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In The  
**SUPREME COURT OF THE UNITED STATES**

October Term 1954

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

vs.

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

Washington, D. C.

April 13, 1955

FRANCIS B. GEBHART, et al.,  
Petitioners,

vs.

ETHEL LOUISE BELTON, et al.,  
Respondents.

SPOTTSWOOD THOMAS BOLLING, et al.,  
Petitioners,

vs.

C. MELVIN SHARPE, et al.,  
Respondents.

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

vs.

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

DOROTHY E. DAVIS, et al.,  
Petitioners,

vs.

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

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## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

OLIVER BROWN, MRS. RICHARD LAWTON, ET AL

vs.

Case No. 1

BOARD OF EDUCATION, TOPEKA, KANSAS, ET AL

FRANCIS B. GEBHART, ET AL

vs.

Case No. 5

ETHEL LOUISE BELTON, ET AL

SPOTTSWOOD THOMAS BOILING, ET AL

vs.

Case No. 4

C. MELVIN SHARPE, ET AL

HARRY BRIGGS, JR., ET AL

vs.

Case No. 2

R. W. ELLIOTT, ET AL

DOROTHY E. DAVIS, ET AL

vs.

Case No. 3

COUNTY SCHOOL BOARD OF PRINCE EDWARD  
COUNTY, VIRGINIA, ET AL

Washington, D. C.

April 13, 1955

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

PRESENT:

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

APPEARANCES:

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

Harold R. Fatzier, Attorney General of Kansas.

On behalf of Oliver Brown, et al:

Robert L. Carter.

On behalf of Francis E Gebhard, et al:

Joseph Donald Craven, Attorney General of Delaware.

On behalf of Ethel Louise Belton, et al:

Louis L. Reading.

On behalf of Spottswood Thomas Bolling, et al :

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

On behalf of C. Melvin Sharpe, et al:

Milton D. Korman.

On behalf of Harry Briggs, et al:

Thurgood Marshall and Spottswood W. Robinson, III.

On behalf of R. W. Elliott, et al:

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

## APPEARANCES (Continued):

On behalf of Dorothy E. Davis, et al:

Thurgood Marshall and Spottswood W. Robinson, III.

On behalf of County School Board of Prince Edward  
County, Virginia, et al:

Archibald G. Robertson, and Lindsay Almond, Jr.,

Attorney General of Virginia.

Amicus Curiae:

I. Beverly Lake, North Carolina.

Mac Q. Williamson, Oklahoma.

Tom Gentry, Arkansas

Richard W. Ervin, Florida.

Edward D. E. Rollins, Maryland.

John Benn Sheppard, Texas.

Ralph E. Odum, Alabama.

## PROCEEDINGS

The Chief Justice: Mr. Lake, you may proceed.

ARGUMENT ON BEHALF OF THE STATE OF NORTH CAROLINA  
AS THE FRIEND OF THE COURT -- Resumed

By Mr. I. Beverly Lake

Mr. Lake: May it please the Court, immediately after the decision of last May, the late Governor Umstead appointed a special committee of nineteen distinguished men and women from all walks of life and all parts of North Carolina and directed them to study the problems which that decision placed before the people of North Carolina, and report back to him with their recommendation.

On that committee of nineteen was three Negroes. Two of those Negroes were and are presidents of great colleges owned and operated by the State of North Carolina for the education of young Negro men and women.

There are three other such colleges owned and operated by our State, and in those two alone there are today 4,000 students enrolled.

That committee made its report to the Governor after our brief was filed to this Court. It was a unanimous report. The committee said:

"The mixing of the races forthwith in the public schools throughout the State cannot be accomplished and should not be attempted."

When the Legislature convened in January for its 1955 session, His Excellency, Governor Hodges, transmitted that report to the Legislature with his unqualified endorsement and approval.

Last week the Legislature, without a dissenting vote, neither the House of Representatives nor the Senate, adopted a resolution approving that report, approving the brief which we have filed with this Court. Since that resolution is a statement, an authoritative statement of the position of North Carolina on this matter and was not available when our brief was filed, Mr. Chief Justice, I request permission to file a copy with the Clerk for the Court's information.

The Chief Justice: You may have it.

Justice Frankfurter: Will you file a copy for each member of the Court?

Mr. Lake: We will file as many copies as you like.

Justice Reed: Does that resolution embody the report you have made?

Mr. Lake: It does not, sir. There are some quotations but I have the report also and will be glad to file that, too.

There is nothing, we think, in the decision of last May which requires a decree that Negro children be admitted forthwith to the schools of their choice within the limit of their normal geographic school district. On the contrary, such

a decree would go far beyond that decision and would, in our opinion, we respectfully submit, go beyond the authority of this or any other Federal Court.

This Court has now held that for a State to separate children in public schools solely on the basis of race reaches an unconstitutional result. So long as that decision remains unmodified, a State may no longer travel that road toward its goal of educated citizenry.

And under existing acts of Congress, it would certainly be within the authority of the Federal Court to enjoin a state official from attempting to travel that road again. But that is a far cry from a decree requiring that Negro children be admitted forthwith to the schools of their choice.

The Federal Constitution does not confer upon the Federal Government, as a whole, authority to impose upon state officials affirmative duties in the administration of the State's schools, and it certainly does not give that power to the Federal Courts. Of course, Congress is authorized by the 14th Amendment to enact legislation to enforce the rights guaranteed by that amendment. But we submit that Congress has no authority to assign children to this or that building owned and operated by the State.

It must be remembered that in North Carolina this is not simply a matter of allowing Negro children to go where they wish. Such a decree would be tantamount to allowing a Negro

child to push a white child out of his desk so that the Negro child may sit in it, for there are in none of our schools in North Carolina any substantial number of empty desks.

Therefore, if such a decree should be issued and next fall a substantial number of Negro children were to apply for admission to and be received in what is now a white school, it would necessarily follow that an equal number of white children could not attend that school even if they wanted to do so.

So a decree such as is contemplated by this Court's Question 4(a) would amount to taking the assignment of children to the public schools in North Caroline out of the hands of the school board and placing it in the hands of Negro children. And we respectfully submit that that would be as unconstitutional as it would be impractical.

Justice Frankfurter: Is what you have just said just a way of saying that it takes time to make the necessary accommodations to carry out that which has been declared unconstitutional?

Mr. Lake: I think it will take a great deal of time, Mr. Justice Frankfurter.

Justice Frankfurter: I am not asking how much. But does it mean any more than that adjustments must be made to prevent the continuance eventually of that which has been declared to be unconstitutional?

Mr. Lake: I think what I have said goes beyond that, but I think that that is also true. What I have said, sir. I think is more fundamental than that, because here I am speaking of the authority of the Federal Government to impose the duties upon the State officials, affirmative duties.

Justice Frankfurter: What adjustment do you make in your analysis between what you have just said and what this Court has done in a number of cases requiring institutions to admit Negro students to law schools and medical schools? The University of North Carolina has admitted both, has it not?

Mr. Lake: The University of North Carolina has admitted Negroes to its law school and to its medical schools, yes, sir.

Justice Frankfurter: Apart from a decree of this Court?

Mr. Lake: Apart from the decree of this Court. There was a decree of the Circuit Court requiring that to be done.

Justice Frankfurter: Is such a decree beyond the authority of the Court?

Mr. Lake: I am not familiar with the exact terms of those decrees.

Justice Frankfurter: Sweatt v. Painter.

Mr. Lake: I think, sir, in Sweatt v. Painter, if I am not mistaken, the Court ordered those Negroes admitted to

the schools of the University of Texas because the State did not afford them an equal opportunity for a legal education in another institution.

Justice Frankfurter: Whatever the reason, the direction of the Court, the affirmative direction, to admit a certain student in a certain institution, surely that isn't beyond the powers of a court, because of any doctrine of inherent limitation or separation of powers or what not.

Mr. Lake: Well, sir, it is our --

Justice Frankfurter: I don't get the force of your argument that there is some suggestion that there is a limitation of the powers of the Court to direct an institution or anybody else to do something if there is a legal duty to do so.

Mr. Lake: No, sir, I agree with that, if there is a legal duty to do it. But our position, sir, is that the states are free to comply with the decision of this Court in several different ways, and the Question 4(a) --

Justice Frankfurter: All the different ways, excluding one way, namely, making a distinction on the basis of color.

Mr. Lake: Oh, yes, sir, that would not be complying with the Court's decision. I say the State is free to select its course among the alternative routes which remain, and the Court in Question 4(a), as I understand it, does not state that choice. It says you must, if such a decree would be

issued, it says you must allow the Negro child to go to the school of his choice.

Justice Frankfurter: Where does 4(a) say that?

Mr. Lake: Question 4(a), sir.

Justice Frankfurter: In the first place, these are questions, not answers.

Mr. Lake: Oh, yes, yes. I am speaking now to the question that the Court asked us to direct ourselves to. Question 4(a) says:

"Would a decree necessarily follow providing that within the limits set by normal geographic school districting Negro children should forthwith be admitted to schools of their choice?"

Now, as I understand it, counsel for the petitioners yesterday said that they would concede, that they would agree with the position which I now take, that this Court has never said that a State must operate a public school system.

It has never said that if a State does operate a public school system, it cannot separate children on the basis of age, sex, educational attainment, health or any other circumstance having a reasonable relation to education and the general welfare.

The Court has closed the road, as I understand it, of a public school system in which children are separated solely on the basis of race. And certainly this Court can

issue a decree forbidding a State from attempting to travel that road again.

But within those alternatives which remain we submit, sir, that a State has the right to choose its alternative.

For example, in the matter of judicial procedure, when a State adopts a court procedure which leads to an unconstitutional result, this Court will throw out that result and require the State to adopt a different procedure. But this Court does not undertake to tell the State what other procedure it must adopt.

It said in *Honeyman v. Hannan*, 302 U. S. 375, that:

"The Federal Constitution does not undertake to control the power of a State to determine by what process legal rights may be asserted."

And we submit that neither does the Federal Constitution undertake to control the power of a State to prescribe by what process and by what criteria children are to be assigned to this or that public school of the State except the State may not use the criteria of race alone.

Justice Frankfurter: You mean, for instance, if North Carolina would choose to abolish the public school system in her universities and high schools and follow on the suggestions of some -- to me, cannot properly characterize -- people who think in those terms whereby all education is to be given through a central broadcasting system and every

parent in the State is given a broadcasting set or TV set and all education is to be done from the central headquarters into the homes for the educating of the children; you think if the State wants to do that, it could do that. Is that what you mean?

Mr. Lake: I do think that the State would certainly be free to do two of those things. It could abolish the public school system.

Justice Frankfurter: It could bring up its children in ignorance if it wanted to.

Mr. Lake: It could do that also. The State could abolish the public school system. It could set up such a TV system, but I do not think it could require the people to allow their children to listen to that alone.

I don't think that it could say that that shall be the only educational system available for the people in our State, no, sir. But with that qualification I think that a State might do so. I am not suggesting that North Carolina contemplates that method.

Justice Frankfurter: You mean that it couldn't abolish private and parochial schools?

Mr. Lake: Oh, no; no, sir. Now, the decision of last May --

Justice Frankfurter: You would agree under your argument, as you say, that while the Court can merely say

this is bad, and day after day or term after term or whatever the period may be, did say this is bad, this is bad, and this is bad, every time it comes up it could do that, you say.

Mr. Lake: Oh, yes, sir.

Justice Frankfurter: It couldn't finally say that there is such a pattern here that the only way to deal with this problem and to enforce these rights of constitutional sanctions is that when you have a school system which is for both white and colored people, you can't leave colored people out, the Court can't do that?

Mr. Lake: I would say, sir, that in the silence of Congress, the Court could say that you cannot exclude a child from that school solely on the basis of race, but if a State were to say, "We are going to send the girls to this school" --

Justice Frankfurter: That is a very different proposition.

Mr. Lake: Yes, sir, but the Court's Question 4(a), as I understand it, does not leave room for that. It says schools of their choice. Now, that is the only point to which I direct that remark.

Now, we do not have here for discussion the possibility of an action at law against a state official to deny these petitioners rights which this Court has now said that they have nor the imposition of criminal sanctions against such a state

official. Those are possible methods of enforcing their rights.

If they do not apply and if they are deemed inadequate, Congress has authority under the 14th Amendment to enact legislation which will provide an adequate remedy, so this Court's withholding from these petitioners the remedy which they now seek is not a nullification of their constitutional right. It is not a retreat from the decision of last May.

No counsel here has questioned the fact that this Court in the exercise of its equity powers which these petitioners have invoked has the authority to allow these defendants and others similarly situated ample time to find and put into operation an adequate and constitutional substitute for their present method of assigning children to the public schools or an adequate and constitutional substitute for their public school system as a whole.

In the New York-New Jersey case in 283, this Court allowed the City of New York four years to make proper disposition of its garbage, and it is our position, we respectfully submit, that if the City of New York is entitled to four years to decide what to do with its garbage, the people of these counties in Virginia and South Carolina are entitled to a great deal of time in deciding what to do with our most cherished treasure.

In our brief, since no petitioner has questioned the

fact that this flexibility of remedy which is characteristic of courts of equity is applicable here, we shall pass over any further authorities on that subject, because I think there is no debate about that, that this Court does have the power to grant ample time to make the adjustment in the exercise of its equity powers.

But I would like to call the Court's attention simply to this quotation from a letter of Lord Hardwick quoted in Pomeroy as to the reason why courts of equity may adjust their remedies to the circumstances of cases. Lord Hardwick said:

"No rule can be equally just in the application to a whole class of cases that are far from being the same in every circumstance."

So in the exercise of its equity powers this Court may certainly mold its decree to fit the conditions in the communities where those decrees are operating. But we respectfully submit that this Court cannot know and cannot determine those conditions so well as can the District Courts which know those communities.

The records now before this Court do not concern themselves with the adequacy or inadequacy of this or that remedy. They were compiled at hearings where the issue was the constitutional right of these petitioners.

Here we are not concerned with that right. We are concerned only with the expediency or inexpediency, the

adequacy or inadequacy of this or that remedy, where, whether and if that right is violated.

Justice Harlan: Could I ask you a question about your committee?

Mr. Lake: Yes, sir.

Justice Harlan: You said your committee had resolved that immediate desegregation is impracticable.

Mr. Lake: Yes, sir.

Justice Harlan: Is the committee now functus officio or is North Carolina going ahead to try to apply the Court's opinion? In other words, are you going to wait until a suit has been brought and North Carolina is under the impact of judicial process, or is it your contemplation that you will go ahead and try to work it out?

Mr. Lake: That committee has ceased to function, but this resolution which I am going to file with the Court provided for the creation of a permanent committee to continue the study of the problems directly and indirectly arising out of this decision.

Now, sir, as to the other aspect of your question, I cannot say what North Carolina will do because we have had no pronouncement from the Legislature as to what will be done in the future.

I would like to call to the Court's attention this difficulty which all of the Southern States now have before them.

Under the Question 4(a) we have the possibility that there may come from this Court a decree -- we do not think such a decree will be issued, but there may come from this Court such a decree -- as to require forthwith admission of Negro children to the schools of their choice.

Now, under those circumstances, and if I may go back just a minute when that decision came out it was the expectation that we would be here last November for the argument. It was then postponed from day to day.

So for nearly a year the defendants and others similarly situated have been in the position that they did not know when a decree might come down requiring a certain action.

Now if I may by some analogy say this. A man who knows that there is a possibility that he may be executed in twenty-four hours is not in a good position to consider plans for remodeling his home. So I do not think that the facts that North Carolina has not come up with an answer to this problem should be regarded as an answer to our suggestions that we must have time.

We have not yet had that time. Now, I want to be completely frank, Mr. Justice Harlan. I do not know, of course, what the future will bring. But so far as I know now, I would say that the chance of North Carolina in the near future will single white and Negro children in her public schools throughout the State is exceedingly remote. That is the reason that I have

the gravest fear that such a decree would result in the abolition of our public school system.

Justice Frankfurter: May I ask you whether I am right in assuming that North Carolina, the school system of North Carolina is not centrally administered?

Mr. Lake: North Carolina, sir, has a State Board of Education, and of course that State Board of Education has general supervision of all the schools.

Justice Frankfurter: Meaning by that there are legislatively laid down certain standards for educational administration?

Mr. Lake: Yes, sir, we have a general school law.

Justice Frankfurter: But the financing, the appropriation, is that state-wide?

Mr. Lake: The school system is a state-wide school system in that respect. North Carolina operates its schools with state funds.

Justice Frankfurter: Exclusively?

Mr. Lake: No. I believe the ratio is about 65 percent State and 35 percent local.

Justice Frankfurter: That leads me to my next question.

Mr. Lake: Yes.

Justice Frankfurter: Is there variety among the different counties, are there disparities and variations in the

facilities, educational standards, et cetera, et cetera, et cetera?

Mr. Lake: Well, of course, sir, there are varieties in the size of the school buildings and so forth and so on. Our school buildings, if I may try to explain our system, it is this. Our school buildings are the county responsibility. The county owns all buildings and supplies the school buildings.

Justice Frankfurter. Do they have to act according to the requirements of the State Board? In other words, the size of the schoolrooms, the number of pupils in a schoolroom, et cetera, et cetera, are important factors in the quality of education.

Mr. Lake: Yes, sir.

Justice Frankfurter: Who determines that?

Mr. Lake: I believe, sir, the County Board of Education. I am not positive of that, but I know of no power in the State Board to control it.

Justice Frankfurter: So you may have varying conditions in the different counties?

Mr. Lake: We do.

Justice Frankfurter: I notice the gamut of white and Negro children from the different counties runs from 1.5 to 62.57, from one point of a percent to roughly 64 percent.

Mr. Lake: Yes, sir.

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Justice Frankfurter: Is that reflected in differences of educational enjoyments, would you say? Does that mean that different accommodations would have to be made in different counties?

Mr. Lake: If I understand you, sir, yes, I think clearly that it would. We have a very complex system in North Carolina, sir. It grew up over this hundred years, you see.

Now, we began, of course, with local schools -- local school districts. As the years have gone by, we have drawn certain powers from those local bodies to the state.

For example, certification of teachers is a matter of state authority. The selection of the curriculum, Justice Frankfurter, is entirely state.

Now, every child in North Carolina except insofar as local tax supplement to provide additional benefit for every child in their district, white and Negro alike, every child in North Carolina, regardless of race, residence, economic or social status, studies the same subjects, he goes to school the same number of days as the other children. That has been true for more than ten years, the length of the school term.

Justice Frankfurter: Is school attendance equally enforced?

Mr. Lake: Yes, sir; yes, sir. There is no distinction in that respect. He goes to school the same number of days, he uses the same textbooks, and the state supplies the textbooks,

so every child in North Carolina, white or Negro, has the books.

The Negro children, I may say, have certain advantages. Every teacher in North Carolina, having the same training, the same experience, teaching the same subjects, receives the same pay. Because of conditions outside the schools, that makes the teaching profession more attractive to Negroes than to white people.

Consequently there is a tendency -- of course, there are exceptions -- there is a tendency for the Negro teachers to remain in the profession longer than the white teachers.

The result is, since they get salary increments based upon experience, the average Negro teacher in North Carolina today receives more salary than the average white teacher, and that has been true for a whole school generation, for ten years.

The same circumstance, I believe, accounts for the fact that the average Negro teacher in North Carolina has had more years of college and university than the average white teacher.

And we have at this moment 288,000 Negro children sitting in the schoolrooms of North Carolina. They are studying the same subjects, using the same textbooks, going to school the same number of days, to teachers better paid, more experienced, with more time in college and universities than our white children have.

These Negro teachers should have a moment of our con-

sideration here, I think. North Carolina employs more Negro teachers than any other state in the Union, and I am told more than all of the nonsegregated states combined. Hundreds of our Negro teachers have been trained in colleges and universities in the Northern states. They have come to us because there was no room for them in the nonsegregated school system of the states where they were educated.

Now, we respectfully submit that those Negro teachers should be given consideration in this matter.

The comments of the county and city school superintendents quoted in the appendix to our brief shows that of 165 superintendents, only three believe that it would be possible to use Negro teachers in mixed schools in North Carolina. Now, if they are right, and as I said yesterday, those are the men who know more about this North Carolina public schools than any other people anywhere, if they are right, the jobs of 8,500 Negro teachers are hanging in the balance in North Carolina alone, awaiting the final decree of this Court.

We have called to the Court's attention in our brief certain major differences between North Carolina and other states in this respect, in this matter.

Justice Reed: Mr. Lake, before you proceed, are you familiar with the parochial school system in North Carolina?

Mr. Lake: I would say, sir, we have a very limited parochial school system in North Carolina, if I understand you.

I assume you mean the Catholic school system.

Justice Reed: Yes, sir.

Mr. Lake: We have very few Catholics in North Carolina. There are some parochial schools. I am not familiar with it.

Justice Reed: Do you know whether they have integrated the classes in their schools?

Mr. Lake: I do not know, generally, but I am inclined to think they have. I know that there has been some such attempt -- I won't say attempt -- they have done so in the schools in and near Raleigh. Whether that is true all over the state I just don't know, but I suspect it has been true.

Justice Reed: Do you know how that was done?

Mr. Lake: By decree of the Bishop, as I understand, and again I am speaking ...

Justice Reed: Did you discuss that question in your brief?

Mr. Lake: No, sir.

That, Mr. Justice Reed, is, in our opinion -- I won't say in our opinion -- it simply didn't occur to me before, because, as I say, the parochial schools in North Carolina are negligible in numbers.

Our state simply does not have many Catholic citizens in it. And so we do not have many parochial schools. Most of the Catholic children we have go, I believe, to the public

schools, but there again, I am speaking only on the basis of belief.

Justice Reed: Do you have any other church schools?

Mr. Lake: Not many. The Baptist Church, and I believe it is true of the Methodists -- I speak of the Baptists because I happen to know them -- the Baptist Church formerly operated a number of academies in North Carolina. Some of these grew into what are now junior colleges. Other were abandoned when the state school system became much more effective.

Now, sir, if I may go on to those differences, because my time is running on. The problem created by this decision is not the same in cities as in rural areas. In cities, North and South -- and, Mr. Chief Justice, I don't know Baltimore and St. Louis; but I believe that would be true of Baltimore and St. Louis -- in cities, North and South, the problem, by virtue of normal geographic school districting, obtains about the same proportion that it does in those states where a very small number of Negroes are mixed with a large white population. But normal geographic school districting is no help in the rural areas. North Carolina has the same differences when one part of the state is contrasted with another.

For example, Mitchell County in the western part of the state, with 49 Negroes and 15,000 white people, has a far different problem from that which confronts the people of

Northampton County, in the eastern part of the state, where there are 71 Negro school children for every 29 white school children, or Anson County, where the population -- in the central part of the state -- is almost equally divided between white and Negro, where they are 50-50, approximately.

Justice Reed: Do you have a law in North Carolina that forbids whites and blacks to go to school together?

Mr. Lake: Yes, sir. That is in our State Constitution. It is also in the statute.

I may say, sir, that that has been true since 1868. The law was enacted by the same legislature about the time of the Fourteenth Amendment.

Justice Reed: It covers only the grade schools?

Mr. Lake: It covers all schools.

Justice Reed: Your universities?

Mr. Lake: No, sir, I did not mean the universities. I had reference to high school and elementary. It covers all.

Justice Reed: It is worded to cover only the elementary schools?

Mr. Lake: All public schools, I believe, Justice Reed. The University of North Carolina is not mentioned in it. But, of course, until the Negro was admitted to the law school some four or five years ago, it was entirely possible.

Justice Reed: My interest is whether the law covered the State Universities.

Mr. Lake: It does not, I am sure; I would have to look at the Charter.

Justice Reed: You have no permissive authority to school boards in counties such as you speak of, where there is a small percentage of Negroes, to unify the school system?

Mr. Lake: Well, I hardly know how to answer that, sir, for this reason --

Justice Reed: I am asking because in my own state we have that permissive authority above high school.

Mr. Lake: Yes, sir.

Not specifically, but this is what we have had, and I offer this to refute the suggestion that the Southern states are doing nothing and would do nothing, with additional time.

This legislature also passed a bill, and it is now the law, that each county or city administrative board is the sole authority in the assignment of children to the schools of that area. Now, because I drafted that bill, the legislature, when it was in session, asked me did that mean that a county, if it saw fit to do so, could admit Negro children to white schools. I told them that it certainly did mean that. The legislature passed that bill.

Justice Reed: So now you do have a law which would permit the integration of schools where the local board wanted it?

Mr. Lake: They also asked me this question, Mr. Justice Reed:

"Does the decision of last May invalidate our constitutional provision?".

And I told them that in my opinion the decision of last May did not technically invalidate our State Constitution because North Carolina was not a party to those cases, but that in my opinion, as a lawyer, that precedent would make it obligatory upon a court to hold that those laws no longer had application.

I believe I have just about five more minutes.

The Chief Justice: You have a little more time than that. You have about ten minutes, I believe.

Mr. Lake: Thank you.

North Carolina differs from Northern and border states in this important circumstance. In North Carolina we have no large metropolitan areas. We have no large sub-racial groups, such as is to be found, I believe, in all large metropolitan areas. Consequently, everybody in North Carolina, practically everybody in North Carolina, is either Anglo-Saxon or Negro. As a result of that, we have more consciousness of race in North Carolina than is to be found in some of the border and Northern states.

That race consciousness is not race prejudice. It is not race hatred. It is not intolerance. It is a deeply ingrained awareness of a birthright held in trust for posterity.

There have been in every group, and are individuals,

who, despising their birthright, have been faithless to that trust. So it has been and so it is in North Carolina.

But the majority of North Carolinians have been taught from infancy, and they understand, how it came about that Israel became a great nation, while Edom faded into oblivion, and they agree with the great Disraeli, who said:

"No man will treat with indifference the principle of race, for it is the key to history."

The Negroes of North Carolina know the difference between race pride and race hatred. Every day there is in North Carolina a demonstration of the truth that two races as fundamentally different as the Anglo-Saxon and the Negro, can live side by side in freedom, security, peace, friendship, mutual helpfulness.

If our State Department will only use that demonstration of democracy in action in North Carolina, it will be a more effective answer to communism at home and abroad than would a decree of this Court which proclaims equality but destroys the public schools.

I do not know what decree should finally be entered in Prince Edward County, in Clarendon County, because I don't know the conditions in those counties. But I do know this:

I know that if a decree should be entered by this Court, or any other Court, requiring the immediate intermixing of white and Negro children in the public schools of North Carolina,

those schools will be in the gravest danger of abolition.

And the friendliness and peace which now characterizes the relations of white and Negro North Carolinians would be supplanted by racial tensions and bitterness and antipathies unparalleled in our state since those terrible days which called forth the original Ku Klux Klan.

If that statement be deemed an exaggeration, I invite the Court's attention again to the comments in our brief by county and city school superintendents, sheriffs and chiefs of police. A public school system forced upon a community by an outside power, which school system does violence to the earnestly held conviction of that community, has always been and always will be a school system of inadequate equipment, shoddy instruction, and irregular attendance.

The people of North Carolina are convinced that a segregated school system is a just school system, and the only practical school system for their state.

That is not an opinion which originated on some tobacco road. That is an opinion which is justified by a century of experience, which has demonstrated the wisdom of this agreement reached a hundred years ago by the carpetbaggers, the scallywags, the Negroes, and the handful of Confederate veterans who comprised the legislature which adopted the Fourteenth Amendment in the name of North Carolina.

Mr. Oliver Justice, the Attorney General of North

Carolina is the attorney for all the people of our state. We have come here conscious of the sacred duty which we owe to the Negroes of North Carolina as well as to the white people. We have discharged that duty.

The people of North Carolina want to go on educating those 266,000 Negro children and their children's children, as well as the white people of the state, and we respectfully ask this Court not to make it impossible for them to do so.

The Chief Justice: Thank you, Mr. Lake. I know the Court will thank you for presenting your views.

Attorney General Thomas J. Gentry of Arkansas.

ARGUMENT ON BEHALF OF THE STATE OF ARKANSAS,  
AS THE FRIEND OF THE COURT

By Mr. Thomas J. Gentry

Mr. Gentry: Mr. Chief Justice.

The Chief Justice: Mr. Attorney General.

Mr. Gentry: May it please the Court, at the very outset of my oral argument, I should like to repeat for the purposes of emphasis what was said on page 3 of our written amicus curiae brief, filed in behalf of the State of Arkansas in these cases.

We there stated that nothing contained in our brief is intended to bring into question the directness of the May 17th ruling of this Court or its reasons for reaching that conclusion.

As we now view these cases, it is wholly immaterial whether the decision was right or wrong, advised or ill advised, or timely or untimely. It is now accepted as the law in Arkansas that in the field of public education the doctrine of separate but equal has no place, as was specifically held by this Court in its decision of May 17th.

As a leader of this Court, I feel it is appropriate for me as the duly elected Attorney General of Arkansas to preface my argument with an explanatory statement as to the reasons for my presence before this Court today, and the reasons which prompted me to file a brief in these cases.

I am not here in obedience to any specific mandate or command from the General Assembly of Arkansas or from any branch of the Executive Department of my State. I am not here because of any political pressure, or pressure of any economic group or any propaganda of any kind.

But I am here because I honestly and sincerely conceive it to be my sworn duty to present to this Court the views of what I believe to be a majority of all of the people of Arkansas on the complex problem which affects substantially all the people of Arkansas in their daily walks of life.

Secondly, I am here because of what I have construed to be the sincere and earnest invitation, if not actual solicitation, of this Court extended to all the Attorneys General of the so-called segregated states.

Without intending any adverse criticism of the AttorneysGeneral of several segregated states who have not seen fit to appear in these cases, yet it is my personal view that I would be derelict in my obligation as a member of the bar of this honorable Court to completely ignore what I choose to consider as an invitation from this Court, an invitation this Court was under no obligation or duty to extend and one which, as I believe, is very rarely extended.

May it please the Court, what is the up-to-date situation upon this matter in the State of Arkansas? In our written brief, on page 2, we set out fully the policy statement issued by the State Board of Education, which was issued on June the 14th, 1954, which was about a month after the decision of May the 17th which was handed down by this Court.

It is not necessary to repeat that statement at this time. Suffice to say that up to the present time the statement of June the 14th, 1954 by our State Board has not been reversed or modified in any respect.

It is also pointed out on page 6 of our brief that two Arkansas school districts have already integrated the white and Negro children in the public schools, the integration being total as to one of these districts and only partial at the high school level in the other district.

We were advised by the State Board of Education just before we left Little Rock that there had been no other inaugura-

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tion of any form of desegregation in this state by any of the school districts.

Justice Reed: Did you have a law in Arkansas forbidding integration?

Mr. Gentry: We have had such a state statute, Mr. Justice Reed, since 1868, prohibiting integration of the races from the first through the twelfth grades.

Justice Reed: And was that repealed?

Mr. Gentry: No, sir, that has not been repealed.

Justice Reed: These school districts acted, then, under the belief that that was no longer a valid law?

Mr. Gentry: They acted under the belief that by the doctrine of stare decisis that in the event that the action should have been taken against them for violation of the state law, that it would have been thrown out by our Supreme Court.

And, as a matter of fact, as the Attorney General of the state, I assume the prosecution in the Supreme Court, not in the lower courts, of all criminal cases, and frankly, Your Honor, I would have confessed error before our Supreme Court if there had been any conviction for violation of this statute.

Justice Reed: Does your office give advisory opinion to the school boards?

Mr. Gentry: Yes, sir; we do.

Justice Reed: You did not issue any opinion?

Mr. Gentry: No, sir. These two school boards did

it on their own volition without consulting my office, without consulting the State Board, which, of course, only has advisory authority, at any rate.

But as you will notice by the policy statement, that was somewhat against the policy even of the State Board which thought perhaps it would be best to wait and see.

There are some 422 separate autonomous school districts in the State of Arkansas, and the school board, the directors of the school, the school board in each district, is elected by the citizens of that district.

By the same token, these school directors on the school board, they propose what tax they think it will take to operate the schools for the succeeding year, and the millage based upon the property tax, of course, is placed upon the ballot, and the people in each school district vote upon whether or not they want that tax for the succeeding year.

There are actually 422 elections, different millages in each of the 422 districts. The taxes which are levied by the school districts are the principal source of revenue for the operation of the school districts, the 422 school districts in the State of Arkansas.

However, the legislature does appropriate supplemental funds to carry on the public school functions of the State of Arkansas, and these funds are distributed to the various and sundry school districts on the basis of enrollment in each

district.

Justice Frankfurter: Mr. Attorney General, may I trouble you, in view of your reference to the two districts in which integration has been successfully carried out, in view of your statement in your brief:

"From a comparison of the factual situations of the Charleston and Fayetteville school districts with, for example, districts in St. Francis and Phillips Counties, it would certainly seem to follow as a matter of necessity that the process of integration must be applied as the circumstances in each district may require;" --

May I trouble you to sketch briefly the difference and make a comparison such as you indicated, which you know, and I do not.

Mr. Gentry: Yes, sir, I will be happy to.

The Fayetteville School District, Mr. Justice Frankfurter, is located in Washington County, Arkansas, and that happens to be where the State University is located. In that district there are approximately 68 Negro students from the 1st to the 12th grade. There was no Negro high school in that district.

Under the law as prevailed under the separate but equal doctrine, the eleven or twelve or ten, or whatever the number of Negro children who graduated into the high school level was, they were sent by trucks from Fayetteville to Fort Smith where there was a Negro high school, in order that they may obtain an education, some 50 or 60 miles, and arrangements were made to educate these people there.

Now when this decision was handed down, the eleven or twelve in the high school there, which was partially integrated in Washington County, they were placed right in with the 500 or so high school students, the white high school students there in Fayetteville.

Now, the other district, the Charleston District is in Franklin County, Arkansas, which is one of the sparsely populated counties, and there were only a few Negro pupils there, and, of course, there was no particular problem. It was, as a matter of fact, less of a problem to integrate them than it was to keep them separated, and as a result in that situation

they were immediately placed. That was the situation in those two instances.

I might say, Mr. Justice Frankfurter, that that has had a very quieting effect in Arkansas. It has been watched with a great deal of pleasure by a lot of people, and the outcome of it is being watched very closely by the other districts, but there have been no untoward incidences and it has worked very well so far.

Now, the other counties which you referred to, St. Francis and Williams --

Justice Frankfurter: Phillips.

Mr. Gentry: St. Francis and Phillips. Phillips County is over in eastern Arkansas on the Mississippi River. St. Francis County is about half-way between Little Rock and Memphis on the St. Francis River.

Both of them are agricultural cotton communities and about the same situation exists in those two counties in all five districts, in each one of the two counties which, as I say, has been described by other attorneys who have argued before --

Justice Frankfurter: You mean like Clarendon County?

Mr. Gentry: Yes, sir, maybe not the same percentage-wise, but the percentages, I believe, are in the appendix of the brief, Your Honor.

Justice Frankfurter: But the crucial thing is the saturation, the large percentage of Negro population compared

with the white. A lot of consequences follow from that, I understand.

Mr. Gentry: Yes, sir but where they are located and the part of the county, and the rural counties getting the children to and from their homes to a school, bus transportation over roads in some of the rural counties in Arkansas presents a problem which certainly the School Board directors of Washington, D. C., couldn't appreciate.

In our written brief which was dated November 15th, we stated on page 3 that the General Assembly of Arkansas had not been in session since the rendition of the opinion of May the 17th.

We said in our brief on page 3 that:

"Without anticipating what action, if any, the General Assembly of Arkansas will take in its 1955 session" -- and the 1955 session convened on January 10th of this year and adjourned sine die on March 10th of this year -- "it is probably safe to say at this time that some further words of advice and direction from this Court will go a long way toward charting the course of future action or inaction by the Arkansas General Assembly."

For reasons not material now, those solicited words of advice and direction from this Court were not forthcoming prior to the adjournment of the Legislature on March 10, 1955.

So it may be said now that the Arkansas General Assembly is still anxiously awaiting the final words of this Court.

Justice Reed: When does it meet again?

Mr. Gentry: In 1957 in January. Every two years, Your Honor, on the odd number of years in January, I believe it is the second Monday after the first Tuesday.

It may be of passing interest, however, to mention that the House of Representatives passed a bill or an act to be entitled, "An Act to regulate the assignment and transfer of school children to and from the various schools within the separate school districts and for other purposes."

Now, the first section of this bill expressly provides, among other things:

"Nor shall anything in this Act be construed as depriving any child of school age of the right to a free public school education as now provided by the Constitution and laws of the United States and the Constitution and laws of the State of Arkansas."

Now, this bill provided that the effective date of this Act should be July 15, 1955. But the Senate amended this Act to make the effective date of the Act July 15, 1957. And the sponsors of the Act, in their wisdom, failed, after this amendment to the Act was adopted, to postpone the effective date of it, did not call the Act up for final passage in the Senate, realizing, I am sure that in view of the amendment, it

would be advantageous to await further the final decision of this Court.

Thus the legislative history of the bill indicates very strongly that the Arkansas Senate still wants the advice of this Court before taking any definite action on the problem of integration of the races in the public schools.

And let me add parenthetically that I was not the draftsman of this bill, neither was I called upon officially or unofficially to rule upon its constitutionality. Thus is the situation in Arkansas upon this matter today.

Justice Clark: Mr. Gentry, I wonder would you tell me what county Little Rock is in?

Mr. Gentry: Pulaski County. That joins Bowie County in Texas.

There seems to me to be somewhat of a confusion in the arguments presented to this Court as to the rights of these appellants and the remedies these appellants seek.

Now, the appellants in their brief contended most earnestly that:

"Where a substantial constitutional right would be impaired by delay, this Court has refused to postpone the injunctive relief even in the face of the gravest of public considerations suggested as justification therefor."

Appellants contend therefore that appellants'

constitutional rights should be effectuated by decrees of this Court forthwith, forthwith

segregation in the public schools. And as a starter for their contention, they cite the Youngstown case and the Endo case.

First in the Youngstown case, that was a case where the owner of a steel mill sought an injunction in the lower court, in the District Court, where the injunction was sustained by the Court of Appeals, and this Court agreed with the lower court.

In the Youngstown case, this Court decided two points. First, that it was unnecessary to await the final order of the District Court before passing on the validity of the executive order and, secondly, that the seizure order was not within the constitutional power of the President.

Now it is very significant in this case to note that the proceedings in the Youngstown case were instituted by the owner of the mills to preserve the status quo.

Therefore, by the very nature of this case, there was no need for this Court, acting under its appellant equity powers, to give any consideration to the necessity for a period of adjustment by reason of a change in the status quo. The injunction was granted.

On the other hand, let it be supposed that the presidential order had been authorized by Congress, and that this Court had held that the order was valid.

Well, in that event there would have been brought about a complete change in the status quo, and this Court might very well, upon a sufficient showing by the owners, have exercised its equitable discretion and granted a reasonable time to make the adjustments brought about by the change in the possession.

So in the instant cases this Court, by its May 17th decision, has ordered a complete change in the status quo. This Court, by its May 17th decision, established the constitutional right of these appellants to attend integrated public schools. Therefore there is not now a question of right of these appellants before this Court.

This Court is not now concerned about rights. Its exclusive concern at this time is about equitable remedies.

Now, Mr. Pomeroy in his equity jurisprudence, points up this distinction:

"The primary right of the complaining party" -- the appellants in this case -- "which has been broken may be purely legal, that is that the right which the law confers, while his remedial right and the remedy which he obtains may be entirely equitable, recognized and given by equity alone" -- Mr. Pomeroy continues -- "the distinguishing characteristics of legal remedies are their uniformity ... their lack of an adaptation to circumstances and the technical rules which govern their use.

"There is in fact no limit to the variety and application. The court of equity has the power of devising its remedies and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties."

To the same effect are the decisions of this Court in Hecht v. Bowles and International Salt Company v. the United States, which we cite on page 10 of our brief. The appellants in these cases have chosen to exercise equitable remedy.

Having appealed to equity jurisprudence, this Court may, if it sees proper to do so in the circumstances, devise the relief granted to fit the complex relationship of the parties. This Court clearly recognized in its May 17th opinion that the public interest is involved in these cases.

In the Virginia Railroad v. Epstein, 300 U. S., the Court stated:

"Courts of equity may and frequently do go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Remembering that this Court is now concerned about equitable remedies rather than constitutional right, we have asked this Court to bear in mind the language of Mr. Justice Holmes in Katy Railroad 194 U. S. where he stated:

"Great constitutional provisions must be administered with caution."

This Court has held in its May 17th decision that the complex problem which would be created by the granting of appellants' prayer for injunction would play no part in determining the rights of the appellants.

As stated by Mr. Justice Frankfurter, concurring in the Youngstown case:

"Balancing the equities in considering whether an injunction should issue is lawyers' jargon for choosing between conflicting public interest. When Congress itself has struck the balance, has defined the weight to be given to competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion."

We interpret Mr. Justice Frankfurter's language, he is making the very point we insist distinguishes the holding of May 17th from the decision in the Youngstown case.

It is stated that the Court does not balance interest in determining whether the injunction should issue. Here the Court has already decided that the injunction shall issue.

The Court is now deciding how to administer the constitutional provision in the light of the Court's well recognized power to make nice adjustments and reconciliation between public interest and private need to use Mr. Justice

Douglas's language in Hyde v. Bowling, at page 12 of their brief appellants say in reference to the Youngstown case:

"If equity could not appropriately exercise its broad discretions to withhold the immediate grant of relief in the Youngstown case, such a postponement must certainly be inappropriate in these cases where no comparable overriding consideration can be suggested."

As I have pointed out, neither the Court in the Youngstown case nor in the concurring opinion engaged in any discussion as to the propriety of withholding immediate injunctive relief. The sole question there presented and decided was the right to the issuance of an injunction.

We submit, therefore, that the Youngstown case falls far short of what the appellants claim that it says.

Further, Mr. Justice Frankfurter in his concurring opinion in the Youngstown case stated:

"A court of equity ought not to issue an injunction even though the plaintiff otherwise makes out a case for it, if the plaintiff's right to an injunction is overborne by commanding public interest against it."

Also it is my contention that in the Endo case there is no support for appellants' contention. The Endo case arose under a petition for a writ of habeas corpus, and finally reached this Court where the writ was granted, and it was assumed by this Court that the original evacuation of all the Japanese

from the Sacramento area was authorized as a matter of military authority based upon the existing war emergency.

But it was held that the intention of the petitioner, who was conceded to be a loyal citizen of the United States by the War Relocation Authority, a civilian agency, on the basis of race was in violation of the Fifth Amendment.

In that case there was no appeal to the equitable discretion of this Court in that proceeding because it was based upon a petition for a writ of habeas corpus. The Government there urged that this Court sustain the authority of the War Relocation Authority on the basis of the pending war emergency.

In other words, this Court was asking a balanced interest in deciding whether the petitioner was being unlawfully deprived of her right of liberty under the Constitution. This Court refused to permit the existing emergency to carry any weight when applied, as Mr. Justice Douglas said, to the sensitive area of rights specifically guaranteed by the Constitution.

The Court in passing on petitioner's rights under the Constitution decided that she had the right to her liberty. This Court in its May 17th decision balanced the interest and considered the national emergency in handing down its May 17th decision, and having done so, the Court finally and completely adjudicated the right of these appellants to attend

integrated schools.

The question now before the Court in these cases was not and could not have been before the Court in the Endo case because the question of granting habeas corpus, as in the Endo case, was not based upon the equitable remedy of injunction. Here the exact reverse is true.

Now the appellants do contend in their brief that the antitrust cases and the nuisance cases relied upon by the appellees in their briefs are not in point because they did not involve the enforcement of constitutional rights.

We agree that these cases have no bearing upon the rights of appellants to an injunction.

Even if they did, they would be out of place in this hearing because the question of rights was decided by this Court in its decision of May 17th.

On the other hand, all of those cases and many others of similar import are authority for our contention that this Court is not required to enter forthwith decrees in these cases as the appellants seem to contend.

May it please the Court, why is gradual integration necessary? We do not consider it necessary or even appropriate in this oral argument.

To repeat our several contentions as set forth in our brief, we are content simply to say that this Court should enter such decrees as will permit these cases and other

similar cases which may hereafter arise to be determined on the basis of the particular facts then shown to exist, recognizing, of course, in all cases that the rights as distinguished from remedies have been adjudicated.

In determining the extent of the exercise of its discretion, this Court will recall that in discussing the First Amendment in *Cantwell v. Connecticut* 310 U. S., it said:

"Thus the amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

Chief Justice Marshall in *Von Hoffman v. City of Quincy*, stated:

"Without impairing the obligation of contract, the remedy may certainly be modified as the wisdom of the Nation may direct."

And further Mr. Chief Justice Hughes, speaking in *Home Building and Loan Association v. Basil* 280 U. S. stated:

"But it does not follow that conditions may not arise in which a temporary restraint of enforcement of a contract may be consistent with the spirit and purpose of the constitution provision, and thus be found to be within the reserve power of the State to protect the vital interests of the community."

In *Interstate Consolidated Railway v. Massachusetts*,

speaking only for himself, Mr. Justice Holmes stated that it was his personal opinion that:

"Constitutional rights, like all others, are matters of degree, and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme but must be taken to permit the infliction of some fraction and relatively small losses of compensation, for some at least are the purposes of wholesome legislation."

Further, Justice Holmes stated:

"If the 14th Amendment is not to be a greater hamper upon the established practices of the State in common with other governments, then I think it was intended they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed."

Further, in *Block v. Hirsch*:

"A limit in time to tide over a passing trouble well may justify a law that may not be upheld as a permanent change."

So when this Court comes to decide the terms of the decrees in these cases, I respectfully urge this Court to remember Mr. Justice Holmes' admonition that traditions and habits of centuries were not intended to be overthrown when the 14th Amendment was adopted, and that the decrees should

be so framed as to tide over a passing trouble.

Justice Frankfurter: What case is that from?

Mr. Gentry: Block v. Hirsch, 256 U. S. 135.

Justice Frankfurter: Did that case turn on the kind of decree entered?

Mr. Gentry: No, sir.

Justice Frankfurter: Not as I remember it. That was the constitutionality of the Rent Control Act.

Mr. Gentry: Yes, sir.

Justice Frankfurter: But what you read doesn't refer to the decree, does it? Would you mind reading that again?

Mr. Gentry: "A limit in time to tide over a passing trouble may well justify a law that could not be upheld as a permanent change."

Justice Frankfurter: You said something about a decree.

Mr. Gentry: I don't believe I did, sir, in the quotation.

Justice Frankfurter: That was your comment?

Mr. Gentry: Yes, sir, that was.

In this litigation one side has said that what we need is an immediate and forthwith decree which will take effect in September, 1955 or not later than 1956. Then other statements have been made on the other side that this matter not be accomplished until 2045.

My guess in these cases is that the date would be somewhere in between, as is in most cases the position taken by opposing sides and opposing lawyers.

I don't know the exact date. I don't think it is possible to determine an exact date. I think that any guess or any statement of an exact date would be purely a guess.

But why guess upon a question which is as important as this, when it is not necessary.

Now, it seems to be logical we should charge the court

of first instance with the responsibility of carrying out the mandate of this Court and placing the mandate of this Court into effect, and secondly, to give the court of first instance, along with the responsibility, the authority to do what is best under the circumstances in carrying out the mandate of this Court.

There are 422 separate instances in Arkansas. How many in other segregated states, I have no idea. But it would appear that by far the most logical thing to do would be to place the responsibility upon the court of first resort and give that court the authority to carry out the duties placed upon it by this responsibility, and not hamper him or the court, lower court, in any respect.

It must always be remembered that if there is any abuse of discretion, these people have their right of appeal to this Court, and certainly almost every week we have some allegations of abuse of discretion by courts below brought to this Court. It is not a new or a novel thing. But I do believe that the redress of the grievances of these people will be better, more promptly taken care of, by referring this matter back to the courts of first instance for solution.

Secondly, this Court might well leave some of the problems of integration to the Congress. After considerable reflection on the subject, since the filing of our written brief, I am still of the opinion that some of the problems of

integration might well be worked out through appropriate legislation by Congress, pursuant to Section 5 of the Fourteenth Amendment.

Justice Douglas: You refer to future litigation?

Mr. Gentry: Yes, sir, Your Honor.

What we who are not parties to this particular case have to look forward to. I, as the Attorney General of Arkansas, have to look forward to the possibility -- not a probability, but a possibility -- of 422 separate law suits in my state, a multitude of litigation. I think that the Congress might well assist in the problem which confronts the nation.

Justice Black: May I ask you a question there.

The argument has been made heretofore largely on the basis that the Court is going to draw a decree which will decide when segregation should end in every state in the Union, draw up a broad legislative plan. What we have is litigation on the part of individuals, a very small number, perhaps a half dozen, that ask to be admitted into certain schools.

Does your argument suppose the decree would affect those individuals? Maybe it would have to. This is a law suit. Would your argument, which you are making, apply then?

In other words, if the decree of the Court is to treat this as a litigation between the parties, which will involve only the person named in the proceeding of today, would the argument you have made be applicable?

Mr. Gentry: I think it definitely would, Mr. Justice Black, because if that is the decision of this Court, I have no doubt but what there will probably be a case filed in practically every jurisdiction in the state where there is segregation, and although I am trying to talk about the broad aspect of this, if that be the law, insofar as these five or six or ten individuals are concerned, then under the doctrine of stare decisis it would be the law when the 2,000 or 3,000 or 10,000 came before this Court and asked for the same right and the same remedy.

Justice Black: But assuming that is true, as you have assumed -- properly, I suppose -- that the Court has already passed on the basic question to that end, assuming that is true, we still have before us a law suit between individuals, certain individuals, perhaps a half a dozen which are admitted to certain schools,

If others wish to be admitted, it would require law suits, it is true. It is true there might be many. But would that not be the appropriate time to pass on whether, in that individual case, the number of individuals who apply could be admitted into the particular schools into which they sought entrance, and are the circumstances which this Court has declared on individual law suits not limited to circumstances of the individual case?

Is it your idea that the Court should attempt to draw

some kind of a broad plan which would be in the nature of legislation to determine when and how, and so forth, the schools shall proceed all over the nation, or should the Court limit itself to the particular law suit before it?

Mr. Gentry: I think that the Court in these particular cases -- far be it from me as a country boy from Arkansas to tell the Supreme Court ...

Justice Black: I am asking you. I appreciate the argument you have made.

Mr. Gentry: I believe that under the circumstances of taking the broad picture, that this argument would be feasible, it would be appropriate. Merely the ten or fifteen that are all we are talking about, they could be integrated, like the eleven were in Fort Smith.

Justice Black: That is what I had in mind in connection with your Arkansas argument.

Mr. Gentry: If that is the problem, and that is all there is to it, then we have no problem.

Justice Frankfurter: You yourself suggested in the exchange that you and I had that the situation in the Charleston school district is one thing, and the case in Clarendon is another.

Mr. Gentry: Yes, sir; that is true.

Justice Frankfurter: In other words, stare decisis applies to the legal principle announced, but does stare decisis

apply to the terms of a particular decree? They are very different things, aren't they?

Mr. Gentry: Yes, sir; they are very different things, but the ultimate result is what I am looking to. The ultimate effect of this Opinion which is already the law in all of our country, that is what I am looking to ultimately.

Justice Frankfurter: What you are saying is that if this Court enters a decree that requires implementation of the May 17th decision forthwith, you say you would, naturally, be troubled by the fact that you would have law suits all over the State of Arkansas asking for the same kind of a forthwith decree. Isn't that what you are troubled by?

Mr. Gentry: That is one of the problems which we must face. But the point that I am undertaking to make to the Court, that it would not be without precedent if this Court would supplement its Opinion and call the attention of Congress to the particular problem that we have as a result of this decree or Opinion of May 17th, and that the solution to the situation could be helped by the Congress.

For example, in the case of Board of Education v. Wynette, that was the flag salute case in which Mr. Justice Frankfurter, in a concurring opinion, stated that the Opinion of the Court meant this, and in fact, as I read the Opinion, told them how to require a salute of the flag within the meaning of the Court, and by the same means that the attention of the

Congress may be called to some of the problems that we have here.

For example, as the Court stated in its Opinion, the public school education is one of the most, or the most, important functions of the local and state governments. At the present time, in the Opinion of this Court, the Supreme Court, on the part of the Federal Government, is now advising the local and state government how it must administer this function of the local and state governments.

Now, if the Fourteenth Amendment -- and the Court has already said that the Fourteenth Amendment includes that, then it is also a Federal problem as well as the state and local problem.

And by enactment of the Congress outlawing, for example, the deprivation of the constitutional rights under the Fourteenth Amendment by refusing to allow someone to go to an integrated school would be punishable by a fine, I think it would have a deterring effect upon any violation, and it might be well that that is the solution rather than the decrees of this Court and the lower court in specific instances.

Justice Black: May I ask you this question. I am asking your view. I want your view on whether it would apply only in a definite and specific instance.

Mr. Gentry: I don't believe that it could, Mr. Justice Black, because the decree would be there, and any

violation of that decree would have to be enforced by contempt proceedings.

Justice Black: With reference to the particular instance?

Mr. Gentry: With reference to the particular instance. There would have to be a decree in every instance where litigation was brought.

Justice Black: Do you suppose there might be many places in which no litigation would be necessary?

Mr. Gentry: That is correct.

Justice Black: And they might not be faced with that litigation?

Mr. Gentry: But these cases, as I understand it, and the persons may be ordered to do something by this decree, are only litigants in the particular case.

Justice Douglas: If Congress did not act -- you said there was a prospect of leaving some of this to Congress -- I am not quite sure that I understand what you mean.

Mr. Gentry: Well, under the present circumstances, the responsibility of seeing that the constitutional rights of the appellants and all others similarly situated all over the segregated areas falls squarely within the Court because there is no law the Congress passed pursuant to Section 5 of the Fourteenth Amendment which would protect the rights which this Court has given these appellants and others similarly situated

in its decision of May the 17th.

Now, it has been held by the Court that there has been a violation of the Fourteenth Amendment, then the Congress can pass an Act saying that the violation of the Fourteenth Amendment in this particular respect is unlawful, place what penalties it wishes, and if somebody wilfully violates the law, then you not only have the courts to assist in the enforcement of this, but the criminal courts, the courts of equity, and the full power of the law enforcement of the United States Government, as well as the Judiciary. That is the point that I was making.

Justice Harlan: Well, wouldn't you suppose that if the impact of the decree in these particular cases, which can affect only the individuals, is remitted to the District Court, and then you have a flock of law suits by others who have not been enjoined, wouldn't it be within the discretion of the District Court to stay those law suits, pending some proposal by the local school authorities to promulgate a plan to take care of the wider situation than that which affected the particular individual?

I thought that was inherent in your whole idea, that this should be remitted to the District Court.

Mr. Gentry: I hope that that will be the case. But I am trying to submit alternative solutions, Mr. Justice Harlan.

10 May it please the Court, I am, of course, primarily interested in what is going to happen in Arkansas, and I am concerned about the attitude which will be taken by both the white and Negro people in some sections of Arkansas where many Negroes live.

There are many sections of Arkansas where integration in the schools will be worked out promptly and without the necessity of the supervision by any court, and regardless of what is contained in the final decree of this Court.

On the other hand, there are many sections of Arkansas where the Negro population is relatively heavy, and it is in these sections where there will have to be close supervision of some sort. It is in these sections, in my opinion, it will be extremely inadvisable for this Court to fix any definite deadline for the completion of integration.

During the transition period it will be my purpose, both officially and unofficially, to assist in every possible manner in bringing about complete transition without any unpleasant incidents.

Justice Reed: What do you mean when you say -- the words you just used -- time, definite time, for the completion of integration?

You said a few moments ago, before, that this judgment can only act on these few individuals, so if we admit, leaving the South Carolina cases for the moment, if these people were

admitted immediately, would there be any particular difference?

Mr. Gentry: I fear that it might be an instruction to the lower court, and any further litigation which might come before the lower court, that it was the duty of the lower court to so order immediately. That is the fear.

3) Justice Reed: It depends on the circumstances, doesn't it?

Mr. Gentry: If the lower court was free and told by this Court that it was free to adjudicate the matter, depending upon his sound discretion, so long as the right were protected and the circumstances considered.

Justice Reed: Well, that means to talk generally in an Opinion, but to act specifically in a case.

Mr. Gentry: That is it, in effect.

Justice Reed: That is what you are suggesting?

Mr. Gentry: Yes, sir.

During the transition period which we have already started in Arkansas and, as a matter of fact, on last April the 3rd, in an interview with the representative of the National Association for the Advancement of Colored People in the Arkansas Gazette, he stated that he had been in Arkansas since October measuring community reaction to the ideas of racial integration in the public schools, and he stated that his experience, he had experienced no unpleasant incidents, and in this interview he is reported to have stated:

"Arkansas represents perhaps the brightest among the Southern states, and it is expected to follow its previous pattern of pioneering."

Still quoting:

"Arkansas represents a variable picture. There are extremes in terms of resistance and in favorable reaction. There are variations in how long it will take for integration."

I am in complete accord with the statements that Arkansas represents a variable picture, and I also agree with the statement of this educational specialist that there are variations in how long it will take for integration in the State of Arkansas.

And it is because of these facts that I am opposed to any decree of this Court which would fix a definite deadline for the completion of integration in these cases, because that might indicate to the other courts in Arkansas that immediate integration was the command of this Court.

Justice Harlan: If it were generally agreed among all you gentlemen representing the different states, as far as the administrative problems were concerned, as to these particular individuals, there wasn't any administrative problem, because there are only a half dozen or so, then this Court would never reach the question of time, would it? It would go back to the District Court, and then it would be up to the District Court, as an original matter, if other suits were filed, to grant

time in relation to the handling of a large number of law suits that are going to pile up?

Mr. Gentry: Not only the handling of a large number of law suits, Your Honor, but the handling of these administrative matters which the appellants just choose to pass off with a brush. Some of the counties in Arkansas are going to have to have buildings built, and other things taken into consideration.

Justice Harlan: You misunderstood me.

In answer to Justice Black's question, you said there were no administrative problems, and in the nature of things I wouldn't suppose there would be in the case of only a half dozen individuals, or so.

Mr. Gentry: No, sir, not in the case of a half dozen individuals.

Justice Harlan: You could absorb those without administrative problems. Your administrative problems arise when there is a flood of applications, and they would result from new law suits being filed, and at that stage it would be the function of the District Court to pass on the time elements.

Mr. Gentry: That is my contention, exactly.

I believe, if the Court please, with the questions, my argument as contained here is complete.

Thank you for the opportunity.

The Chief Justice: Thank you for the cooperation of your state and the presentation of your views.

Mr. Gentry: Thank you.

The Chief Justice: Attorney General Williamson of Oklahoma.

ARGUMENT ON BEHALF OF THE STATE OF OKLAHOMA,  
AS THE FRIEND OF THE COURT

By Mr. MacQ. Williamson.

Mr. Williamson: Mr. Chief Justice; Your Honors:

Although Oklahoma is not a party contestant in any of the litigations currently being considered by the Court, I would like to say that Oklahoma is keenly interested in the principles heretofore enunciated by the Court of May 17, 1954, and we are further interested in the principles which will follow in due course this year.

We filed a very short brief herein upon invitation of the Court, for which invitation we are grateful. Our brief pointed out principally, Your Honors, the fact that Oklahoma has a unique, different system of raising funds for the support of our separate schools, and I may say at this point that Oklahoma, having been admitted into the Union in 1907 as the 46th state of this Union, had in its Constitution, imbedded in the Constitution, the principle of compulsory segregation in the common public schools of Oklahoma. That has been the rule, the constitutional rule, in our state since 1907, and it is compulsory.

So when the occasion came for this Court to promulgate

the Opinion of May 17, 1954, that Opinion posed at once a question involving the fiscal arrangement of our funds for public schools, and we met that question in due course, as I shall explain.

In our brief filed in November of 1954, I said to the Court that our State Legislative Council, which is an organization consisting of the entire current membership of both the Senate and the House of Representatives of the State Legislature, was giving careful and studious consideration to the impact of the May 17th decision upon fiscal arrangements of the State of Oklahoma and drafted, as they are, into the Constitution, providing for funds to run separate schools. So upon the convening of the regular 1955 session of the Oklahoma Legislature, which did convene on January 10, 1955, and which is currently in session and about to wind up its duties, that Legislature, among other things, passed a resolution submitting to the people of Oklahoma at a state-wide election the question of whether the people of Oklahoma wished to and would amend their own Constitution, taking out of our Constitution the segregation provisions for the raising of taxes on a basis of four mills to the dollar upon all the taxable property of the state, to be devoted to separate schools.

That question was submitted to the people of the state, and on April 5, 1955, that being the date called by the present Governor for the submission of the question, the state-

wide election was held.

I may say to the Court that the people of Oklahoma responded with more than 300,000 votes cast, perhaps nearly 350,000, and the question of removing the segregation feature as a constitutional feature and substituting therefor an amended constitutional section providing that the money so levied would go into what I may call a common jackpot for the distribution county-wide for the benefit of all children, based on an average daily attendance of the fiscal year preceding.

So this election, having been held, showed that the people of Oklahoma, by a majority of 3 to 1, adopted and ratified that change, the spirit and significance of which was to take segregation out of the Oklahoma State Constitution.

So I point out that Oklahoma has already made substantial progress along the lines of putting our house in order, fiscally speaking, and I may say further that the fiscal question was the principal question which stood as an obstacle in the way of this plan for proposed gradual changeover.

Justice Reed: Is that Section 9 of Article 10?

Mr. Williamson: Yes, sir.

If Your Honor please, that will be found on page 8, and the following pages of our brief.

Justice Reed: As I understand it, the segregation clause was repealed from the Constitution.

Mr. Williamson: That is quite correct.

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If Your Honor will notice the text -- and we have it in our brief on page 9, rather close to the top there -- you will see there is quite an extended provision there, and it writes segregation into Section 9 of our Constitution. That Section 9 of Article 10 of our Constitution is what we refer to as the fiscal section. It provides the fiscal framework for raising money, assessing taxes, and ad valorem taxes, statewide.

This fiscal problem being the big problem, our present Section 9 as amended by this 3 to 1 vote of the people, provides, as I said, first, that the same four-mill levy on all taxable property, real and personal, which was therefore levied for separate schools, is still to be levied against the property of the state, but when this four mills is collected by the various county treasurers, and there are 77 of them -- this millage is then distributed without regard to color, but based upon the average daily attendance of the school children of each county.

So there has been a transition of the four mills out of the segregation group.

Now, if Your Honors please, this amendment does another thing. It provides that whereas Section 26 of Article 10 has provided a limit with regard to the issuing of bonds by school districts, that limit being 5 per cent of the net valuation, real and personal, of the school district, this constitu-

tional amendment raises that limitation for the purpose of assisting impoverished and rural districts, it raises that limitation from 5 to 10 per cent, thereby allowing districts with modest or impoverished assessed valuations, the right, should they see fit, to go 5 per cent stronger for the purpose of erecting public improvements in the various school districts.

It will be understood, I am sure, that our method of financing contemplated county-wide assessment for separate schools, whereas the method of raising money for district or majority schools in Oklahoma has been a district basis, with geographical limitations, each district to itself.

So we have a rather incongruous situation in Oklahoma where the four mills for separate school purposes has been invested in buildings.

In the capital city, for instance, in Oklahoma City, which is the largest city of the state, some 350,000 people, that city has received the impact of most of the money collected throughout the length and breadth of Oklahoma County for public schools.

Farmers 45 miles southwest and southeast pay their two mills, but the money is gathered at the county treasurer's office, and then is administered as a separate school fund on a county unit basis and is administered by the Board of County Commissioners of the county, and in case there happens to be an independent school district, that is, the wider majority

district, which needs the separate schools also in the district, they go to the County Commissioners and from the county treasurer they receive money which is allocated to the independent district for the purpose of separate schools.

So we have the county unit system on separate schools. In Oklahoma City alone, we have this sort of a situation. This separate school money, collected county-wide, doesn't belong to the Oklahoma City school district. That is the majority district. Yet we find erected in the Oklahoma City school district, out of this county-wide school fund, what is known as the Douglass High School, which is a high school for colored children.

(3) That high school, as I have the figures, cost in excess of \$2,100,000. That high school stands within the geographical limits of Oklahoma City, the majority school district, but that building doesn't belong to the taxpayers of the Oklahoma City majority school district. It belongs to the taxpayers in the county.

That is true in a greater or lesser degree. We have, for instance, in Oklahoma, 1,795 school districts. Out of those 1,795, we have 313 school districts which have within them separate schools. In each of those 313 instances the buildings and permanent improvements have been bought and paid for by people, many of them do not even live in the school districts which contain the sites of the building.

So we have the problem there of the permanent improvements in 313 school districts of that state which really do not belong to the people of the district where the buildings in each instance sit.

That is a problem which must be wrestled with. There are probably in the entire operation of 313 separate school districts 500 school buses. That is an item. They don't belong to the school district where that school is. They belong to the people of the county.

I point out to the Court there are property situations there with which our Legislature must concern itself, and which it will concern itself.

In addition to the fact that this amendment adopted by the people has not only taken away the separate school label on that four mills which was given generally to the schools, in addition to the fact that it has also given the impoverished school districts 5 per cent higher limitation on the right to vote bonds, since they raised the limit to 10 per cent of the taxable valuation, they have also set up and created by this new constitutional amendment a fund which is supplied from the various items of the state income, which are all provided by the statute.

This amendment creates the state public common school building equalization fund, and into that fund will flow moneys from various state sources.

That is the third benefit which the new constitutional amendment gives to the school situation.

That common school equalization fund will receive various public moneys from time to time, and the purpose and intent of that third item in this amendment to the Constitution is to give to impoverished districts loans which will make up for their needs for buildings where they haven't got the money to pay for them.

In other words, we are trying to fix the fiscal picture.

The Chief Justice: We will recess now.

(A recess was taken.)

AFTER RECESS

2:30 p.m.

The Chief Justice: Attorney General Williamson,  
you may proceed.

ARGUMENT ON BEHALF OF THE STATE OF OKLAHOMA  
AS THE FRIEND OF THE COURT

BY MR. MAC Q. WILLIAMSON (Resumed)

Mr. Williamson: Mr. Chief Justice, Your Honors, when the Court arose, I was speaking among other things about the features of the amendment which was adopted by the people. I think I finished my explanation of the third feature which is a state fund for assistance of impoverished districts.

There will be a burden thrown on some small rural districts in this state because of the fact that colored children are in some cases transported by the buses many miles and there may be the disposition of the rural school boards to cut out that charge and let these children go at home.

There will be a national shifting of the personnel of the minor population, school children population here and there and the basis on which that will be taken care of is by upping of five mills of the debt limit on bonds voted by the district. That is planned to take care of the need of some school districts for great public improvements, greater than they could pay for under the old system.

No actually there is one district for instance in Oklahoma, that is in Carter County, that has 45 white children and

201 colored children and they bring those colored children from many parts of adjoining counties.

They have some four buses. There is a white district that is very limited in its area and limited in its taxability and there is going to be a shift of population there. Some of these children are transported many miles, will go to schools in their area.

We think the new amendment to Section 9 of Article 10 of the Constitution rather fully takes care of the physical problem that had been created by our theretofore constitutional segregation levies.

Now, if I may say one thing at this juncture, Section 9 of Article 10 of the Oklahoma Constitution is the only amendment which was submitted to the people.

Reference to my brief will show that upon two other places there in the Constitution, the term negro and the reference to separate schools are found.

That will be found on page 7 in my brief.

At page 7 it is found right at the top, Section 5, Article 1, makes provisions constitutionally for the establishment and maintenance of a system of public schools and the italicized language at the bottom provides constitutionally for the establishment and maintenance of separate schools.

Just under that Section 3 of Article XIII provides again

and in other places in the Constitution that these separate schools shall be provided by legislature and impartially maintained and defines the terms of the children and then Section 11 of Article 23 of the Oklahoma Constitution defines the words wherever used in the Constitution and statutes "colored" or "colored race."

I point out to the Court, lest there might be some confusion that none of these sections were amended but that only the section with the big obstacle, the fiscal section without which we could not run schools.

It was thought proper at that time not to load the special election ballot with four or five questions but to present to them the single sole question.

Will you be in favor of amending the Constitution of Oklahoma to provide for the untying of the separate school levy and for the elimination of the separate school levy from the state constitution?

That question was put directly to the voters. No other questions. As I said to the Court a while ago it was approved by a vote of three to one.

The legislature now, as I said is in session. The legislature proposes to implement this newly adopted Section 9 of Article 10.

It will implement it, no doubt, in the next two or three weeks.

bd4

Of course, the legislature could with better understanding implement that if we had the decision of this Court in the meantime.

But if we have that so well and good. If we do not have it --

Justice Burton: Mr. Attorney General, have you rendered any advice or opinion as to the status of these other three provisions?

Mr. Williamson: No, sir. If your Honor please, this matter has been pending continuously in litigation here. I will say to the Court that we have had a rule of long standing policy in the Office of the Attorney General of Oklahoma where I have had the honor personally to preside for several years, we have a rule in that office to the effect that we will not arrogate to ourselves the right to publish or prejudge a pending legal question and write an opinion of the Attorney General's Office when it is before some court.

We discuss informally with our state officers and with those who are entitled to inquire, we discuss legal questions but we do not formalize opinions on them.

Justice Burton: Are there any proposals pending in the Legislature for the amendment of these provisions?

Mr. Williamson: Not at this time. The three I have just mentioned.

Justice Burton: Yes,

bd5

Mr. Williamson: Not at this time.

Justice Reed: No provision for advisory opinions of the Attorney General?

Mr. Williamson: No, there are not, Mr. Justice Reed. No provisions. However, we freely discuss the matters informally with anyone who cares to ask and is entitled to ask.

Now, that brings me to the last and final remarks I should like to make to the Court. In Question No. 4, as propounded by this Court some several months ago, providing as it did for (A) and (B), which have been alluded to by some, both lawyers and laymen, and without levity, is the \$64 question, while the immediate impact of that question, as answered here in this litigation by this Court will not reach Oklahoma and many of the other so-called segregation-practicing states, yet we feel that it would be perhaps unfortunate and we feel that perhaps we should speak out against any proposed deadline now forthwith.

We feel that we should speak out because of the impact potentially which it may have on some of these segregation states in the future.

We feel that we should speak out at this time upon the question of an effective gradual adjustment, because we see in this historic occasion before this Court, we see balanced here the rights of young colored minors who wish to go to the school of their choice, and we see over as against that

b6

a tremendous public interest where men and women, the fathers of children, boys and girls are disturbed and are vexed and are apprehensive and we see them having the tremendous public interest themselves in this situation.

And in view of that, we believe earnestly that there might be a situation, perhaps not in these cases pending now, but there might be a situation in the future sometime where something that the Court might say by way of laying down a deadline in these cases might be inferred to mean that there will be a deadline laid in all cases, a pre-judgment if you please that it may amount to.

It might be twisted into that by somebody out yonder trying to interpret it.

It is our considered and earnest view that public officials as we are in Oklahoma trying to do our duty, trying to go along with a Governor who staked his personal and professional reputation with the people of our state on adopting this bill -- and that is Answer 3 -- school officers, state officers, all over the segregating practicing states honestly and earnestly endeavoring to try to fit this thing together -- we feel there might be a bit of a potential stigma on any disposition to give a man a deadline or especially where the courts are open and active and vigorous and no suspicion is cast on the trial courts as to their ability to take care of situations.

bd7

It seems to us of Oklahoma that nothing even in the remotest instance constituting any driving or lashing some public official toward a deadline should ever appear until and unless it appears in the record such officials are negligent or malingering or not promptly attending to their duty.

Thank you.

The Chief Justice: Attorney General Williamson, we thank you and your state for this expression of your views.

Mr. Williamson: Thank you, Mr. Chief Justice.

The Chief Justice: Attorney General Ferdinand Sybert of Maryland.

ARGUMENT ON BEHALF OF THE STATE OF MARYLAND

AS THE FRIEND OF THE COURT

BY ATTORNEY GENERAL C. FERDINAND SYBERT

Mr. Sybert: With your Honor's permission, on behalf of the State of Maryland I desire to express to the Court my thanks for this opportunity to appear and assist in the resolution of these momentous questions. I call the Court's attention to the effect that the Amicus Curiae brief filed herein on behalf of Maryland was prepared and filed by my predecessor in office Attorney General Edward Rollins whom I succeeded last December.

I adopt and subscribe to that brief in its entirety. While Maryland was a slave state, they have always been considerate of its colored population. It is highly

bb8 significant that at the beginning of the war between the states only one-half of the negroes in Maryland were slaves and the rest were freedmen.

In its Constitution of 1867 Maryland provided for the free education of both the white and colored races.

While it is true that it did provide by statute for separate schools, this was the accepted pattern of the day. Our brief delineates and documents the progress that has been made in the education of our colored population in Maryland from 1867 to the present day.

That progress has really been remarkable. It is completely true that at the time the Court's opinion was handed down in these cases last year Maryland's educational facilities were already equal though separate.

Equal in physical fact and not in theory only. I cite this situation to indicate the bona fides of the state's goodwill toward all its citizens.

Maryland has of course for many years proceeded, like most of the nations, on the supposition that segregation in public education was not in violation of the provisions of the 14th Amendment so long as the facilities provided for the races were substantially equal.

I do not intend to over-emphasize the difficulties occasioned by the impact of this Honorable Court's opinion upon standard and established practices and traditions in

bd9 Maryland.

But I feel it would be a disservice to the Court to say that no difficulties have been encountered or will arise.

To be at all helpful we must examine the situation factually and realistically. Shortly after the Court's opinion in these cases last year, several parent-teacher association groups in a Southern Maryland county adopted what they identified as the West River proclamation, a copy of which appears in the appendix to our brief at pages 62 and 63.

This manifesto in essence would prohibit any change in the existing educational pattern in Maryland, except by state law sanctioned by the people through referendum.

Another plan to circumvent this Court's decision was a petition circulated by a group known as the Maryland Petition Committee and signed, I have been informed, by approximately 36,000 citizens.

The petition called upon the Governor of the State to make provision for the establishment of a system of private schools for any groups which do not believe in integration, with freedom from school taxes for such citizens as might support those free schools.

The petition also affirmed the belief of its signers that the Constitution grants them the right to withdraw their children from the public schools if denied the above-mentioned privileges; for the Court's information, the Maryland Petition

d10 Committee after a protracted difficulty in attempting to find a sponsor finally obtained the introduction late in the recent session of the Maryland Legislature of two bills designed to implement its petition.

When the legislature adjourned sine die last week the two bills died in the committee of the House in which they were introduced.

Maryland was one of the three states which refused to ratify the 14th Amendment in the 1840s and which have not ratified it since.

A bill for such ratification was introduced in the recent session but died in committee.

Also the legislature made no changes in Maryland's segregation statutes although no bills were introduced toward that end.

The Office of the Attorney General of Maryland has received hundreds of letters since the opinion in these cases containing almost every conceivable suggestion as to methods of circumvention or implementation of the decision.

Many meetings of citizens have been held to the same ends.

I will now relate an incident which occurred in Frederick County, Maryland. Frederick is one of our northernmost counties, bordering on the Mason-Dixon line.

It is a highly conservative county and is one of

the richest farming counties in the nation. Its colored population is not quite 7 percent of the total. Last fall after the schools were opened, the county Board of Education gave orders for three colored children to be placed on a white school bus in order to be saved, those three children would be saved a mile and a half longer ride.

They would be left off at their own colored school. The next morning after this ban was put into effect irate parents descended upon the County Board of Education and persuaded it to reverse itself and put the colored children back on the colored bus.

Now if Your Honors please, let us inspect some other things which have been happening in Maryland, both before and after the May 17 opinion.

The University of Maryland has been operating its graduate schools on a non-segregated basis for a number of years. Very soon after the opinion was handed down in these cases last year, its Board of Regents announced the ending of segregation in all undergraduate departments as well, of course, as graduate departments and negroes were freely admitted last September.

The state has been spending approximately a quarter of a million dollars on out-of-state scholarships annually for negroes who could not obtain in Maryland courses being taught at the University of Maryland but not theretofore

bd12 available to them.

Due to the complete desegregation of the University, the granting of any further scholarships of this nature have now been eliminated.

The state for many years has operated Morgan College, Morgan State College as an institution of higher learning for negroes with a regular and summer enrollment of about 2300.

In recent years Morgan has admitted white students who desire to attend that institution. The number has been very small.

So much for the situation in Maryland with respect to higher education. In the City of Baltimore, which contains almost one-half of Maryland's population, the public school authorities began the process of desegregation in September 1954, with elementary and high school students attending the schools of their choice, regardless of race. Some early difficulties were encountered, such as picketing by some parents and absenteeism or, as sometimes termed, a strike of pupils.

Pupils marched in columns from one school to another, from two schools in the northern section of Baltimore they formed columns and marched possibly two miles down to the central part of the city and marched on City Hall.

bd13

The police struggled to maintain order. That situation existed, began on a Thursday, continued on Friday, over the week end. Colonel Ober, the Commissioner of Police of Baltimore issued a statement that picketing of the schools was a violation of the school's laws and could not be tolerated.

The school authorities in Baltimore City also made public announcement that absenteeism was of course a violation of the compulsory attendance laws and would not be tolerated.

As a result of those statements, the children came back to school on Monday and I am informed by the Superintendent of Schools of Baltimore City that no untoward incidents have taken place since.

I have been informed by a good many citizens that possible further trouble is feared this coming September. I might say that the process of integration in Baltimore has taken this shape: In Baltimore the students have been allowed to go to the school of their choice, except I might say there are 175 schools in the City of Baltimore -- only 35 of those schools are districted because of crowded conditions.

Other than in those 35 schools -- some of those are colored, some are white, any student is allowed to attend any school of his or her choice.

Justice Reed: How many schools do you have in Baltimore?

bd14

Mr. Sybert: 175 schools in Baltimore.

Justice Reed: He can go to any school he wants to?

Mr. Sybert: Any school except in 35 districted schools which are districted simply because of overcrowded conditions, some white and some colored.

I might add that any pupil in the district of a districted school may go to any other undistricted school but no person, no child from outside the district of a districted school might go to that school because it is already overcrowded.

About 24 or 2500 negro pupils availed themselves of the right to go from former colored schools in Baltimore City to theretofore white schools.

Justice Burton: Has that optional effect been in effect for a long time?

Mr. Sybert: Traditionally, right along. That optional situation has been in effect.

Justice Burton: It means in substance you can choose any school you want to provided that school is not already crowded?

Mr. Sybert: Yes, sir. 24 or 2500 colored students last September entered in schools theretofore white and a handful of white students I believe I was told three or four, availed themselves of the right to go to colored schools which happened to be nearer than the schools they previously attended.

bd15

In the 23 counties of Maryland outside of Baltimore

City --

Justice Reed: I don't know if I fully understand that. The right to choice has existed for many years?

Mr. Sybert: The right to choice of white students as to white schools and colored students as to colored schools before September 1954 --

Justice Reed: Then the statute forbidding segregation was changed to allow them to go to any school?

Mr. Sybert. There wasn't any change in statute or ordinance. The school authorities in Baltimore City decided to desegregate and announced that policy in the summer and in September --

Justice Reed: It was carried out?

Mr. Sybert: -- without regard to race from September on.

Justice Clark: How many colored students are there in Baltimore City?

Mr. Sybert: There are 57,000 colored students in Baltimore City and 87,000 white.

Justice Clark: And you say 2500 chose to go to another school?

Mr. Sybert: 24 or 2500, approximately five percent. A total school population of 144,000 in Baltimore City.

There has been no integration or desegregation in the

d16

counties of Maryland up to the present time. In the 23 counties of Maryland the situation is extremely varied. Maryland has often been referred to as America in miniature.

We have the wooded mountainous Western section, three or four counties, the rich grain area upland central district, the alluvial plains of Southern Maryland and the Eastern Shore of Maryland bisected by the Chesapeake Bay with its seafood industry.

Baltimore City in approximately the center of the state, a great seaport.

I am bound to inform the Court that the existing ways of life and established patterns of thinking vary between the inhabitants of those dissimilar regions as much as does their habitat.

It is also true that great differences as to population of schools and school attendance by races exists among the counties.

I direct the Court's attention to Table B on page 38 of our brief, 38 of the appendix which reflects the number and percentage of white and negro school population in the counties.

That shows there are actually no negro children of school age in Garrett County. I might say the negro population of Garrett County, the mountainous most westerly county is nine, but none of them are of school age.

sd17 In Southern Maryland Calvert County has a colored school population of slightly over 50 percent.

The other counties range in between. A few, five, six, seven percent and from there 16, 20, 30, 40 and so on, up to 50 percent in Calvert County in Southern Maryland.

Yet in every county except Garrett, of course, where the occasional colored child went to the white schools because there are seldom more than one or two colored children of school age, there being only one or two colored families that ordinarily live in that county; all the other counties have established and maintained since 1870 separate facilities.

In the last 30 years Maryland has undertaken a program of bringing the colored facilities equal with the white.

And for some years the facilities in the separated colored schools have actually physically and in all other respects been equal with those of the white schools.

Within a few days after this Court's opinion of May 17 the Maryland State Board of Education issued a statement appearing at Appendix Page 17, pointing out that the problems involved in any program of integration would vary among the different school systems of the state but expressing confidence that they will be solved in fair, decent and legal manner and with good common sense.

The Board also stated that until the decree of this Court should be handed down any detailed plan of action for integration would be premature, but it pointed out that

the State Board and the local school authorities should not delay in analyzing the situation and making plans for implementing the decision of the Court.

Thereupon the Superintendents of all the school systems of the county, some 23 county school systems, appointed a committee to determine just what were the facts of the whole situation, the local situations, also to make recommendations as to policies to be adopted by the local systems and to suggest answers to the two questions propounded by this honorable Court.

The report of this committee of superintendents begins at page 1 of our appendix. It is exhaustive and illuminating. Its conclusions may fairly be said to represent the consensus of mature opinion of the counties of Maryland.

Its suggestions as to the answers to the questions here being discussed have been adopted by the Maryland Board of Education and by the Attorney General of Maryland.

The committee summarized its recommendations in part as follows -- and this is found on page 16 of the appendix.

In summary the committee advocates a policy of gradual adjustment and remanding of responsibility for implementing the decree to the local school authorities.

Legal opinion would seem to indicate that the issues to be treated in moving from segregation to desegregation are not within the venal experience of the judiciary.

The state and local agencies which have been established to cope with such problems should be afforded the first opportunity to work out on a biracial basis the procedures for meeting the new principles of law as contained in the Court's decision of May 17.

Our adherence to this position is based on our desire to build at the local level in our respective counties a climate of goodwill between all parties concerned.

This climate is necessary to undergird the program of action which is necessary to carry out the program of the Court.

We recommend to the several counties formation of citizen's committees appointed by the local board and consisting of representatives of both races who will consult with the local educational authorities on the steps to be taken in each county, the program of desegregation and the setting up of safeguards for the protection of the rights of all children, and so on.

I respectfully commend to the Court's attention the whole report of the committee of superintendents which as I have just said represents the mature thinking of the school authorities on that and most of the other thoughtful citizens.

Justice Reed. Did they make any recommendations as to the steps to be taken?

Mr. Sybert: No, their report indicates that a process of education, getting together of the races through their

bd20 parent-teachers' associations, by racial meetings, being first set up to discuss ways and means.

They have not gotten as far as discussing specific plans.

Therefore Maryland's position --

Justice Frankfurter: Their theory is that the specific plan will derive out of an active and aggressive attitude of the state in carrying out this decree; is that a fair statement?

Mr. Sybert: I think so.

Maryland therefore specifically recommends to this Court that the questions propounded should be resolved in favor of an affirmative answer to Question 4(b) and an affirmative answer to Question 5(d), that is first that this Court may and should in the exercise of its equity powers so frame its decree as to effect an effective gradual adjustment be brought about from existing segregated systems in public education to systems not based on color distinction.

On that point that is the position taken in the brief of my predecessor. To my mind the same end would be attained if this Court, in considering these cases involving specific persons who have sued, would simply remand the cases to the lower courts for such further action in the light of the opinion in this case as should appear to be necessary.

Second that the cases be remanded without specific direction as to methods of time or compliance which

bd21 should be determined by the courts of first instance in the light of local conditions as they may be found to exist.

We respectfully submit that the 90-day period suggested by the Government within the lower courts should order local authorities to present their plans for ending segregation as soon as feasible would make for makeshift and abortive planning.

The Baltimore Evening Sun gave its answer to this question in an editorial on November 26, 1954.

I quote, "From the evidence presented so far by the individual states, the plan is going to take time if done on a community by community basis. School authorities have expressed a need for full talks with all interested parties so that each community will know exactly what the plans are. If this attempt to get community understanding and cooperation is made, more than 90 days will be required for the planning stage."

The Chief Justice: Do you feel, General, that the District Court is entitled to any guidance as a matter of help to them in supervising these cases?

Mr. Sybert: If your Honors please, I really don't think that is necessary. I think the fact that this decision has been handed down in most instances is going to lead to the gradual and ultimate adoption of the principles there laid down.

In my state we are fortunate enough not to have any

pending litigation with respect to schools.

The general consensus is that as this plan can be worked out, gradually, ultimately non-segregation will be achieved.

We feel that the 90-day period --

Justice Frankfurter: Do I infer from what you just said that you think no litigation will arise at all. There is no problem so far as Maryland is concerned about any action by a District Court?

Mr. Sybert: That depends upon the degree of forbearance, the degree of intelligence with which both races approach this problem.

There is no question about it, we have a severe problem in some counties in Maryland.

If the members of the colored race find that honest, intelligent steps to work out a desegregated school system are being pursued, I think the great majority of them will bear the immediate filing of suits.

Justice Frankfurter: None has been filed, I suppose?

Mr. Sybert: Not in recent years.

Justice Frankfurter: I mean since last May, for instance?

Mr. Sybert: I did not understand.

Justice Frankfurter: Since these litigations?

Mr. Sybert: None has been filed.

sd23      Justice Frankfurter: On this school board were there members of the colored race, were there colored members on this school board?

Mr. Sybert: The State Board of Education has one colored member.

Justice Frankfurter: The State Board?

Mr. Sybert: The Baltimore City Board of Education has one. Three or four counties in the State have colored members on the school board.

Justice Frankfurter: I notice you point with pride with justifiable pride, as I understand, as to the number of colored teachers in Maryland schools compare with -- I think it is always invidious to make comparisons with other places --

Mr. Sybert: Page 10.

Justice Frankfurter: Are there any colored teachers in non-segregated colored schools?

Mr. Sybert: No, your Honor.

Justice Frankfurter: Do the colored teachers absorb the personnel requirement of teaching in the colored schools?

Mr. Sybert: Yes. Our qualifications have been exactly the same for years --

Justice Frankfurter: No, I mean are there exclusively colored teachers in the colored schools?

Mr. Sybert: Exclusively colored teachers and in the white schools exclusively white teachers.

Justice Frankfurter: Is that a requisite of law or practice?

Mr. Sybert: Our Constitution provides for a free system of education; our statutes require segregated schools.

Justice Frankfurter: Does it require segregation of teachers or has it just worked out that way?

Mr. Sybert: That has worked out that way. Our statute simply requires the setting up and maintenance of separate schools. The law does provide for colored normal schools and white normal schools.

Justice Reed: I understand that on the State Board of Education there is one member who is a negro?

Mr. Sybert: One member of the State Board of Education, that is true, sir. As I said, not only that, but a colored member of the Baltimore City School Board of Education, we have had them in three or four counties. We have had colored policemen in Baltimore City for years; colored firemen for the last three or four years.

Justice Reed: Did that member participate in that report?

Mr. Sybert: There wasn't a colored member on the Committee of Superintendents because we don't have a colored Superintendent in the state. We have 24; one in Baltimore City and one in each of the 23 counties.

bd25  
I might say that I am convinced that I am correct when I say that thoughtful leaders of both races in Maryland believe that we should make haste slowly. They feel that coercion and force can only lead to trouble in Maryland.

They believe that they themselves and local authorities can work the situation out now that the Court has enunciated the principle in a calm lawful manner and within a reasonable time.

Unless there are further questions that concludes my statement.

Thank you very much.

The Chief Justice: Thank you very much, General, for your cooperation.

Attorney General Shepperd of Texas.

ARGUMENT ON BEHALF OF THE STATE OF TEXAS  
AS THE FRIEND OF THE COURT

BY ATTORNEY GENERAL JOHN BEN SHEPPERD

Mr. Shepperd: May it please the Court, the purpose of the State of Texas in appearing as an amicus curiae in these cases is to bring more fully to the attention of the Court the problems with which we will ultimately be faced as a result of the decision of last May 17. I shall discuss the background of the segregated system in Texas together with the factual information as to the varying degrees in which different

areas of the state shall be affected.

My assistant, Mr. Waldrep will continue our discussion with observations relative to the question propounded by the Court.

In order to determine the problems with which the Texas Public School System is confronted, our office has made a sincere effort to obtain a correct cross-section of views of the people of our state.

Surveys were made of editors, legislators and others with a knowledge of the subject matter under consideration.

Public opinion was sampled and composite views of groups of negro and white editors, civic leaders, school administrators, parents and many others were obtained.

We shall attempt to present the Texas picture as reflected from this research.

Expressive of the general attitude of our people is a statewide survey conducted by the Texas people on September 12 last. It was indicated in that poll that 71 percent of our people are definitely opposed to the decision.

Seven percent are in favor of putting the Court's ruling into effect immediately. 23 percent believe plans should be made to bring the races together in the schools within the next few years, and 65 percent prefer continued segregation.

A little poll made public on April 6 of this year revealed that 45 percent of the cross-section interviewed

bd27

expressed determination to circumvent desegregation either by disobeying the law or by evading the law through legal channels.

35 percent favored gradual mixing of the races and only 14 percent wanted to obey the law to the letter.

The poll indicated that there would be less resistance to a plan of gradual integration.

Justice Frankfurter: Am I right? Am I right in understanding that 35 were for gradual integration and 14 for immediate compliance?

Mr. Shepperd: Yes, sir.

Justice Frankfurter: That means about 50 percent or 49 percent close to 50 percent --

Mr. Shepperd: I think there were four different questions asked, Mr. Justice Frankfurter.

Justice Frankfurter: On this last figure you gave I gathered from the figures in the State of Texas 50 percent have indicated their readiness to carry out sooner or later the decision of this Court, is that right?

Mr. Shepperd: 35 percent.

Justice Frankfurter: Gradually and 14 percent immediately?

Mr. Shepperd: 35 percent answered the question as to whether or not there should be immediate integration as opposed to gradual mixing of the races.

Justice Frankfurter: 35 percent said they would be for

gradual?

Mr. Shepperd: Yes.

Justice Frankfurter: 14 for immediate?

Mr. Shepperd: Yes.

Justice Frankfurter: So half in your state -- any validity that poll may have about which I am very skeptical --

Mr. Shepperd: I might point out that this poll predicted the re-election of Mr. Truman in '48. That has been pretty accurate as far as the state -- I would be ashamed if it were not more generally rated.

Justice Frankfurter: That makes it scientific?

Mr. Shepperd: The four questions propounded by the Court dealt with immediate integration and gradual integration and some of the same people answered all four questions.

Of the Texas Negroes interviewed only 32 percent favored immediate desegregation. 30 percent approved gradual mixing of the races and 26 percent wanted to continue separate school facilities for negroes and whites.

The Chief Justice: What does that represent, General, these last figures you just gave us?

Mr. Shepperd: It represents the Texas Negroes interviewed, Mr. Chief Justice.

The Chief Justice: Those figures are different from the first ones you gave us?

Mr. Shepperd: Yes, sir.

9 It is in the same poll, but this is the negroes  
that were interviewed in this poll.

The Chief Justice: I see. I did not understand that.

Mr. Shepperd: Of this latter number about half or 12 percent of the total number of negroes polled were determined to prevent integration even if that meant disobeying the law. 67 percent of the negroes, 70 percent of the Latin American whites and 85 percent of other whites interviewed predicted trouble between White and Negro parents in the event of desegregation.

Three out of 10 expected serious trouble. Seven out of ten predicted more than a little trouble and only 15 percent of all races were optimistic enough to expect a minimum.

From its inception the Texas Public School System has been operated and maintained on a segregated basis. That has existed for more than 80 years under the authority of Section 7 of Article 7 of our Texas Constitution of 1876.

This provision requires that the State maintain separate schools for white and colored children with impartial provisions for both.

This constitutional authority was a direct and continuing result of the expressed will of the people of our state.

This doctrine of separate and equal schools was not the result of official or governmental prejudice or a desire

to discriminate against either race nor caused by any hatred or feeling of superiority.

The truth is that the purpose of the system is to furnish equal opportunities, privileges and services for the children of the two races and at the same time to preserve the peace and harmony and public support of the public school system.

In certain localities it would have been impossible to maintain peace, order and harmony among the people and to have the taxpayers' support for the public school system if those people were forced to mingle together against the will of the majority.

This was a valid exercise of the police power of the state. The argument that the states have been violating the Constitution by maintaining separate and equal school systems is without foundation.

On the contrary they have been acting in accordance with numerous precedents of this and other courts.

With this background we now consider the geographical picture in Texas which points up the need for a decree which will preserve the administration of our educational system in local school boards.

According to the Federal census of 1950, the State of Texas has a total population of 7,701,194, of which 977,458 or 12.7 percent is colored.

bd31

of the 1,786,918 persons of school age enumerated in our school scholastic census of last year, 13 percent or a total of 230,546 are colored.

Texas has 254 counties. But one-half the colored school children of the state live in only 45 counties of the eastern section of the state. About 90 percent of all the colored scholastics of Texas reside in the 88 counties comprising the eastern third of the state. The remaining ten percent of our colored school children are scattered throughout 125 central and western counties, thus the proportionate colored population of Texas counties vary sharply with five eastern counties having colored school children in the majority and 41 western counties having not a single colored school child.

Referring briefly to our appendix No. 1, it will be seen that the colored population drops sharply as we move from the eastern boundary of our state to the western boundary.

In those counties designated in red, 50 percent or more are colored. In those in blue 40 percent or more. Those designated by the dashed mark, many along the Louisiana line and in the central eastern part of the state, 30 percent or more are colored.

Those in green, 20 percent or more. Those in pink, 10 percent or more. Purple, five percent or more.

The diagonal green, one percent or more and those in white less than one-half of one percent or no colored population

bd32

at all.

Taking our next exhibit, which covers the scholastic population of Texas, you will notice depicted in brown in the eastern 45 counties of our state 50 percent of the negro scholastic population.

In the next 43 counties, an additional 40 percent of our negro scholastic population or a line drawn on the eastern third of our state roughly from Sherman, Texas to include Dallas and Fort Worth, Waco, Austin and San Antonio and back to the Gulf of Mexico to Jackson County or Edna, Texas, we find the total of 90 percent of our negro colored population.

The rest of the state comprising the vast area of western and southern Texas and the Panhandle of Texas has actually less negro scholastics in that than does Harris County in which Houston is located and when we look at Harris County we find that actually only 17 percent of the scholastics in that county are colored.

Thus it is obvious that the question of separate and integrated schools is as vast and as varied as Texas terrain and population and the varied situation that exists in these communities cannot be treated under a single blanket policy. They must be considered as they exist in local school districts.

This idea has been manifested in prior consideration of the subject matter made by our editors and our Texas Commissioner of Higher Education, Dr. Edgar who stated in June of

last year, "Texas has 2,000 problems as a result of the Supreme Court's decision. We have 2,000 school districts and they vary from totally white to totally negro. The final decree of the Court ought to be to permit continued management of local districts by local boards. Schools must be run on a community basis. They cannot be run successfully from Washington or even from Austin. Experience in separating children on a language basis has proved to us that where the responsibility is put on the local community, they work honestly to resolve differences.

"Anything which schools do effectively must be done with public support. We don't care to tell others how to run their schools. But we certainly believe that our 2,000 problems can be resolved best if the Supreme Court leaves control in local districts."

That is a quote from Dr. Edgar, the Commissioner of Education of Texas.

Of the 213 counties listing negro scholastics 146 counties offer a complete negro high school. 21 counties offer some negro high school but not 12 grades. 36 counties offer only negro elementary school and 10 counties operate no schools for colored children. However, these counties have ten or fewer negro scholastics and the Texas school laws requires that a district must have an average daily attendance of at least 15 pupils authorized to maintain any type of school financed by state

bd34 laws.

This law applies whether the pupils are white or colored. Negro scholastics in those counties not having a complete 12 grades are transported at state expense to other schools.

Texas provides public education for every colored pupil on an equal basis with the white people.

Texas in 1953-54 had 1953 active school districts; of these districts 292 offered a full 12-grade school for both white and negro.

125 districts maintained a negro school but did not have a white school. A total of 956 districts provide some colored schools. The districts that did not maintain a white or colored school were in areas that did not contain the requisite number of white or colored scholastics. So we see that the Texas educational system is predicated upon local self-governing school districts. They have full authority to administer the school system. Basic and historic concept of the public free schools is based upon the Democratic and salutary privilege of local self-government.

The schools of Texas are operated, maintained and controlled by local school boards made up of men and women elected by their neighbors.

There are 911 of these school trustees in the state.

Each one fellow citizens. Each one familiar with

their problems, temperament and economic conditions of his locality. Citizens may resolve their complaints or effect scholastic district policies quickly, face to face with the men and women who are responsible for them.

Justice for parent, child, teacher and administrator alike is of the greatest importance. Only a short distance across a town or down a farm to market road -- it is local.

Expenses of these school districts are paid through local taxation voted by the taxpayer of the District and complemented by the legislature under an automatic system of finance called the minimum foundation program.

Capital expenditures are made through bond issues voted by the taxpayers of the district.

All personnel of the schools with the exception of the elected officials are employed by local officers and work under their supervision.

Considering the attitudes of the Texas citizens, the structure of the Texas school system, the variety of local situations, the urgency of saving and increasing facilities, and the necessity of maintaining peace and order, it is clear that any attempt to effect immediate or too sudden mixture of white and colored pupils, especially if made by an authority outside the individual school district, would be rash, imprudent and unrealistic.

Texas loves its negro people and Texas will

solve their problems in its own way. During the past decade in particular gigantic strides have been made in human understanding, in raising the standards of education and in elevating the level of education among our citizens. We are proud of our school system and we make no apologies for it.

We have worked exhaustively to make it a good one. We are proud of the 9,000 men and women who serve on our school boards without pay.

We are proud of the management and the fact that they have been able to raise the standards of our schools. We see no reason to subject our economy, our traditions, our state of social harmony or our children to the shock of forced or too rapid integration before the public conscience is prepared to accept it.

We see no reason to pluck local affairs out of local hands.

The question is more basic than laws and systems. This touches the deepest roots of human emotion. It touches mothers and fathers and children in an area of deep sensitivity.

It comes dangerously close to interference in the sacred inviolable relationship between parent and child and the right of parents to bring up their children in their own customs and beliefs.

Texas does not come here today to argue the cause of other states because its situation is unique.

ed37 It argues only that in Texas a man-made cataclysm must be made slowly and with wisdom. Our argument may be summed up in 8 words, the simplicity of which I believe this Honorable Court will appreciate.

It is our problem, let us solve it. Even as I talk here this afternoon my fellow Texans are working with diligence and prayer and with consciousness before God to bring enlightenment, with understanding and wellbeing to all our people.

Were they alive the framers of our Constitution would not ask more.

The Chief Justice: General, have any steps been taken at all to bring about desegregation?

Mr. Shepperd: No, sir, they have not. The only state action, Mr. Chief Justice, that was taken is an action by the State Board of Education shortly after the May 17th decree stating that in their opinion it did not apply at this time to Texas and during the present school year that we are in now that segregation would continue to be practiced. Our legislature has been in session since January 7 and they have taken no action and there are no bills pending before them.

The Chief Justice: You say you anticipated difficulties in some parts of your state but I notice over in the West and in the North and even down in the South, that there are a great many counties that have from two-tenths of one percent up to

bd38 one percent, would you anticipate any real difficulty in integrating those schools.

Mr. Shepperd: I don't believe that there would be any serious trouble in integrating those schools. It would depend upon the method in which it is presented to them.

Texans are kind of like California, they are a rugged breed of individualists and without any disrespect at all to the Court intended, I think if this thing is approached on a partnership basis rather than being told what to do that we are all going to get along better and I believe that is what the Court had in mind when they propounded these questions.

As Mr. Justice Black pointed out in his question earlier, in the cases before you the questions propounded in all probability would not be necessary.

The Chief Justice: The only point I make is this. You anticipated there would be some difficulties in some parts of the state. What probability do you believe there would be of having integration very quickly let us say, in these places where there are less than one percent or one percent, two percent, three percent, something like that, what is your prognosis there?

Mr. Shepperd: I think that there are some of those particular counties in some of those particular districts that would like integration. It would be more economically feasible

bd49 for them to integrate.

The Chief Justice: That is the only reason. I say that is the only reason they would do it?

Mr. Shepperd: That is the only reason I have heard advanced. As far as difficulties are concerned, I would hesitate to speak for my brethren from West Texas because they too get a little rugged in spots.

We might find in many of those counties just as much feeling as we would in east Texas counties.

The Chief Justice: Thank you.

Mr. Shepperd: Thank you, sir.

The Chief Justice: Mr. Waldrep.

#### ARGUMENT ON BEHALF OF THE STATE OF TEXAS

##### AS THE FRIEND OF THE COURT

BY: MR. BURNELL WALDREP

Mr. Waldrep: Mr. Chief Justice Warren, may it please the Court. With every new change in our school system, we have many problems. The Texas Public School System is no exception to this rule.

Inasmuch as these are class actions before this honorable Court and because of the great variety of local conditions which exist, this Court has stated that the decrees in these cases will present problems of considerable complexity.

Therefore the cases with regard to this were restored

50 40  
to the docket and all of those states now requiring segregation in public education have been permitted to appear and present argument with reference to questions four and five.

While we are not before this Court as a party litigant, Texas does appreciate this opportunity of presenting argument relative to these complexities referred to by the Court as they relate to the State of Texas and particularly to our public school system.

The educational system in Texas stems from a Constitutional mandate to the effect that it shall be the duty of the legislature to establish and make provisions, the support and maintenance of an efficient system of public free schools.

In keeping with this educational policy there was also a constitutional mandate in Section 7 of Article 7 of the Constitution of our state to the effect that the races should be separated in the public schools.

This condition has existed for more than approximately 60 years and in the remarks of General Shepperd it was shown that these problems that are peculiar to Texas appear primarily in the northern quadrant of the state of Texas.

For that reason we feel that no single equitable general decree could be formulated for the entire state of Texas because the establishment of an integrated system is not a problem which would apply equally to West or South Texas where

bd41

there is only a small percentage of the population and to Northeast Texas where the concentration of the negro population is the heaviest.

In keeping with the pronouncement of this Court that education is perhaps the most important function of our State Government Texas has worked diligently to improve its school facilities.

Not many years ago we established what is known as a Minimum Foundation School Program which provided that all possible control and responsibility be left to the school administrators and local school boards to meet the needs of the children in the various school districts within our state.

This program guaranteed to every school age child within the borders of our state regardless of his or her race, creed or color, economic status or his place of residence at least a minimum of a full nine months schooling each year.

This program has been in effect for five years and as a result the average daily attendance of school-aged children has risen from 77.3 percent in 1900-1949 to 80.5 percent during 1953-1954.

79.31 percent of the negro school-age children were in average daily attendance in 1953-1954.

Now this program which is in operation in our state provides a system of financing which guarantees to the local school district that state funds will be available to pay the

d42 cost of a minimum school program when local funds are in sufficient amount. If a school program in the state superior to the minimum requirements is desired by any particular district, it may be paid for by the taxes voted and levied and collected from the taxpayers within that particular district.

Most of our minimum program in Texas reveals from the polls taken and the results of that program that the teachers and the school administrators salaries have risen from 29th in the nation to 16th.

97.1 percent of our teachers within our state now have college degrees. And there are approximately 8,500 negro teachers and school administrators in Texas.

By reason of this emphasis which the state has placed upon the Minimum Foundation School Program, we respectfully submit that any decree of this Court should permit an effective gradual adjustment toward integration.

And unquestionably the integration of a particular program within a district should be left to the local school districts.

Inasmuch as our educational program is predicated upon local self-governing districts and the schools are operated and maintained and controlled by local school boards, these school boards are elected by the people within the particular district and the operational and maintenance costs are provided by taxation of the district and supplemented by the Minimum

bd43 Foundation Program.

All of these capital expenditures which are being spent and more than half of the operational and maintenance costs are provided by local taxation, taxation of themselves directly after election by the voters of that particular school district.

Our citizens within the state have taxed themselves heavily with reference to this emphasis on an efficient school system within the borders of our state.

Subsequent to the decision of this honorable Court on May 17th of last year, the State Board of Education of our state adopted a resolution to the effect that the decision of the Court not being final, that the Board was obligated to adhere to and comply with the present state laws and the policies providing for segregation within the public school system until such time as they may be changed by constituted authority.

It was also stated by this Board that if the Texas laws were changed, each local district should have sufficient time to work out its own individual problems.

The school system within the borders of our state at this time is presently overcrowded and any immediate integration of course would create many problems and particularly additional facilities would be needed in many of our districts.

Justice Beale: Why is that necessary?

d44

Mr. Waldrep: The buildings within the districts.

Justice Reed: Additional facilities? There would be no more children.

Mr. Waldrep: In some instances, your Honor, where the daily average attendance is not sufficient to warrant a negro school, these negroes are required to go to the adjoining districts. Under our compulsory attendance law if they are required to return to the district that they are residents with our school buildings presently overcrowded, there are no facilities available for them until such time as additional wings or buildings are constructed.

Justice Reed: Why would they have to? Why wouldn't they go to the school they have been going to?

Mr. Waldrep: In some instances they would provide a method of voluntary transfer, I am sure. But in the meantime that would take --

Justice Reed: I don't grasp the problem of space. Undoubtedly your schools are crowded, most schools are.

Mr. Waldrep: That is right, sir.

Justice Reed: But there would be the same number of children. There would be the same number of schools.

Mr. Waldrep: There would be the same --

Justice Reed: There would be the same number of seats.

Mr. Waldrep: There would be the same number of schools and the same number of seats but there would be a shifting of

bd45 the children, a shifting of the population by reason of the compulsory attendance laws.

Justice Reed: Couldn't they go just where they are going now?

Mr. Waldrep: They could arrange it in those counties, particularly in West Texas where they are now being transported by bus to the adjoining district.

Justice Reed; A sufficient number could still be transported?

Mr. Waldrep: Yes, sir.

Justice Reed: I still don't grasp why there would be a need for additional facilities.

Mr. Waldrep: In some areas in the particular county of Red River for example, there are negro students transported by bus from three communities to the high school at the county seat.

These particular children would be required to come back to the district of their residence and attend that high school within that area which is not equipped under our compulsory attendance law. Unless that was changed, we could make an additional provision under our compulsory attendance laws, I am sure, as pointed out by your Honor.

Justice Reed: There would be no lack of facilities.

Mr. Waldrep: There would be in many instances.

Justice Reed: But none on account of race?

bd46

Mr. Waldrep: None on account of race. Within the geographic limits. If the districts were changed, it would create a problem I am sure.

For that reason with reference to the existing boundary lines and a utilization of the present housing facilities, it is our belief that no equitable general decree would be entered.

But it would appear that a particular decree, specific in nature would have to be entered which would be based upon the fact and conditions existing then in a particular locality.

No single formula can be applied to all of these localities as an effective and orderly transition will depend upon special conditions and problems that exist in a particular area.

And in Texas there is a wide variance of the local conditions and a practical approach in one community may not be a practical approach in another community.

So it is apparent that there can be no general state-wide pattern of integration in our public schools.

We say that the school authorities in the local districts are best acquainted with conditions and are more familiar with local conditions and can best evaluate the existing problem.

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The Chief Justice: Doesn't that assume that they all want to conform?

Mr. Waldrep: No, sir. That decision, Mr. Chief Justice, would be left primarily to the governing body of the local school district.

The Chief Justice: And you feel that even though there is just one colored child in a school district, as there are in some of your districts that I see here --

Mr. Waldrep: Yes, sir.

The Chief Justice: -- and there is no administrative problem, no financial problem, no physical factors to take into consideration; you believe that that should be left to the school board without any interference, even though there is an intention, a desire, not to conform to the law?

Mr. Waldrep: It would be left to the --

The Chief Justice: Is that what you are asking, I mean?

Mr. Waldrep: We are asking that it be left to the administrative discretion within the local governing districts of Texas, yes, sir.

The Chief Justice: Regardless of whether there are any physical problems or financial or administrative problems?

Mr. Waldrep: Presumably those particular counties would integrate where there is no physical or practical problem at that particular time based upon the particular problems pre-

sented to them. That would be my construction, sir.

The Chief Justice: You would assume, then, that in places where there are no physical factors, financial problems or administrative problems, that they should and they would integrate?

Mr. Waldrep: In all probability they would, sir, in compliance.

The Chief Justice: That is what I wanted to ask.

Mr. Waldrep: Yes, sir.

Justice Burton: You are not advocating local option?

Mr. Waldrep: No, sir; other than the administrative discretion within the local governing school district, as set up by statute in Texas.

Justice Frankfurter: You are urging recognition of local differentiation?

Mr. Waldrep: Yes, sir.

Well, in a sense, that conditions in one particular district would be different than conditions in another district within the State of Texas, yes, sir.

A gradual transition to an integrated public school system is not a denial of a constitutional right enunciated by the Court. So we feel in passing specifically to Question No. 4 propounded by the Court that the geographical school districting in Texas is such that there should be a gradual adjustment from a segregated system to an integrated one, and that this

Court should not formulate a detailed decree, but the decree should remand the cases to the courts of first instance with directions to frame decrees in these cases in this manner, adjusting the equities between the parties without unduly hindering the public school system.

Texas urges that consideration --

Justice Reed: Which cases are you referring to, Nos. 2 and 3, South Carolina and Virginia?

Mr. Waldrep: Yes, sir.

Texas urges that consideration be given to these traditions and usages that have grown up through the years as a result of separate but equal facilities, which includes a vast amount of capital expenditures and provision or facilities for the schoolchildren of Texas. A period of orderly transition will more certainly insure that the decree will meet with favor.

Texas enjoys harmonious relationships and has made excellent progress in economic, educational and social advancement. We have striven to create an atmosphere in which people can think clearly and act intelligently.

We want to respect community attitudes, preserve our public school system and solve the many social and legal, as well as economic, phases of this particular problem.

Fifty per cent of our Negro scholastics are located in 45 of our northern counties, and ninety per cent of the total Negro scholastics are located in the 88 counties comprising the

northern quadrant of the state. This area is predominantly an agricultural area, and in cities and towns residential certification prevails, and there are separate schools in these areas for white and Negro schoolchildren.

The Negro school building, of course, is located in the Negro section of town, and the white school building within the white section of the town.

Each district should be permitted to adjust its own problems as the conditions exist.

By reason of these particular varying degrees within the State of Texas and with the background considered, in keeping with the segregated school system and the urgent necessity of utilizing all of our school facilities, both Negro and white, and the attitudes manifested by the people of our state, and the necessity for maintaining a harmonious relationship, it is clearly indicated that there should be a local self-governing administration of this particular problem and a gradual transition period which would better insure an orderly compliance with the decision of the Court.

Thank you.

The Chief Justice: Thank you, General Shepperd and Mr. Waldrep, for your views.

Mr. Sobeloff.

ARGUMENT ON BEHALF OF THE GOVERNMENT OF THE  
UNITED STATES, AS THE FRIEND OF THE COURT  
BY SIMON E. SOBELOFF

Mr. Sobeloff: May it please the Court, arising to address the Court toward the end of the third day of argument in this case devoted to a consideration of the Fourteenth Amendment, and occasionally the Fifth, almost, it seems to me, that the Court might invoke for its own protection the Eighth Amendment, which guarantees it against cruel and unusual punishment.

I am going to try not to be repetitious and yet reframe arguments that have been made here, restate them in a context that seems to us coherent from the government's point of view.

I am not so presumptuous as to claim that we have complete objectivity, but I am more than ordinarily conscious in this case that I am privileged to speak for the United States, and our approach to these problems is perhaps a little different than that of the plaintiffs or the defendants, or even of some of the States or other governmental authorities that might appear as plaintiffs or as defendants in future cases.

Of course, there are certain areas of agreement, obviously. There is some true concurrence. Some of the concurrence that has been voiced is more apparent than real; that is, it is verbal. I am not challenging the good faith or the

em6 sincerity of these declarations, but as often happens, different people say the same thing, but mean different things by it.

Everybody here has urged that this Court should not itself frame detailed decrees, but should remand the cases to the District Courts. But the objectives of the different opponents of that idea are not always the same. Some would ask this Court, have asked this Court to remand the cases with specific and rigid directions to the District Courts to specify a fixed date for desegregation by 1955 in September or at the latest a year later.

Others have gone to the other extreme, and they have urged a remand, but they have specifically asked that this Court shall fix no date, and more than that, it shall give no criteria in its decree to the lower courts for the guidance of those courts, leaving open, as is plain, the possibility that nothing would eventuate except delay.

The government rejects both extremes. Our brief, which sets forth our views at length and more in detail than it will be possible for me to present them, or even necessary to present them orally, our brief offers the counsel of moderation, but with a degree of firmness.

This, as everybody recognizes, is not a debate on the validity of the Court's decision. This is not a reargument. Segregation has been declared unconstitutional. While it continues, as has been said, constitutional rights are being

denied, and in some cases the delay is irretrievable.

On the other hand, that doesn't mean that institutions and practices that have persisted for generations may be erased with a single stroke of the pen. No practical person will overlook that situation.

Difficulties undeniably exist in some places. In other places, as has been stated here at this table, the difficulties are practically non-existent or are very slight. Obviously, the Court ought not to treat all these decisions as a lot. There has to be some discretion. Of course, it should be recognized that these cases are not like the Gaines case, or the Sipuel case, where a simple order to admit would suffice.

Affected here are seventeen states, and millions of pupils and school plants costing enormous sums, and school buildings that are not interchangeable, that are not readily augmented. That doesn't mean that the problem arises everywhere, but where it does arise, it can be severe. There are teaching and administrative organizations that have to be adjusted, and such organizations are not readily altered and integrated. There are physical problems. There are financial problems. There are administrative problems. There are indeed emotional problems.

But this Court at this stage, on this record, lacks the materials for judgment either as to what ought to be done or as to the order or the time schedule within which it ought to

be attempted in particular cases.

There are certain places where, for instance Delaware, both parties agree there should be a simple affirmation. That case practically disposes of itself.

Kansas says, "We are going to be integrated in September."

The Court can simply refer the matter back to the District Court from which the case emanates, with the simple direction to pass an order in accordance with the decree. If the Court finds that there has been substantial integration by September 1955, there is no difficulty about it. It may decide that the case calls for a simple order. It may decide that the case calls for no specific direction or injunction.

These cases present no difficulty. Even in the District of Columbia substantially they say they will have integrated by September. Oh, there is indeed some question, and it may be a serious question, as to the propriety of certain options.

I wish -- and I must say this in all frankness -- that there had been a more generous recognition and credit given to the District authorities for the readiness with which they proceeded to respect this Court's decision and indeed, as has been brought out here, they had planned even in advance of the Court's decision, in anticipation of it, and had laid plans for integration, which plans have been put into effect, and even though there is a legitimate basis for disagreement as to those

as to some provisions, as in this option plan, I think on the whole they are entitled to considerable credit for the readiness with which they acted.

That doesn't mean that this Court should either approve or disapprove the option provision. The Court has not been informed in detail about that provision and how it is operating. An option provision that is perfectly all right in the District of Columbia might work in an entirely different way in another place, or it may be all wrong in the District of Columbia and might work better in other places.

This Court, I am sure, would be better advised and would be acting more consistent with its usual practice to say that as to a matter of that sort, where the record has not been made, the facts have not been developed, it will not pass on that. The problem may solve itself, as the more momentous problems in connection with desegregation in the District of Columbia seem to have been solved.

If it arises and is presented in orderly fashion, it can be dealt with.

Of course, it is obvious from what has been said here that there is such a great variety of conditions as between the states and within states and within counties and even within a particular school district, that no single formula can be devised by the ingenuity of man that will fit aptly all cases, and this Court could not, in any event, take unto itself the

burden of acting as a super school board. It must necessarily repose some measure of discretion elsewhere, and I think, by common consent, by common agreement of the parties, and the others who have addressed this Court, the District Courts are the appropriate agency.

Now, giving a measure of discretion to the courts, however, does not mean that they ought to be given no guide, no instruction, no criteria. This Court ought not to give a District judge a blank check and say, "Fill it out any way you want." It ought to tell him to consider all the facts, everything that has been mentioned here. Some of these things are very weighty. But the court ought to be told, the District Court ought to be told by this Court that that measure of discretion is not to be used for the purpose of frustration. He is not to permit delay to be had for the mere sake of delay. Where difficulties exist, the Equity Court, of course, has the right to fashion its remedy according to the needs and time where it is needed and to the extent that it is needed; but only to that extent, should be allowed.

The District Courts ought to have it made plain that in the view of this Court a time shall be allowed, but not for the purpose of paralyzing action or of emasculating the Court's decision of last May.

Justice Harlan: Mr. Sobeloff, do you think these decrees, whatever they are, can affect anyone other than the

litigants who are actually before the court?

Mr. Sobeloff: I would say that these decrees, like all decrees, affect only the parties, or if they are class actions, the people who are identifiable as belonging to the class.

Justice Harlan: That is the "if", though.

Mr. Sobeloff: But regardless of that, I am sure this Court will not overlook the immense importance of its declarations in a particular case as a guide to a general treatment of problems in other cases.

I don't mean to suggest that if this Court were to say that a certain time element should be allowed, if you decide that you ought to put in a time element, that you allowed in this particular case, that District judges generally ought to adopt that same schedule under entirely different conditions, but I do think it is important for this Court to indicate its approach and the approach of the District judges on the matter, and in most instances where the Court makes that clear, the tendency is to reduce litigation.

It has been pointed out here that in these college cases and the professional school cases, the Sipuel case was decided, and other states having similar problems didn't go through a process of litigation. They foresaw the inevitable result of a future case that made a future case unnecessary.

I don't mean to say that our position will fold up

automatically. I don't mean to say that there will be no further litigation. But I think that what you do here will largely influence the temper, the spirit in which District Courts will operate, will be guided by the way you fashion the decree here.

Justice Reed: Take the South Carolina case. What do you envisage would be the result of the judgment in that case?

Mr. Sobeloff: The judgment here?

Justice Reed: Either here or if it is sent back to the District Court.

Mr. Sobeloff: I think in the South Carolina case -- let's see. You have the Clarendon County case. You have about 2500 Negro children and about 300 white children in that case.

Justice Reed: No. You have about seven or eight Negro children, and they represent as a class all of the Negro children, numbering about 2500.

Mr. Sobeloff. Yes. I would say that ought to be referred to the District Court there.

Justice Reed: What is his problem? To admit ten children whose names are on this list?

Mr. Sobeloff: I understand that these are class cases.

Justice Reed: So the problem would be the 2500.

Mr. Sobeloff: Yes.

My own thought is that it would not serve any useful purpose to unduly narrow the scope of the case. I know you don't

want to adjudicate questions that are not necessary to be adjudicated, but nothing is going to be gained by admitting ten and disregarding the situation of the others. I don't think that would be satisfactory, either to the plaintiffs or to the defendants. I think in that instance you have to look to the whole situation. I think you have to tell the District judge that he must consider that, but that doesn't mean that the District judge ought to be told nothing as to how to proceed.

Justice Reed: No.

Mr. Sobeloff: And our brief -- and I will come to it presently --

Justice Reed: My question is directed to whether he is dealing with ten people or 2500 people.

Mr. Sobeloff: I think he is dealing with 2500 people there. If you were simply going to order the admission of ten people, I suppose that that would be of some value as a declaration of this Court, but you would be adjudicating an unreal situation. You know that you are not really dealing with ten people, you know you are dealing with 2500 people, and I think what you ought to do is treat that as that kind of a case, and tell the judge below to treat it as that kind of a case, but that doesn't mean the judge ought to be left without any support, without any guidance. His hands ought to be strengthened.

He ought to be in a position, when the contesting litigants appear before him and make their contentions, he ought

to be able to say, by reason of the Court's decree, this is what the Constitution directs me to do. I can allow time if you show me the need for the time, and if you show me a plan why the time is necessary and how you are going to employ the time, not merely give time and time indefinitely.

I think it would be an unfortunate thing for both sides if the thing were handled in that way.

Justice Burton: Following Justice Reed's question, you would frame your opinion in the light of the 2500, and you would frame your decree in the light of the ten.

Mr. Sobeloff: I would say so. I don't know technically whether that is a class suit or not. I understand from the way the thing is written that it is a class suit, the way the briefs are treated. The Court's questions are predicated on the assumption that these are class suits. The Court says in so many words, in addressing the parties and addressing the Attorney General of the United States and the Attorneys General of the States, this Court says, since these are class actions, and the impact will fall on a great many, we want further argument on these questions.

So this Court has heretofore regarded these cases as class cases.

Justice Harlan: You would agree, would you not, whether they are or not, goes to the very heart of the character of the decree we will enter, because if only five or six plain-

tiffs are involved, what is the reason for delay?

Mr. Sobeloff: If only five or six persons were in that situation, let's assume, even though they are not class suits, let's assume that five people came to the court to sue for themselves and did not say they were suing for a class, I think that the court, to be practical about it, would have to look at those five, not as though they were the only ones on the scene, it would have to look at those five in the context of the whole population where they are white and colored.

The first thing that this Court should make clear is that any state constitutional provision or statute which conflicts with the opinion of the Court, with the decision of the Court of last May, is void. There has been some confusion about that. The Attorney General of Maryland has told you that in Maryland there is this division in Baltimore City, because although the statutes are the same, they went ahead and desegregated. In the counties, because of some things that were said officially and unofficially, there has been some doubt about it.

Some of the counties who want to desegregate, school officials who want to desegregate, were led to believe that they couldn't desegregate until there was a final decree by this Court.

Although Maryland was not directly a party, they thought these laws did not fall in Maryland from the mere rendition of the decision in May, but there would have to be a

16 decree. I don't think there is much doubt about it. Some of the attorneys here have said frankly that they think any conflicting statutes or constitutional provisions have fallen, but this Court ought to declare that, so there will be no room for doubt or hesitation, so that those who want to obey the law will know what that is.

Justice Reed: Even though the particular statute has not been involved in this particular case?

Mr. Sobeloff: If this Court has said that under the Constitution there can no longer be separate but equal; and the local law says, commands, separate but equal, I think it is plain that that local law has to give.

Justice Reed: Yes, even though it is not raised here.

Mr. Sobeloff: You don't direct your decree to those who haven't appeared in the court, but the impact of that will be felt if this Court says so, in this decree.

I think as a matter of clarification that ought to be in the decree.

Justice Frankfurter: The Delaware Supreme Court made a distinction. It said that the provisions in the Constitution and all the laws carrying out the Delaware Constitution allowing or commanding segregation are null and void, but unless there is a decree entered, there is no compulsion in the translation of that nullification.

Mr. Sobeloff: This Court can very readily in the next

few weeks set at rest any doubts about it. I don't think there could be any doubts in lawyers' minds as to what will happen, but I think it ought not to be left to further speculation.

Justice Frankfurter: That is what the Delaware Supreme Court said, and it seems incontestable to me.

Mr. Sobeloff: But others have expressed different views.

Justice Frankfurter: The decree, you say, should formalize what this Court said on May 17th.

Mr. Sobeloff: Exactly. It ought not to be left to be gathered from the comments of the Court in the opinion. It ought to be in the decree itself.

The Court ought to also make clear that the remand is for the purpose of effectuating its decision, not for the purpose of frustration. I think it would be greatly of help to the judges in the performance of their duties if they knew that the Court wants or directs them to resume jurisdiction of the cases for the purpose of effecting the decision as soon as feasible, not limiting them specifically as to a date, but allowing them to fix dates with that in mind, not merely to wait until attitudes change in some remote generation, but consider the matter, hear the parties and, after debate, discussion and consideration, decide it with a view to effectuating the Court's decision as speedily as feasible.

Justice Black: What does "feasible" mean?

Mr. Sobeloff: "Feasible" means like any other question of fact, a determination after considering all relevant facts.

If you find that the judge is not given enough time, or if he finds he has not given enough time, he can give further time. If either side feels he has abused his discretion, either side can, on appeal, have a review. The merit of that is that this Court does not undertake to pass on situations with which it is not intimately familiar.

The District Court judge can familiarize himself with it. He is directed to familiarize himself with it, and to order the effectuation of the Court's decision as speedily as feasible, bearing in mind these facts, these circumstances, that will be brought out in the hearing before it.

Justice Black: Does that include circumstances with reference to the feasibility to do this, or would it also include attitudes of the people?

Mr. Sobeloff Attitudes ought to be considered, but attitudes are not to control. Attitudes ought to be considered, because there are certain things that cannot be done within a certain time, but that doesn't mean that whether or not a constitutional right shall be vindicated by a court shall depend upon a public opinion poll; these inquiries are interesting, but courts do not adjudicate constitutional questions on that basis.

Justice Black: Does that not indicate the difficulty

of "as soon as feasible"?

Mr. Sobeloff: I don't say the words "as soon as feasible" are self-interpreting. They cannot be. If it could be, then the government's recommendation to you would be to put in that date, and interpret it. It is because we recognize that the matter cannot be interpreted and translated into a precise date by this Court that you ask the District judge in the first instance to translate that; but you say to the District judge: "Give them all the time that is reasonably necessary to effectuate the Court's decision, to put into effect that decision, to give it, as this Court said, effective gradual adjustment."

The word "effective" is there, as well as the word "gradual".

Justice Minton: Would you put a deadline in at all?

Mr. Sobeloff: I don't think I would put a deadline in the more complicated situation. I think you could, if you saw fit, in the District of Columbia, if you decided it was necessary to have any time, you could perhaps put in a deadline. Even there I would prefer that the District Court do it in the light of all the circumstances. I think that is the more orderly way. I think it is, on the whole, a more satisfactory way.

But in a complicated situation, I don't think this Court should put in a deadline. Our brief recommends: Don't put in a deadline.

Justice Burton: That is, you do not recommend any

deadline for the completion, but you do mean the immediate start forthwith, to begin to make it effective.

Mr. Sobeloff: I think, Your Honor, that this Court ought to say to every District judge: Call for a plan within ninety days. Somebody here has said that ninety days is too short a time. I think a plan can be formulated in ninety days, especially after eleven months have already gone by since the decision. But I would say that if the plan cannot be formulated within ninety days, then the District judge, as a judge in equity, is applied to for further time, he ought to be permitted to give further time; but the burden ought to be on him who wants the delay to show that he needs it, that he is engaged in a good-faith effort to solve this problem, not that he is waiting for the day after tomorrow, the day after the expiration of the period; but that he is moving, and then when the plan is presented, there should be hearings and all these relevant considerations are to be addressed to the court, and they ought to deal with it as the facts would indicate; and he should require a bona fide beginning.

I think he ought to be required to require a bona fide beginning, whatever he thinks can be done, not to put off everything until some future date, but let the first step be taken as speedily as it can be done without disruption.

That will be interpreted. Fortunately, it will be interpreted by people who live in these communities and under-

stand them. But they ought not to be given an open-end time. He ought to be permitted to channel these efforts, not to impose his will, not to decide it abstractly without hearing, but to let the school officials formulate the plan and produce it, not some time in the remote future, but reasonably promptly.

If more time is needed, he can give it to them.

Justice Reed: While the local school board is before the District judge.

Mr. Sobeloff: Yes.

Justice Reed: But the state Attorney General and the state Board of Education have something to do with it, and perhaps furnish money or perhaps the statutes provide for the building of new schools, yet none of those parties are before the court.

Mr. Sobeloff: That is a difficulty. It may be that in a particular case, additional parties may be required, either at the suggestion of the plaintiffs, or the court may do that.

That illustrates how these complexities that cannot be foreseen here will arise and can be dealt with intelligently in the light of the situation. But the point is that they be dealt with in an orderly fashion.

Local sentiment, local conditions are not being overridden, but neither is action paralyzed because of an assertion of a local feeling.

Now, the experience in the District of Columbia since

May 17 is not going to be exactly paralleled in other places; it can't be. The government recognizes, of course, that because of the President's particular relation to the local government here, his influence would be exerted and was exerted in a way that perhaps he wouldn't wish and couldn't properly attempt to exert it in other situations.

The very character of this community, drawn as it is from various parts of the country, engaged in government work, things that have happened here earlier in recent years, other litigation with which this Court is familiar, all those things have an impact to differentiate the District of Columbia situation from others, and yet the District of Columbia does teach a lesson.

It shows that despite these differences that very often problems that are said to be utterly insoluble, when approached with understanding and sympathy, reasonable good will, not rigidity, yet with a degree of firmness, can be dealt with, and sometimes the difficulties that are foreseen at the beginning do not materialize.

The authorities here in the District did not believe that they could effectuate as much as they did in the time they did.

In another situation, the estimate may prove to be insufficient. More time may be granted.

This Court ought not to make it impossible for the

local judge to do that in a proper case.

The reluctance of the plaintiffs in this case to tolerate any delay at all is perfectly understandable, although I don't agree with them on this, although we recommend against setting a fixed date in this Court's decree, and we understand their skepticism about allowing any delay.

But I think that their fear stems from the fact that if the Court sends it back, sends the cases back without any directions, and without a time limit, the thing will be so gradual that there will be nothing affected, and the Court would really be frustrating its own decision of last May.

That is their fear.

The Court can minimize the danger which they apprehend, in a reasonable way, if these provisions -- which I will defer until morning -- that we have set forth in our proposal, are incorporated in a decree of the Court.

You can have that measure of flexibility which the defendants rightfully ask for and at the same time give the plaintiffs assurance against abuse.

Of course, there will be resistance in some places, and the progress will not be equal. No important change in social policy has been achieved without some resistance, but you must not assume -- and I am sure the Court will not assume -- that all men in the South are resisting the Constitution, any more than it would be safe to assume that everybody in the North

gives enthusiastic support to every provision of the Constitution, but this Court should not, and I am sure will not, underrate the immense influence of its authority on men of good will and intelligence and patriotism in all sections of the country, and I am sure that is a factor that will not be lost sight of and will greatly come to the aid of an ultimate solution.

With the Court's permission, I will resume in the morning.

Justice Black: Would you mind tomorrow addressing yourself a little more to the question of class suits, having in mind *Hansbury versus Lee*, and other cases, as to who can be covered by a class suit?

Mr. Sobeloff: I will do that.

Justice Reed: Also the case of *Ben Hur*.

Mr. Sobeloff: I am not familiar with that. I will get that.

The Chief Justice: We will now adjourn.

(Whereupon, at 4:30 p.m., the Court recessed, to reconvene at 12:00 noon, Thursday, April 14, 1955.)