in this Court, it takes four minutes --

It first says that HEW plans need not be submitted until December 1st, because HEW may "perhaps want to correct or refine them." On Page 5. Our position is that that's not adequate; we don't see any reason in the world to wait until December 1st. /they know there are mistakes in those plans, that information should/ have been provided to the Court with the brief which has been provided today.

Second, they say formulation of a workable plan followed by implementation necessarily requires several weeks of informed effort. And we say there has been plenty of time. We think that the people who drew up the HEW plans, if you look at them, were aware of these needs and their belief was that the need for human relations work and informing people about how to work together and the desirability of following the Constitution, could be done simultaneously and best in the context of actually following it.

They say that implementation may be had, for example, at Christmas recess or mid-semester. My understanding is that there is no mid-semester. So far as Christmas recess is concerned, I don't see why that is any more desirable than Thanksgiving recess, which is sooner, or indeed, if the mandate

and the mechanical work in the Court's deliberations can be completed, before then; in advance of that. No reason why it should wait this long.

Finally, and this is the part of their position that we find most distressing. "The school board should bear the burden of justifying below in the context of an appropriately expedited Appellate review schedule, any delay beyond Christmas recess or mid-semester."

This, to me, is an indication once more, for more litigation forever. No one doubts that the school boards in these cases, in any event -- they have a lot of cases where school boards are not doing this; they are obeying the law and we have had a substantial amount of change now, particularly since the Green decision. But no one doubts that these school boards, during their history, are going to litigate whatever order comes out of here. No one doubts that this District Court is going to rule with them and there is going -- that we are going to be on the merry-go-round again, going up and around and around again.

We submit that in these cases we have plans; those plans should be put into effect; that those plans will be the status quo pendente lite and if anyone litigates forever, they can do it. But I doubt that there would be the incentive.

Mr. Satterfield's position, I think, is the position of the State of Mississippi, in the brief which they have

submitted indicated that is their disposition. They claim that Mississippi is in compliance with the Constitution, but nothing further has been done; that the rule of law is being obeyed. I think I need make no comment on that.

I should like to reserve the balance of my time.

Q Mr. Greenberg, there is just one question, if I may: Since we are very swiftly approaching November 1st now, the difference between your position and that of the Solicitor General really comes down to something like 60 days, more or less, doesn't it?

A Well, I hadn't calculated but -- well, no, there are a lot of differences between us. He says that we can keep on litigating -- willing to have us litigate forever if -- during -- while the status quo of segregation is maintained.

Q I did not read his brief that way.

A He doesn't agree with our position on pendent lite, I gather and stated his objections to it.

Q I was just going to say I didn't read his brief that way, Mr. Greenberg.

A On the other hand, on Page 7, "Since we agree that the school board's obligation to desegregate their school systems, is immediate and unqualified, we believe that the courts below may properly be authorized to require the implementation of the plans commencing at the most practicable

imminent juncture in the school year, as for example: Christmas recess or mid-semester. Moreoever, the school boards should bear the burden of justifying below in the context of an appropriately expedited appellate review schedule and delay beyond these points. "

Well, we've had expedited appellate review schedules here and those expedited appellate review schedules have brought us here.

Q I read it as contemplating and certainly permitting doing just what you have suggested earlier, implementing, as his brief says, and then litigating against the background of that implementation. I don't see that you and the Department of Justice are on a collision course here; you are very close together.

A I had not read it that way; I would be quite pleased if the Department of Justice would take the position that we should have a desegregation pendente lite. But, nevertheless, we do disagree on the timing. I see no point in waiting for Thanksgiving; certainly not for Christmas. Certainly the judicial work must be done and no one can say how long it will take the Court to deliberate and come to a conclusion but if the Court has come to a conclusion substantially in advance of that, then we say the mandate should go down forthwith, and those rights shall not be denied one moment longer.

Q May I ask what kind of order you suggest?

A Well, I suggest that, Your Honor, that the plans were --

Q A concrete order?

A Yes, a concrete order. The order should be, Mr. Justice Black, for all districts in this litigation with the exception of Meridian and Holmes.

Q Why would they be exempted?

A Well, because there is some slight confusion about the plans necessary, which I think will take a matter of several days to work out. But in all districts except those -- except those two districts, these plans in this book, which has been prepared by the Department of Health, Education, and Welfare, should go into effect instantaneously; taking only so muchtime as is necessary to complete the mechanics of informing the parents and the children and the bus drivers and the teachers and, in any event, no more than eight days.

Q If they should go into effect now and it would have to be understood that you would have to go through certain mechanical steps and you would say eight days?

A That's not an entirely arbitrary period of time; that's the period of time that the Court of Appeals directed the Department of Health, Education, and Welfare to draw up plans for -- within which they could be implemented.

Q Would you refresh my recollection, Mr. Greenberg, on the problems of Meridian and Holmes County. Were there some building problems there; structural?

A Yes, and the Department contemplated, in view of the fact that certain building plans were in process, they would wait for those plans to be completed and consequently, desegregation would be completed there in the '70-'71 school year, instead of '69 and '70. While we would certainly see that there might be a much more desirable situation with new buildings, and as the 1970-1971 and we say they should do the best they can with the existing buildings in '69 and 70 and let all the children, black and white alike, share such buildings as they have at the present time. In 70 and '71 when they have more buildings, then they can redistribute them.

Q So, what you suggest is that -- what do you urge that our order should be with respect to those two schools?

A That the Department of Health, Education, and Welfare or some other agency selected by the Court of Appeals, give the directions within a brief time period to make the necessary revisions in those plans to put them into effect right now.

Q Are you -- you are not suggesting, Ihope, Mr. Greenberg, that this Court appraise and evaluate these plans,

are you?

A No. I think that this Court can appraise and evaluate the quality of the plans on the record which has been made about them, without reading the plans themselves. I'll confess I subjected myself to that and they seem like any other plans and they certainly come with better credentials than any other plans, I would say.

But, the Court of Appeals -- this Court enter an forthwith order/directing the Court of Appeals to see that these are implemented. I don't suggest that this Court get involved in the details of that.

Q As I understand it, your suggestion that the system of dual schools be ended immediately?

A That's correct, Mr. Justice Black.

Q If that requires the buildings -- if the buildngs are unsatisfactory, then they do the best they can until such improvements can be made.

A That's correct, Mr. Justice Black.

Q Could I ask you a question: Have you filed objections or exceptions inthe -- under the original order of the Court of Appeals to any of the plans of HEW?

A No.

Q You had not at that time?

A Not -- there was no opportunity to -- the only rules we were exposed to were the '70-'71 plans.

Q To get on focus again, your entire action is directed to the timing problems, I gather?

A Yes, except that within that --

Q The timing and the status pending any appeals?

A That's correct.

Q Those two.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg.

Mr. Oberdorfer.

ORAL ARGUMENT BY LOUIS F. OBERDORFER, ESQ.

AS AMICUS CURIAE FOR LAWYERS' COMMITTEE

FOR CIVIL RIGHTS UNDER LAW

MR. OBERDORFER: Mr. Chief Justice, and may it please the Court. I appear here today for the Lawyers' Committee for Civil Rights Under Law, which has filed a memorandum as amicus curiae by leave of the Court and participates briefly in the oral argument, by the consent of the Petitioners, who conceded us some time.

This Committee was organized in June, 1963 under the co-chairmanship of the late Harrison Tweed and Bernard Segal, in Philadelphia. They, and 45 other members of the Bar, leaders of the Bar, have formed the nucleus of this Commission. When they joined in a public appeal for peaceful compliance with court orders, especially in desegregation in the University of Alabama, these gentlemen had been concerned about the failure of many leaders of the Bar to

involve themselves as citizen lawyers at the time of enforcement of court orders in respect to Little Rock, Arkansas and later in September 1962 and at the University of Mississippi.

Their purpose and their interest in this case is in pursuit of their objectives of committing the prestige and skills of private lawyers, creating and preserving an atmosphere which will facilitate prompt, and graceful, if not cheerful compliance to court orders on the subject of desegregation.

Since the formation of the Committee and since these lawyers have begun to speak out, as Mr. Greenberg suggests, there has been less vigorous resistance to these orders; more graceful compliance. Schools in such places as Bogalusa, Louisiana have been the subject of orders for reorganization of dual school systems into unitary school systems and which orders have been honored and obeyed.

Recalling the Committee's continuing role and interest in this aspect of the administration of justice, it became concerned that the actions of the lower courts and accounts, at least, of some of the actions of the United States during the pendency of these proceedings, might tend to cuase an unraveling of the atmosphere of respect which has been developed over these recent hard years.

We were heartened by this Court's prompt action on the petition for certiorari. And now that the case is here we

have some suggestions as amicus curiae on the merits, primarily with respect to remedy.

Our suggestion to the Court in general here, that the decision and order of the Court of Appeals of August, 1969 should be affirmed insofar as it orders a reorganization of the dual school system in these districts into a unitary system.

But the August Order of the Court, unlike the July order of the Court, not only set back for 90 days the periods for formulation of plans, but it failed to do what the July order had done, namely: to prescribe, not only basic formulation of plans, but also precise dates for the commencement of implementation. And we would suggest an order or mandate directing a further ordering a precise date for the completion of these -- or at least substantial progress toward the completion of the decentralization plan.

An order that describes dates, not only for formulation but for performance with the plan.

Q What date do you suggest, Mr. Oberdorfer?

A Your Honor, we have not been in this litigation; we haven't been in the crucible of detail about it. We really can't make a responsible suggestion for a particular date. We do suggest that as the Court of appeals set down; I refer to Page 37a in the Appendix to the petition that no consideration should be given; that the Court of Appeals should be

firm in this respect, no consideration should be given to the fact of interrupting the school year inthe event that further relief is indicated.

We wanted to suggest to the Court in appraising the mandate, that -- and the United States in its last memorandum, conceded as much, but there is no reason to worry too much about having this done before summer. As we would like to suggest from the point of view of the administration of justice and from the point of five of law enforcement, if you will, that -- nobody's an expert on this, I suppose, but there are good reasons to believe that the reorganizationof the schools can be better accomplished during the school years when the students are in school; when the teachers are in school; when the courts are in daily business; when this Court is in session, than would be possible if we had, as has happened over and over again in so many school districts, this matter decided more or less in rhetoric in the spring, as it happened in this case, then in the summer doldrums set in, and then about August when everybody concerned is on holiday, we suddenly -- and law enforcement people, courts, school administrators, teachers and students are suddenly confronted with the -- whatever activity goes on to try to delay past the opening of schools.

As the matter of fact, to set these things down for the first day of school is an invitation to them -- those who

try to interfere, to -- on the theory that if they could just get by that first day of September, then they are home free for another year.

So --

Q Do you suppose, Mr. Oberdorfer, that that last sentence of the Court of Appeals was entered in the opinion that you just read --

A 37-a?

Q 37-a -- was directed to the proposition that there is apparently no formal semester. The mid-year or approximately mid-year, as they have in many other places, and that they were -- the Court of Appeals was suggesting that if this can't be done until December, let it be done in December. Do you think that's what they were driving at?

A I think that's a possible interpretation, Your Honor. I think, though -- I really think that they were saying -- probably they were saying what I was trying to say: namely, that whenever you do it, don't worry about waiting until June in order to do it; don't worry about waiting until September when in the normal course of expediting litigation and expedited effort by the -- administered by the Executive Branch, the matter is ready to go; the plans to complete it. Go ahead with it, if it happens to be the third day of November, then go ahead on the third day of November.

Q Well, there is no point in quibbling about this

language, Mr. Oberdorfer. But I understood this opinion of the Court of Appeals of July 3rd, it's basic thrust was to put a plan of unitary school system, a desegregated system into effect as of September first.

A That's correct, Your Honor.

Q September 1, 1969, and that this final sentence refers only to the possibility of further relief, or further ancillary relief that might be included.

A Well, it's possible that it means that no stay -- it might mean that no stay of the order effective September 1st will be granted simply because there may be a later interruption in the school year.

In any event, the Government's memorandum of yesterday, says that: "We believe that the courts below may properly be authorized to require the implementationof plans commencing at the most practical, imminent juncture of the school year."

Now, I have two suggestions about that. One is perhaps instead of authorizing the courts below to require implementation,of the plans, as I read that, sometime during the school year, that this Court's mandate direct the Court of Appeals to enter an order to that effect.

Q If I understand -- I think I do -- that you are in agreement with Mr. Greenberg's suggestion that the thing to do is to say that the dual system is over and that it

is to go into effect today, and that there is no reason for delay by reason of the fact that things will not be perfect the first day. The thing to do is to go at it now. Do you agree with his position on that?

A I agree with that, Your Honor, without knowing exactly what "now" is.

Q I mean when we issue an order -- if we do.

(Laughter)

A If you do, Your Honor. I had thought that the Order could well be an order to the Court of Appeals to direct the District Court to enter an order and for that length of time for that mandate to get down to them, would be inappropriate, if that's the decision.

In any event, there is no reason to wait for the end of the school year.

Q There is no reason to wait on future arguments about "deliberate speed."

A Correct. And furthermore --

Q You would like tohave us act with all deliberate speed?

A Faster than that, Your Honor.

(Laughter)

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Oberdorfer.

Mr. Leonard?

ORAL ARGUMENT OF JERRIS LEONARD, ASSISTANT ATTORNEY GENERAL, ON BEHALF OF THE UNITED STATES

MR. LEONARD: Mr. Chief Justice, and may it please the Court: I first of all would respectfully request this Court seriously consider affirming the judgments of the courts below and before the questioning of the counsel previously completely takes over the situation, I urge this Court not to be too caught up in the frustration that counsel have portrayed to the Court today.

I don't mean that for a moment to imply that there isn't a great deal of frustration involved, for there is. But let me just, for a few moments, set the stage for a very brief argument I am going to make, to give you a little background on where we stand with respect to southern school desegregation, because I, unfortunately, think that there are those who take an entirely pessimistic point of view and I, for one, would like to be on the side of taking a more optimistic point of view and I think those of us who deal daily with the problems of school desegregation, can safely say to this Court that we have made some rather substantial breakthroughs in school desegregation and in truth and in fact the end of the road is sight. It is in sight, admittedly a long road, but it is in sight.

First of all, we are now in the area of Green.

Counsel continued to refer to the Green decision as an important turning point; and indeed itwas an important turning point; but Green was handed down by this Court just 18 months ago.

Prior to Green the requirements that were laid down by this Court could, in the main be met by a school district adopting some sort of a free transfer plan, generally put together in the phrase "freedom of choice." And upon doing this the school district was generally considered to be in compliance with the mandate of the court. But Green changed all that.

And since the time of Green there hsa been substantial progress; substantively, as well as procedural, in school desegregation. Whereas, in the 14 years from Brown 1 to Green only approximately 20 percent of Negro children in southern schools had moved into desegregated schools. In the one school year which was affected by the Green decision, at least according to the figures supplied by the Department of Health, Education, and Welfare, in that one school year as to the effective date of Green, that figure almost doubled. So that today it's approximately 40 percent, again, in the southern states.

Now, whether that figure is completely accurate or not is not the important issue --

Q The 40 percent figure is 40 percent of what?

A Of the total number of Negro children involved.

Q We are in what?

A These are in the school districts in the southern states. In the southern states -- I'm not talking about -- de jure school districts, without reference to what may be de facto school situations, and obviously it would be much less than that when you take those into account. But we're talking today about school districts where segregation was official policy.

But what is material about the Green decision? What is important; is that it literally opened up a new era for the guarantee of the 14th Amendment rights of these Negro children on the one hand; also the educational benefits for white children and they are there, of desegregated education.

So, we're a little genuinely -- a little disturbed about those who become frustrated and say it's been 15 years since Brown. Well, that's true, but it's more true to say it's been 18 months since Green, because that's when the important turning point, we feel, came about in substantial progress.

Now, let me give you specific examples: In 9 deep south states there are better than 1100 school districts. Prior to the Green decision more than 200 of those were, in fact, already desegregated, leaving 900 affected by the Green decision. Since Green, 400 of those 900 are either desegregated, or have in the works and in implementation,

satisfactory, at least according to the District Courts, satisfactory desegregation plans. They are in operation. Another 100 including these districts are subject to so-called Green motions to improve the status in those districts, leaving 400 in which at this point are being made on behalf of the children in those 400 districts.

Q By that, you mean that as to those 400 there is no pending litigation?

A Nothing going on. And many of those are districts whose substantial number -- better than 25 percent, are districts in which Federal funds havebeen cut off or are laying fallow, so to speak.

Q Do you have any figures for, say, the North like the Green in the Midwest?

A Justice Douglas, I am trying to say that our figures for the North are very scarce, but I want to point out to the Court that the Department has commenced de jure type litigation here against the northern school districts where it has been found. And it has commenced litigation or at least investigated segregation of faculties, even in de facto northern school districts.

I do want to point out tothe Court that there is a procedural problem, at least with respect to the Government, and that's the requirements IV of the '64 Civil Rights Act, which the Attorney General must have a written complaint from

a parent before he can initiate litigation. So, that does have an effect upon these remaining 400. We have asked the Congress to remove that, and hopefully, that may be done.

Now, let me turn to Green for a moment, as it applies to the instant cases. I don't think there is any question in anyone's mind that Green requires these school boards to act, but the fact of the matter is that we must be cognizant that this -- whatever the reason is that they didn't act; they didn't act. And there are many other districts similarly situated, like these 33. Whether you like it or not, it's true -- that fact is true in too many jurisdictions, and therefore, the job of drawing up desegregation plans is, in fact, going to fall to the district courts. And the district courts in many, many cases, have called upon the Government; have called upon HEW for help, and rightly so, and I think that that's going to aid the total desegregation process.

The Attorney General has said himself, that the fact that you can call upon qualified experts, the courts can, at HEW to help in this process, is going to assist the district courts; assist the school districts themselves, if they want to be assisted; if they want to cooperate. If they don't, then these people are there to assist the District Courts and the Secretary of HEW himself, has joined in twith this idea of using these educational experts to aid the school districts and the district courts.

But I plead with this Court to remember that these people are professionals; they are professional educators and their professional judgment must be given some weight; it must be given some credence or the entire experiment is going to fail; and if it fails, we will return to the time where the District Court judge, and the lawyers from both sides will be sitting across from each other with the school district map drawing lines and sticking pins and drawing some more lines. And I'm not talking about a New Kent County type of case; I'm not talking about a two-school school district: one black and one white. But there are districts in this situation among these cases which are terribly complicated.

Q Terribly what?

A Complicated.

Q Did you read the brief from the American Educational Association?

A I have, Your Honor.

Q And do you agree with what or disagree with that?

A I disagree with it; I agree, however, with the two experts who are members of that association, who testified on behalf of the Government with respect to the complexity of -- and I'm not saying that all of the districts are the same. Some of them, I am sure, are very simple.

Mr. Greenberg said that of two schoolhouse

districts, there is at least one that has only three in it. That isn't terribly complicated. But there are complications.

Q Why do you have to have plans to -- just say "we're not going to have a dual system," and we are going to do it now?

A Mr. Justice Black, I was just going to get to that.

Q How does that do anything except delay?

A Mr. Justice Black, what this Court has required in Green is a reorganization of school districts; a reorganization that is really, in fact, a measure -- a measure of two separate and distinct school systems: one black and one white into one.

Now, the testimony in this case clearly shows that in some of these districts that this is going to include grade restructuring, faculty reorganization, realignment of bus routes --

Q Why not do it and put it into effect and submit that arrangements be made thereafter?

A Well, then the "what" is the problem, Mr. Justice Black.

Q What?

A The "what" is the problem. You have to do something and that something has to be some kind of a plan. The "if" is the problem.

Q You can start in each one of these schools and say: "We are not going to have any dual system of schools here; it's going to be intergrated and/if the buildings don't suit, we will do the best we can with the buildings we have; we will do the best we can with the teachers we have. Why do you have to draw any other plans but that?

A Mr. Justice Black, that is the position of the Petitioners in this case --

Q Well, I know, but I'm asking you whether that view is right or whether it's right or not, whoever's view it is.

A I think it's wrong; I think it's terribly wrong; I think there may be some other alternatives to this frustration that --

Q The frustration has been going on for 15 years, hasn't it?

A My point is that the frustration, I think, is more properly directed to the 18 months because --

Q You want to divide it up into segments?

A No, I really don't.

(Laughter)

A I really don't; Your Honor. What I'm pleading with this Court is not to do something precipitous, like the pendente lite ideal.

Q Could anything be precipitous in this deal now?

A With all due respect, Your Honor -- let me say that many hundreds of thousands of the children that we are talking about are children of a very tender age. Many of those little people are six and seven and eight and nine years old, and what you do with them can have an effect on their total future life. We want to -- I hope our point is that we are trying to improve the education of the Negro children; we know we will improve the education of the white children by desegregation, anyway, but let's try to do it with some order.

Q Are you arguing for perpetuation of the term, "with all deliberate speed?"

A I am not; I don't believe that's the law now, Mr. Justice Black. I think that's by the boards.

Q Do you think it is possible to compromise -- to pay no attention to Brown; pay attention to Green, or could we compromise a little with Aaron and Cooper?

A Well, I think that Aaron and Cooper is an entirely different situation. I don't think that --

Q The opinion in which this Court went out of its way to sign each Justice's name to it. And said that all nine agreed. Wasn't that a slight warning?

A I think that it was, Mr. Justice Marshall, but I think it was in Green that this Court articulated the need to have plans; plans realistically designed to work now.

We believe that's what the law is. The question is: you have got to get the plans; you've got to find the way to get the plans into effect; into a court order in these situations, because the districts in too many situations, will not voluntarily put these plans into effect, and that's the point I make.

Q Well, in this case we have had reports and there have been formulated plans for these 14 school districts. To be sure, they may be subject to refinement, in some of their details, but in any particular case, these are the plans of the 14 school districts.

A Mr. Justice Stewart, let me point out to you that I don't think there is any disagreement about plans. There is some clear-cut testimony from both of the witnesses, and I might point out that this authority was based on the testimony of people like the two witnesses that the Government presented, that the Secretary acted and did what he did. This wasn't something that he pulled out of the air. He acted upon the advice of the people who were involved in the drawing of these plans, and what they say is really two things: Number one, there are elements to these plans that need validating. For instance, in one school district a substantial reorganization of the bus routes, but there is no bus to them. Now, are we to ask six, seven, eight, nine-year-old children to stand out in the street corner waiting for the

bus that the bus doesn't know where to be? That can be overcome in a short period of time. I don't point that out as being of great difficulty.

But the fact of the plans -- the fact of the matter is that the plans as filed were not as refined and as complete as they could have been if these men who worked nights, weekends -- I'm talking about the educators -- if they had had an opportunity to really refine them. That's Problem Number 1.

Problem Number 2 was that September 1st was the key day, because it was September 1st that the Court of Appeals set down as decision day. Now, if the plans were to have gone into effect on September 1st. In the first place, some of the school districts already had been open three or four or five -- I'm not sure just how many, but some of them were. The majority of them were opening, I believe, on September 2nd, the next day, because September 1 was Labor Day. And the following were opening the following week of September 7th.

Now, I will plead with this Court, that decision day and implementation day and school opening day were all on the same day. Now, that can't be. We certainly can't organize our affairs, given a reasonable period of time -- not deliberate speed by any means, but some reasonable opportunity, allowing these professionals some reasonable chance to work their professional judgment. There is no question what the eventual result has to be here and it's got to be soon.

Q They have had six or seven weeks since September 1st.

A And they have been meeting with these school districts during that period of time.

Q Well, are there any plans that have developed within the last six or seven weeks, different from the ones that were originally filed?

A Mr. Justice White, I honestly don't know the answer to that question. I meet with the people involved regularly and --

Q Well, the two witnesses that you had testify for the United States indicated some dissatisfaction with these plans.

A Not dissatisfaction so much with the total plan, as with the lack of an ability to validate the plans. To conduct some certain peripheral --

Q I'm not sure I know what you mean by that. Did these two witness that you had on the stand, disagree with these plans?

A Not basically; no, they did not.

Q And as far as you know, they still don't?

A I am certain that they still do not. At least at the last juncture of my --

Q The gentlemen who propounded these plans and filed them, not only said that they were sound substantively,

but that they would be put into effect in a timely manner. Did your witnesses disagree with that?

A They did.

Q And do they still?

A They still do.

Q Well, what is their -- what amendment would they propose?

A I think -- I doubt very much that there was any testimony that related specifically to any period of delay; it was simply the shock of it all occurring on the same day.

Q This was your two experts and we had some others who were advising the Secretary, thought that these plans might be perfectly sound but they just had to make more arrangements to put them into effect; is that it?

A They have to do things, as I indicated: They felt they needed to validate some parts of the plan.

Q Validate?

A Conduct some additional studies to determine -- let me give you an example -- Mr. Justice White. For four weeks, Counsel -- Mr. Oberdorfer mentioned Bogalusa. For four weeks I was in Louisiana during the school openingsdown there and I went to a school in one parish in which there were 500 children standing outside the door because somebody miscounted the number of youngsters who were inside that

particular school district. Now, that goes -- those plans also were prepared in a little longer time frame than these, but you will recall -- you may not, but the Louisiana appeal was handed down prior to the Mississippi appeal by the Fifth Circuit. And that's what can come about when validation, as Mr. Sullens and Mr. Jordan in their testimony indicated is not done.

Q Just one question, if I may: If there had been no appeal here after the Court of Appeals had acted, and in view of assurance that the plans would have been submitted on December 1st, or is it the 15th -- December 1st in accordance with the Court of Appeal's Order; do you know any reason why they would not have been submitted on that date? schedule?

A Mr. Chief Justice, the plans -- if this Court does nothing with this lawsuit between now and December 1st, the plans will be submitted on December 1st and all of those elements of the plans which can be implemented according to the decision of the Fifth Circuit -- all of those which have any reasonable hope of being implemented during this school year,-- when I say "elements," there are various elements in the desegregation plan -- all of those that can be implemented in the '69-'70 school year will be. Again, this is dependent upon the decision by the District Court, but our urging will be -- let me put it that way. And if there are any elements

in those desegregation plans which cannot be implemented during this school year, we will expect the school boards to come forth and meet the burden and show why that particular element, or those particular elements in that plan will not be met.

Q Give me an example of an element that you think might not be able to be implemented here.

A Yes. You have one of the school districts -- I think has some 11,000 and there are some others in the package of 33 here that have some fairly good number of students.

Many times school reorganization, Mr. Justice White, will call for the building of middle schools, separating a grade structure -- if you will look at this plan you will see that many of these schools are k through 12; k through 8, plus a high school. There are grade schools feeding high schools and please understand, I am not an educational expert by any means -- but many times what will happen is that in the reorganization of a school district you will adopt an elementary school structure -- one through four; one through 6; a middle school structure and a senior high school structure. Now, it can well be that, either through the construction of temporary or permanent facilities --

Q I thought these plans had failed to cover these counteis where that sort of a problem was being -- would come

up at all.

A No, Mr. Justice White. There are 11,000 students in one of the districts --

Q That doesn't necessarily follow that this plan can't be implemented during this year.

A Well, I think Mr. Sullen's testimony was that in this -- in his opinion -- he's the one who worked on the Holmes County -- it's a big district; or Hines County -- I am not sure whether it's Holmes or Hines --in any event the big one, that in any event he felt there was not any reason why the plan could not be fully and completely implemented, totally by next September, even with those elements that might need some delay; that they would not go beyond the '71 school year.

Q Which is only one more year; isn't it?

A That's only for part of the plan.

Q But it's another year, that it is going to wait another year?

A For part of the plan.

Q Yes, six; well, it's all been done in parts or segments, hasn't it?

A No; not always. Green versus New Kent County was --

Q That wasn't the first one that said they had to do it now. Why do you mark that as the first case that said

we had to do it now? Why was that such a turning point in history?

A Well, I may be wrong, Mr. Justice Black, but --

Q What about the Virginia schools; they said substantially the same thing. We said -- this Court said that the time for deliberation was out and the thing to do is to do it now.

Q But Green threw out the freedom of choice aspect.

A Green threw out the freedom of choice and made it clear that they -- unless they really had worked, and said we needed a plan and that I think is what everyone is struggling for, is to get the plan before the Court.

Q Too many plans and not enough action, maybe.

Q What about the plan of the report that was supposed to have been made to the Court on October 1st; is that report made?

A The report is made, Mr. Justice Marshall, and the pre-service training and the rest of it is going on right now.

Q A report was made?

A A report was made.

Q Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Leonard.

Mr. Summer?

ORAL ARGUMENT OF A. F. SUMMER, ATTORNEY GENERAL OF MISSISSIPPI, ON BEHALF OF RESPONDENTS

MR. SUMMER: Mr. Chief Justice, may it please the Court. I did not have the opportunity to participate in the trial of these cases below. I have been the Attorney General of Mississippi for just a few months, and therefore have not previously participated in either of these two cases.

So, with the Court's permission, it would be my purpose to take a very few minutes of the remainder of our time and pass the argument then to the Honorable John Satterfield, who has participated in thse cases from the beginning and who will be better qualified to answer any of the specific questions regarding these specific cases, and with your permission I would refer to him for that.

Just a few comments, however, in regard to the very loose statement made by the Counsel that the law has been disobeyed and the Courts have not required obedience. That's carrying the -- very far, I believe something that does not appear in this record, nor in my opinion, in any other record of the Court below. He -- this record will not show any disobedience of the Court, nor Court Orders in this case, nor do I believe it will show that the judge has refused to require obedience to the laws.

And further, to Counsel's extreme reluctance, to have

the same standards applied to all of the hools in the nation that apply to those in the area in which we live. With the Court's permission I would like to point out our part of the evidence in these cases below that addresses itself to that point.

The record in these cases contain absolute proof, taken from the HEW files, that there are hundreds of all Negro and all white schools in the de facto area, which was being inquired about just a moment ago. They are all Negro and all white because of the living patterns and other factors.

We feel no longer have de jure segregated schools, but de facto just as those in other parts of the nation -- just as their schools are. How much longer can it be fairly said that Chicago with 610 schools can have 208 all Negro students; 184 all white students and 228 schools with no Negro teachers?

But each of these schools before the Court, must affirmatively or forcefully integrate each of their schools summarily, without a hearing, both students and faculty, whether it is right for the students or not.

In St. Louis, with its 164 schools, 83 of which are black and 31 of which are all white; 81 of which either have have either all black or all white teachers, continue to be exempt from this new constitutional principle they are advocating.

As a matter of fact, proven in the record of these cases, are of the 12,197 schools in the 100 largest schools districts in the nation, assuming that a school with less than one percent of a minority race is an all-Negro or all-white school, 6,137, or 48 percent, are either all black or all white.

These are schools that have never had a dual system. Our record as a whole, is no worse than what seems to be the national average.

The advocates here would have these children -- these children involved in these lawsuits, 135,722 children -- endure a discriminatory application of a constitutional standard that does not apply universally in this country.

If the Court please, I will refer you to Mr. Satterfield for the balance of the argument.

MR. CHIEF JUSTICE BURGER: Mr. Satterfield.

ORAL ARGUMENT OF JOHN C. SATTERFIELD, ESQ.

ON BEHALF OF RESPONDENTS

MR. SATTERFIELD: Mr. Chief Justice and the Court: It is a pleasure to appear before you today in this connection because there are quite a number of matters which need to be cleared up for the benefit of the Court, the litigants and of the children herein involved.

The first is this: That this procedure has been handled by the officials in the same way they handled the

before the Fifth Circuit of -- this was purely a motion concerning a docket sale, at which time the Fifth Circuit had no record before it; no evidence before it; no briefing of of the basic merits --

Secondly, and these cases appeared, as I understand it, before the Fifth Circuit, they were urged upon eight days notice. The record was in four packing boxes and was not available to the Court and the Court as inthe directive of October 24th, found it did not intend to review the record, but would accept the finding of the District Court on all matters of fact which, with deference, it wholly failed to do.

This proceeding resulted without the record before the Court, although it was available to be brought even within the time limited under Rules 20 and 12 of this Court and Rule 11 of the Rules of the Federal procedure.

And this is, again, an objection, to make broad statements, not supported by the record, because the statement they made about some 3,000 pages of testimony, most of which was directed toward the allegation that there is a difference in the intelligence of Negro and white children. That statement is absolutely without any foundation in fact, and contrary to the truth.

The record contains evidence demonstrating compliance by many of these districts with the requirements, not only throughout the year, but Luvenia, Rainey, Monroe and Taft. I

will not take the time to go into the illustration, but in the Meridian District, in athletics, black citizens in the faculties; in the participation of students. We see demonstrated inthe record, that there is no longer a dual system, but there is a unitary system.

And Mrs. Crump, a leader of the N.A.A.C.P. of the Southern Christian Leadership Council of the Black Methodists who has been connected in all civil rights movements in Meridian for the last 31 years, testified the system was unitary; that there was a complete right of attendance of all students to every school and in their opinion this was working and would continue to work.

And there is evidence throughout this record, if Petitioner's were willing for the Court to have the opportunity of seeing it of that nature as there is to most of these issues. They differ in many, many different ways.

Now, I call the Court's particular attention to the fact that as has been stated to this Court -- we did not know -- if you read the brief you would see furthermore in the statement on Page 23, approximately thereof, that this be made available to the Court, copies of certain claims. We have never even seen --

In this matter the Petitioners bring piece by piece that which they want the Court to see but have actually to pass upon this matter without there being before the Court the

record of the --

And what do they say? Their prayer appears on Pages 30 and 31 of their present brief. And this is one that we are most familiar with -- I have never seen anything like it before.

In the first place, they ask that this Court require that there be put into effect specific plans that have been withdrawn -- withdrawn by whom? Withdrawn by the Department of Education, Health and Welfare as to the full confederation of our --

We found that that was not sufficient; that was supported by the testimony of Mr. Jordan and of the other gentleman whottes ified. This gentleman, Mr. Sullens, one of the top employees of HEW first found/and it was found by the District Court Court of Appeals, the witness was examined and it was found that in order to formulate -- to formulate -- not implement, to formulate and implement successful and effective desegregation plans, the additional time will be required.

Now, reference was made to the chaos which might result as if it had to do with community resistance. That is another matter in their attempt to give erroneous ideas to this Court to put it in a more charitable light.

The statement of the Secretary is as follows, to wit: There on Page 31-E of the Petition is the letter written by the Secretary, and by the way, that came into the Court as

an exhibit to the motion. There is no sense in having -- or anything; the Secretary's obligation was to file and formulate plans. "Further action will be taken by the Court with the assistance of the Department of Justice." And when that letter came to Chief Judge John Brown and to Chief Circuit Judge Sparks, they turned and they talked on a motion setting forth timing, similar -- almost identical to that already in the original order of July 3, with the exception of the necessary time to dowhat? Not to implement things, but toformulate proper things.

Now, here is what Mr. Finch said: He said this: "I am gravely concerned that the time allowed by the Department of these terminal plans has been too short for the educators of the Office of Education to develop terminal plans which can be implemented this year."

He says, "The administrative and logistics pose difficulties to the administrators which must be encountered and made in a terribly short space of time, must share in my judgment, produce chaos, confusion and a catastrophic educational setback to the children involved."

"An administrative difficulty," and here is the prayer that is now made, and we will quote:

"The first is: That there should not be any hearing by the District Court that this Court should overrule or modify Brown 1; Brown 2; Cooper, Green, Red and all other

cases that have been decided by this Court and should put into effect plans --as evidence by Mr. Finch, the Secretary, or Mr. Jordan in charge of that Bureau, of Mr. Sullens, who was his Assistant, were not sufficiently developed, would have any bearing before the Court at any time under any circumstances.

The fact is that the public officials who are charged with the duty of administering the educational system within these states, should not be permitted to participate in any manner in the preparation of or collaboration concerning the plans.

It was found by the District Court and affirmed by the Court of Appeals that when various plans had been submitted and withdrawn, were presented to the local educational authorities, they would preserve with the statement and I can prove this because it is in the record and is undisputed and it is -- I was present when it was done.

As the record shows, it states that there was no time to discuss and collaborate concerning them or work out several projects which might develop.

And that is the present situation. The only thing, which was filed in accordance with the order of the Court by the Defendants themselves, on the regulation, that they had not had an opportunity to fully collaborate with the Department and to render our plans satisfactory to all parties.

I have not lost my temper in the last 30 years and

and I did not do so today. But I am somewhat shocked when I hear the statement made of constitutional defiance by the public officials of Mississippi, and particularly of the schools.

The fact is, and we have certified to it in our brief, beginning with 1959, 1962, 1964, 1966 up through January 16, 1966, the decisions of the Court of Appeals of the Fifth Circuit were: That freedom of choice plans were proper; they should be extended year by year and we have set out very clearly in our brief the language that "since a late start had been made in certain districts, the hearing in 1965, it should be extended to four grades a year and these districts every --

They are law-abiding citizens and those who allege otherwise, do so being, I hope, innocent of the facts, to be most charitable to them.

May it please the Court, with reference to the matter of briefs. Of course, as the Court knows, in that case, freedom of choice was by no means outlawed. Now, by the way, the Court has noted on Page 31 of the letters to be filed by the Petitioners that the prayer that is made clear is not with reference to desegregation. The prayer is as follows concerning action pendente lite:

"That this Court should make the action pendente lite requiring that integration and not segregation be the status quo pendente lite." In other words, that integration

and not desegregation be made the status quo pendente lite. And yet this Court says in Denning and in Carr, that there is a law of the land and recited by this Court as follows: That is "we do not hold freedom of choice to have no place in such a plan. We do not hold that a freedom of choice plan, of itself, might be unconstitutional." Our argument has been that this Court specifically declined so to hold, rather, all they did say is that in desegregating a dual system the plan of freedom of choice is not an end in itself.

In closing there are two things I do want to call your attention to. The fact is I am somewhat embarrassed after reading the brief to admit that I'm a charter member of the Lawyer's Committee for Civil Rights Under the Law. I was the one to arrange for them to open an office in Jackson, Mississippi and for a number of years they did a very fine job. Recently, it's quite a different situation. I'll refer you to my brief in that connection and in connection therewith.

The other is this: That where and if the Court grants the prayer which is now made and the request which is now before this Court; that is that integration shall be the -- pendente lite shall be the matter of the day. Now, if that were to be carried out there would be a conflict --

I recognize that time has run out, sir. Deliberate speed is no longer the call of the day. Everything must come and come right now, realistically.

The question of delay here did not come from the school districts; it came from those public educators of the United States of America who found that the plans that were drawn under the pressure that was working was such that they could not recommend and asked that they be withdrawn.

Q Let me get something straight here -- maybe I misunderstood it. I do not understand under the proposal of your opponents that the things in these plans thatyou have been criticizing would be foreclosed from objection and ultimately reviewed by this Court, if necessary, if their proposal went into effect.

Do I misunderstand it?

A No. May it please the Court, I think it could be foreclosed in two ways --

Q You say that it would be foreclosed?

A In fact I think it would, in my judgment. The act that would be required to put into effect pendente lite is another way of putting into immediate effect without a way -- without an opportunity for consideration by either this Court or the Court of Appeals, even.

And if broad changes such as those that were that suggested are made, they would be -- not exactly irreparable, but irretrievable; could never even change the Act.

Then, may it please the Court, I believe that it means that if what they ask is granted, it would not be

done in this school year, because they are asking that the District Courts not be permitted to have any -- but that their experts be used as special masters by the Court of Appeals. And while, at some time there might be a later appeal, I believe it would be water down the drain.

I do believe that if their request is set that it could never be -- we take the position that one of the distinguished Members of this Court took on May 6, 1955; Mr. Justice Marshall, when he said in brief filed in Brown II, "The Negro children before the Court in these cases are entitled to public education on a nonsegregated basis. The only way that relief can be given meaningfully to them, is to abolish the policy of using race as a criterion for assignment of pupils. Thus, the only effective decree would be one which would enjoin the use of race in the assignment of any pupils in the school districts involved.

Before I leave I would like to read the position taken by Mr. Justice Goldberg in Brown in which he said: "We do not mean for it to be understood that there is anything in the 14th Amendment which makes it mandatory that pupils be given a choice of schools. We mean that the elimination of compulsory segregation is not the same thing as the compulsory attendance of whites and Negro students or Negroes at white schools. Negroes and whites would no more be compelled to attend the same schools under such regulations than are Negroes and whites

compelled to live in the same neighborhood when compulsory residential segregation was declared invalid in Buchanan and in Walch."

And may I say this to the Court, frankly, that if and when the Court has the opportunity of reading this record, the Court will find that in the majority of these issues, and the great majority -- the vestiges of the dual system have been removed and those that have not is realistic with policies the way --

And may I say, finally, in response to a question, I believe, by Mr. Justice Marshall: that the question of the number of years or what is the status of individual schools is a national question; not a local question. And you will find on Page 64 of our brief a list here of some 20 schools, all with the exception of one, which is in Texas, are in the Northern, Eastern -- not in the Southern areas.

I believe that my time has about expired. In Chicago, out of 610 schools there are 392 of one race, or serving 99 percent or more of one race. In Iowa, in Des Moines, there are 36 out of 81 that have students of one race. In Newark there are 27 out of 80 composed of students of one race. In Los Angeles, California, in that district, out of 591 schools, 359 are composed of students of one race, and finally, in New York in the New York City schools, out of 853 schools, 158 are composed of students of one race.

Now, may it please the Court, when the -- says that any one of these three things exist, schools of one race, a small proportion of white students attending -- no white students in any formerly Negro schools -- a small portion of Negro students attending former white schools or a small number of teachers of the opposite races, it is a direct violation of the Order of this Court in Green, Monroe and --

One statistic is said to be in question here, of whether the vestiges of the dual system are being removed. We feel that we are in the hands of -- we know that you will do what is best under our Constitution; we feel that the relevant issue here laid is one that is worthy of your consideration and that the request that you put into effect immediately, is that the matter of pendente lite be integration and not desegregation; that time be withdrawn; that no time be allowed for collaboration with HEW and those public officials charged with the administration of schools, is a request that -- well, I will say this -- I would think that they would make such a request in shame.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Satterfield.

Mr. Greenberg, you have a few minutes left.

REBUTTAL ARGUMENT BY JACK GREENBERG, ESQ.

ON BEHALF OF PETITIONERS

MR. GREENBERG: Mr. Chief Justice, and may it please the Court: I have a few moments of rebuttal, if I may.

Mr. Satterfield has made regular reference to the absence of a record in this Court and I think that's very illuminating because I might say that there is, indeed, the complete record in the Court and it has been here for some considerable period of time. It's in Mr. Davis's office right behind the Court; it's not before the Court; it is behind the Court.

The problem was, in obtaining this record, and it teaches us something about this litigation. When we filed this case here we asked the Clerk of the Fifth Circuit to send up the records. He sent up everything that he had, however a part of the record was in Judge Cox's Court. We requested Judge Cox's Court to send the record up and he refused. He sent a lawyer to visit the Clerk and the Clerk said that he had to get 50 cents a page for the record and we said we didn't we could not pay that money for thousands and thousands of pages of record and the lawyer went and visited Judge Cox and Judge Cox said he would not send the record up, and indeed, he thought the price had gone up.

We then communicated with Mr. Davis of this Court, who process communications wtih the Federal District Court in Mississippi and he obtained the record and it sits there in eight huge boxes for anyone who cares to read it.

That is the story of the litigation in this case. Judge Cox doesn't let you have the record and Mr. Satterfield says you don't belong in this Court if you don't have it.

Now, I would like to make a reference to further response to a question asked by Mr. Justice Harlan, about whether the rules proposed here were for one part of the country.

The pendente lite rule which is what I believe Mr. Justice Harlan had reference to, is particularly appropriate in these cases because here we have substantially or fully matured plans which are capable of being put into effect and have completely -- or almost close to completely, carried out the purposes in this Court's decision in Brown as elucidated by their later decisions. So, I think that is why it is peculiarly appropriate to reply in this particular case and is not a sectional suggestion, but one that acts for the circumstances here.

Now, this country has made immense strides in eradicating the stigma of slavery since and largely as a result of this Court's decisions in Brown against Board of Education. The principle of those cases has been an important one, not only in theory, but because of actual implementation shows that this makes motions and stands behind them.

Conversely, a retreat from the principles of Brown, as well as what that retreat would symbolize, would tell the

country more than many volumes of mere rhetoric about what the country stands for.

Plessey against Ferguson symbolized the retreat from the principles of the 14th Amendment. It was followed by not even a separate but equal doctrine, which was professed. It is crucial, we submit, that if we were to continue in the path of bringing the black and the white citizens of this country together, the course which was resumed by the Brown decision, more than half a century following Plessey versus Ferguson, that this Court may create in this case, and it is the real issue, whether we shall continue to go forward or halt.

The rights of the Constitution are for the here and now and not merely stuff about which lawyers play charades. But there is more in this case than the relations of America's black to white citizens, as crucial as that is.

In one of his great opinions, almost a quarter of a century ago, Mr. Justice Rutledge voiced in dissent, an admonition that has special application today. He said, "It is not too early; it is never too early for the nation steadfastly to follow its great constitutional traditions. It can become too late.

Every one of the tens of thousands of school children, black and white, in the 14 school districts encompassed by this litigation, entered the public schools of

Mississippi years after the day, May 17, 1954, when this Court announced that segregation and the Constitution cannot co-exist. Yet, no more than a handful of these children have attended a lawfully constituted school. Thus far, then out of bare life experience, the black and white school children of these 14 school districts have not learned that the Constitution is to be protected and defended, cherished and lived.

Today we ask this Court to direct the entry of decree ordering desegregation now.with the Constitution to be the rule of decision, pendente lite. We ask this not merely because another fortnight of the dual school system is intolerable, because another fortnight of unwarranted displacement of the Constitution is intolerable. The question in these cases is whether the children in these school districts, and indeed, the children in any school districts throughout our beloved land, are at last to learn that there is a supreme law of the land, binding upon children and parents; binding upon school boards; binding upon the state; binding upon the United States; and binding upon force of this high tribunal.

When Mr. Justice Frankfurter wrote in his concurring opinion in the suit against New Hampshire: "But in the end, judgment cannot be escaped." The judgment of this Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg.

Thank you, gentlemen, for your submissions and the case is submitted.

(Whereupon, the argument in the above-entitled matter was adjourned)