

C O N T E N T S

1
2 ORAL ARGUMENT OF:

P A G E

3 Erwin N. Griswold, Esq. on behalf of
4 Petitioner - 798

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5 Jack Greenburg, Esq. on behalf of
6 Petitioners - 997

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7 Joseph D. Phelps, Esq. on behalf of
8 Respondent

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

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United States

Petitioners,

v.

No. 798

Montgomery County Board of Education, et al.

Respondents.

Arlam Carr, Jr., by Arlam Carr and
Johnnie Carr, etc., et al.,

Petitioners,

v.

No. 997

Montgomery County Board of Education, et al.

Respondents.

Washington, D. C.
Monday, April 29, 1969

The above-entitled matter came on for argument at
10:30 a.m.

BEFORE:

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

1 APPEARANCES:

2 ERWIN N. GRISWOLD, Esq.
3 Solicitor General
4 Department of Justice
5 Washington, D. C. 20530
6 (Counsel for Petitioner - No. 798)

7 JACK GREENBERG, Esq.
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9 New York, New York 10019
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12 36 South Perry Street
13 P. O. Box 901
14 Montgomery, Alabama 36104
15 (Counsel for Respondents)

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 798, United States
3 versus Montgomery County Board of Education, et al., and No. 997,
4 Arlan Carr, Jr., by Arlam Carr and Johnnie Carr, etc., et al.,
5 versus Montgomery County Board of Education, et al.

6 THE CLERK: Counsel are present.

7 MR. CHIEF JUSTICE WARREN: Mr. Solicitor General.

8 ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

9 ON BEHALF OF PETITIONER - 798

10 MR. GRISWOLD: Mr. Chief Justice and may it please
11 the Court.

12 This is a school desegregation case. The question
13 arises here, hwoever, with respect to faculty desegregation
14 rather than directly with student desegregation.

15 The issue is a rather narrow but important one. It
16 arises with respect to the schools of Montgomery County,
17 Alabama, including not only those in the city of Montgomery
18 but also those in the surrounding county area.

19 For the 1967-68 school year the defendants operated
20 52 schools, including 32 predominantly white and 20 predomi-
21 nantly Negro schools.

22 There were approximately 22,500 white students
23 and 17,000 Negro students taught by approximately 815 white
24 teachers and 550 Negro teachers.

25 This suit began with a complaint which was filed on

1 May 11, 1964, almost five years ago. At that time as the
2 District Court stated in its opinion -- and this is at page 524
3 of the printed record -- the Montgomery County Board of
4 Education had taken no steps and had made no plans whatsoever
5 to comply with the law of this land in the area of school
6 desegregation even though ten years had passed when this
7 matter came on for a hearing in 1964, the Montgomery County
8 Board of Education was allowed by this court to proceed with
9 desegregation gradually for the reason that it was realized
10 that desegregation of the public schools cut across the social
11 fabric of this community and that there would be both
12 administrative and other practical problems for the Board to
13 cope with.

14 And the court went on to show the way in which it had
15 helped to cooperative with the Board in moving forward in this
16 and concluded, however, we have reached the point where we
17 must pass tokenism and the order that was entered in this
18 case on February 24, 1968, is designed to accomplish this
19 purpose.

20 It was not designed to and was not intended to
21 accomplish and if complied with will not require more than the
22 Supreme Court of the United States and the other appellate
23 courts have held must be accomplished in order to desegregate
24 a public school system.

25 Well, now, what had been done since the suit was

1 filed in 1964? In the year 1964-65 as a result of an order of
2 the court entered on July 31, 1964, the Board permitted
3 transfers under the Alabama school placement law in four grades.
4 Grade 1, and grades 10, 11 and 12 in the senior high school.

5 This order did not affect the system of initial
6 assignments on the basis of race. The Board accepted 8 of 29
7 Negroes who applied to transfer to traditionally white schools.
8 Two students withdrew their application and the Board denied
9 the remaining 19 applications, so that during the first year
10 there were 8 Negro students in what had previously been white
11 schools.

12 In 1965-66, Grades 1, 2, 7 and 9 through 12 were to
13 be desegregated. Forty-nine Negro students applied to attend
14 predominantly white schools. The defendants rejected appli-
15 cations from 31 of these and accepted 18 applications.

16 On appeal to the court, the court overturned six of
17 the rejections but accepted the remainder. This made 24
18 students who were admitted to the schools.

19 In 1966-67, approximately 330 Negro students chose
20 to attend white schools, traditionally white schools in
21 Montgomery County. No white student chose to attend tradi-
22 tionally Negro schools.

23 This was the first year that the School Board oper-
24 ated under a freedom of choice plan without initial assignment
25 on the basis of race, except in the two grades which were not

1 yet covered by the desegregation plan which were Grades 5 and 6.

2 In the year 1967-68 was the first year that all
3 twelve grades were to be formally desegregated. Approximately
4 550 Negro students attended traditionally white schools. No
5 white students attended Negro schools and in the year 1968-69,
6 the current year, there are approximately 950 Negro students
7 in 30 traditionally white schools, and approximately 16,500,
8 or 94 percent in all Negro schools.

9 There are no white students in Negro schools. So
10 that in summary as of today, no white student has ever attended
11 a traditionally Negro school in Montgomery County. The number
12 of Negro students attending traditionally white schools has
13 slowly increased until at the present time it is 950 which
14 seems like a substantial number, but it is less than 6 percent
15 of the Negro students in Montgomery County School System.

16 Q What is the relevance of this, to the issues in
17 this case?

18 A What?

19 Q What is the relevance of these figures about
20 students to the issues in this case?

21 A The relevance, Mr. Justice, is to show the
22 slowness of the progress which had occurred over four years
23 and the background for the order of the judge which is under
24 review here.

25 Q Which has only to do with the faculty as I
understand?

1 A I am turning now to faculty which is the issue
2 here.

3 There was complete segregation of faculty in the
4 Montgomery County Public Schools prior to September 1967.

5 Q Before you get there, Mr. Solicitor General,
6 could you tell me whether the distribution of Negro population
7 is pretty general throughout the area covered by the school
8 system or whether it is more or less separated?

9 A No, Mr. Justice, I cannot.

10 I do not have that information. Mr. Greenberg may
11 be able to supply something about that but I do not know.

12 Q Thank you.

13 A The complaint in this case as I have said was
14 filed on May 11, 1964. In it the plaintiff sought faculty
15 desegregation.

16 The court's first order made no specific reference to
17 faculty desegregation, but it did require the defendants to
18 submit a plan designed to eliminate segregation of students
19 based upon race and the complete elimination of the bi-racial
20 school system within a reasonable time.

21 The defendant's first segregation plan was submitted
22 in January 1965, and it was silent as to faculty desegregation.

23 The plaintiffs objected to what the court declined
24 to act beyond ordering the defendants for the second time to
25 submit a plan for the complete elimination of the bi-racial

1 school system within a reasonable time.

2 The defendant's second desegregation plan was sub-
3 mitted in January 1966, and it, too, was silent as to faculty
4 desegregation. Both the plaintiffs and the Government
5 objected, and on March 22, the District Court ordered the
6 Board to adopt a desegregation plan providing in part -- and
7 this appears on page 337 of the printed record -- that race
8 or color will henceforth not be a factor in the hiring assign-
9 ment, reassignment, promotion, demotion or dismissal of teachers
10 and other professional staff with the exception that assign-
11 ments shall be made in order to eliminate the effects of past
12 discrimination.

13 Teachers, principals and staff members will be
14 assigned to schools so that the faculty and staff is not com-
15 posed of members of one race.

16 And that is a fine statement but a completely general
17 in its terms.

18 Judge Johnson at that time stated from the bench that
19 I will not expect too much of it -- meaning faculty desegre-
20 gation in September '66 because of the timing, but I will expect
21 a considerable amount of it effective in September '67.

22 However, in August of 1966, following the decision
23 of the Court of Appeals in a case involving the Mobile schools,
24 Judge Johnson sua sponte declared that the Montgomery Board
25 would have the same period available as the Court of Appeals

1 had established for Mobile and that they would be allowed until
2 the school year '67-68 to commence desegregation of the faculty
3 and professional staff in the Montgomery County School System.

4 At that time the defendants had tentatively assigned
5 four teachers of each race to teach in high schools attended
6 predominantly by students of the opposite race for the '66-67
7 year.

8 But after Judge Johnson's modification in August 1966,
9 these assignments were not implemented.

10 On June 1, 1967, the District Court ordered the
11 defendants to adopt the desegregation plan with faculty pro-
12 visions substantially similar to that which it had ordered
13 in March, 1966, but with certain additions.

14 The court indicated for the first time that its
15 desegregation order was to extend to student teachers. Also
16 the court directed, and this appears at page 454 of the
17 printed record, wherever possible, teachers will be assigned
18 so that more than one teacher of the minority race, white or
19 Negro, will be on a desegregated faculty. The school board will
20 take positive and affirmative steps to accomplish the deseg-
21 regation of its school faculties, including substantial
22 desegregation of faculties in as many of the schools as possible
23 for the '67-68 school year notwithstanding the teacher con-
24 tracts for the 67-68 or 68-69 school year have already been
25 signed and approved.

1 The objective of the school system is that the pattern
2 of teacher assignment to any particular school shall not be
3 identifiable as tailored for a heavy concentration of either
4 Negro or white pupils in the schools.

5 And here again it is an excellent general statement
6 with no appreciable specifics in it.

7 As a result of which the defendants assigned five
8 teachers of each race to schools predominantly of the opposite
9 race. The ten teachers taught only at four high schools in
10 the city of Montgomery, none in any elementary schools, none
11 in any of the schools outside of the city, except that in the
12 elementary schools the defendants did assign three white speech
13 therapists to teach in all elementary schools.

14 On August 17, 1967, the Government objected to the
15 defendants failure to bring about more faculty desegregation
16 and move for further relief.

17 The plaintiffs in the action joined in the motion.
18 There was a hearing in September, 1967, and the Superintendent
19 of the Montgomery School Board, Mr. McKee, explained the
20 defendant's failure to assign desegregating faculty members to
21 48 of their 52 schools.

22 He said, "We felt there would be less objection in
23 the senior high schools because one teacher would not have the
24 pupils as much of the day as they would in the lower grades."
25 He acknowledged reassigning over 40 Negro teachers from schools

1 closed pursuant to court order to other Negro schools for
2 the 67-68 school year.

3 He also acknowledged assigning over 90 new teachers
4 for the 67-68 school year to schools where their race pre-
5 dominated. The court declined to enter any further order in
6 the fall of '67.

7 However, in January of 1968, the District Court set
8 the August '67 motion of the United States down for a second
9 hearing in February, 1968, a little over a year ago.

10 Both the Government and the plaintiffs filed supple-
11 mental motions for further relief shortly before the hearing.
12 In the meantime the defendants had signed six or seven addi-
13 tional white teachers to three or four more traditionally Negro
14 schools, so that seven or eight of the 52 schools had deseg-
15 regated facilities.

16 The chief evidence concerning desegregation is
17 summarized in the District Court's opinion of February 24,
18 1968. This is on page 493 and 494 of the printed record.

19 Since the order of this court on June 1, 1967, Judge
20 Johnson said, "Defendants have assigned or transferred approxi-
21 mately 75 new teachers to faculties where their race was in
22 the majority. Since the opening of school in September 1967,
23 defendants have hired approximately 32 new teachers, 26 white
24 and six Negro.

25 Of the 26 new white teachers, only 6 or 7 have been

1 placed in predominantly Negro schools. All six Negroes were
2 assigned to predominantly Negro schools" and the judge went
3 on to say the defendants have adopted no adequate program for
4 the assignment of student teachers on a desegregated basis.

5 None of the approximately 150 student teachers used
6 in the Montgomery County School System in the fall of 1967 were
7 assigned to schools predominantly of the opposite race. Four
8 Negro student teachers have very recently been assigned to
9 predominantly white schools.

10 There has been no faculty desegregation in the night
11 schools operated by the Montgomery County School System.

12 Now Judge Johnson could have added that the defendants
13 had continued their policy of assigning Negro teachers only
14 to Negro schools and dthe two traditionally white senior high
15 schools in the city of Montgomery.

16 They had assigned no Negro teachers to traditionally
17 white elementary or junior high schools or to a predominantly
18 white senior high school outside of Montgomery.

19 No teacher was assigned to teach an academic subject
20 in a traditionally white school. Superintendent McKee testi-
21 fied that the defendants assigned white teachers to Negro
22 schools only if the teachers expressed a willingness to teach
23 there even though the superintendent knew, he testified, that
24 the law did not permit him to rely on voluntariness.

25 The defendants continued to hire new white teachers

1 whose application showed that they would not accept integrated
2 faculties. The defendants assigned Negro teachers to Negro
3 schools even though they were willing to teach at traditionally
4 white schools because of the defendant's concern for the
5 reaction of white community members.

6 And so in summary, at the time the order with which
7 we are concerned was entered, prior to 1967, there was no
8 faculty desegregation. During 1967-68, 32 teachers, 26 white
9 and 6 Negro out of over 1350 were assigned to schools where
10 their race was in the minority.

11 Four of over 300 student teachers were assigned to
12 desegregating positions. No Negro substituted for a teacher
13 in a traditionally white school. Night school facilities were
14 segregated.

15 During the year 1968-69, since the order of the court
16 below, 216 teachers have been assigned to desegregating
17 positions. Now in this situation what was the order of Judge
18 Johnson?

19 It appears on pages 503 to 510 of the record but it
20 was then amended on pages 520 to 523, and I think the most
21 convenient place to examine it is as it is set out in the
22 opinion of the Court of Appeals where it is set out with the
23 amendments incorporated, and that appears on page 754 of the
24 record.

25 It is there exactly the same as in the references I

1 previously gave except the amendments have been read in.

2 It starts out on page 754, "Statement of Objective."

3 In achieving the objective of the school system that
4 the pattern of teacher assignments to any particular school
5 shall not be identifiable as tailored for a heavy concentration
6 of either Negro or white pupils in the school, the School Board
7 will be guided by the ratio of Negro to white faculty members
8 in the school system as a whole and that is about 60-40, about
9 3 to 2, three white to two Negro.

10 The School Board will accomplish faculty desegregation
11 by hiring and assigning faculty members so that in each school
12 the ratio of white to Negro faculty members is substantially
13 the same as it is throughout the system.

14 At present the ratio is approximately 3 to 2.

15 This will be accomplished in accordance with the
16 schedule set out below.

17 Then under B, "Schedule of Faculty Desegregation."

18 1968-69, that is the current school year, every
19 school with fewer than 12 teachers the Board will have at least
20 one full-time teacher whose race is different from the race
21 of the majority of the faculty and staff members of the school.

22 At every school with 12 or more teachers, the race
23 of at least one of every six faculty and staff members will
24 be different from the race of the majority of the faculty and
25 staff members at the school, and then the court will reserve

1 for the time being other specific faculty and staff desegre-
2 gation requirements for future years.

3 So that though there is a statement of objective in
4 terms of 3 to 2, the only order of the court was that in
5 schools of 12 or more faculty members, the ratio should be
6 5 to 1.

7 Now that, it seems to me, is not as mechanical or
8 rigid as it might seem when one examines the opinion of the
9 Court of Appeals.

10 I call attention to the top of the court's opinion,
11 the top of page 759 where the court has in large capital
12 letters, "Fixed Mathematical Ratio."

13 The Court of Appeals because of that fixed mathe-
14 matical ratio made two changes in the decree of the District
15 Court. Instead of maintaining the 5 to 1 ratio with respect
16 to schools of 12 or more, it required inserting substantially
17 or approximately 5 to 1, and then on page 765 of its opinion,
18 it struck out the 3 to 2 ratio entirely.

19 On page 765 the Court said, "There must be a good
20 faith and effective beginning and a good faith and effective
21 effort to achieve faculty and staff desegregation for the
22 entire system, although a ratio of substantially or approxi-
23 mately 5 to 1 is a good beginning we cannot say that a ratio
24 of substantially 3 to 2 simply because it mirrors the ratio
25 balance of the entire faculty must be achieved as a final
objective.

1 And so the ratio provisions of the District Court's
2 opinion were left out and the only thing that was left in to
3 guide the future development here is that there must be a good
4 faith and effective beginning and good faith and effective
5 effort to achieve faculty and staff desegregation.

6 Now that obviously is wholly vague and uncertain and
7 it means that the case must be tried anew every time it comes
8 up at large and not merely on matters of detail in connection
9 with the practical problems of complying with the decree.

10 Q It is also the requirement of approximately
11 5 to 1 for the first school year and I suppose the Court of
12 Appeals approved that, didn't it?

13 A The Court of Appeals in the District Court's
14 order was that it be 5 to 1.

15 Q I understand.

16 A The Court of Appeals put in substantially or
17 approximately 5 to 1.

18 Q And that would require some shifting, major
19 shifting, would it not? Of faculty in the school?

20 A Oh, yes, Mr. Justice, that would be considerably
21 more than they had achieved so far and from the materials
22 referred to in the respondent's brief here it would appear that
23 they have made substantial progress towards that. Five to one,
24 of course, is a long way from 3 to 2.

25 It may be that the generality of the Court of Appeals'

1 opinion is no kindness to the School Board of Montgomery
2 County and its responsible employees. The Panel of the Court
3 of Appeals said early in its opinion at the outset we note
4 that the testimony of the school officials indicates a need
5 for specific directives in the instant case, and the court set
6 out some of that testimony.

7 Before going further, I should point out that the
8 decision of the Court of Appeals was a 2 to 1 decision, with
9 Judge Thornberry dissenting. The plaintiffs and the Government
10 filed a petition for rehearing en banc before the full Court
11 of Appeals. That petition was denied by a vote of 6 to 6
12 and with an opinion supporting the rehearing by Chief Judge
13 Brown.

14 It should also be noted that the modification of
15 the decree ordered by the Court of Appeals knocks out the
16 portions of the District Court's order which were applicable
17 to substitute teachers, student teachers and night schools.

18 It should be noted that ~~at~~ the time Judge Johnson's
19 order was entered in February and March, 1968, there had been
20 virtually no desegregation of substitute teachers and none of
21 student teachers or night schools and there were no plans in
22 these areas.

23 Thus, it cannot be said that the respondents were
24 making progress on these matters. They had not even started.

25 The brief for the respondents relies on the facts

1 also relied on by the majority in the panel below that Judge
2 Johnson several times complimented the respondents on their
3 efforts and their progress over the years from 1964 to 1968.

4 But this case can hardly be decided by recalling
5 compliments.

6 The record also shows that Judge Johnson in February
7 1968, expressed his concern about the conduct of the Board. He
8 suggested that a geographic zone plan might have to be imposed
9 if it continued that conduct.

10 In his February opinion, Judge Johnson spoke of
11 aggravating conduct by the Board and he said that the re-
12 spondents here would have to act less dilatorily.

13 The respondents also rely in their brief on the
14 appreciable progress which they have made over the past year
15 since the decree of the District Court was entered, and indeed
16 since the decision of the panel of the Court of Appeals.

17 We can be grateful for what they have accomplished
18 but it is in fact far short of the objectives of the District
19 Court's decree. It may be that it complies with the require-
20 ments of the decree as modified by the panel of the Court of
21 Appeals, and this serves to illustrate the shortcomings of
22 that modification since the results achieved are so far short
23 of disestablishing desegregation in the respondent's school
24 system.

25 We do not contend that the Constitution requires a

1 mathematical ratio in the allocation of faculty members. We
2 do not contend that such a ratio should be applied in all cases
3 involving all school systems.

4 We have here a school system which was undeniably
5 completely segregated by law for many years and in which no
6 steps or plans were made for change up to 1964 when this suit
7 was filed.

8 We have here a case where token changes have been
9 made over the four years from 1964 to 1968. We have here a
10 case which has been presided over by an able and understanding
11 District Judge wholly familiar with the local situation, who
12 engaged in patient prodding for a long time and then finally
13 came to the conclusion that the ultimate result, a disestab-
14 lishment of segregation in a system which had long been
15 legally completely segregated would be achieved only by
16 reallocation of teachers, so that no school would any longer
17 carry that mark that it was a white school or a black school.

18 The District Judge in such a case should have wide
19 latitude in formulating, structuring his decree in order to
20 bring about a result which is undeniably in accordance with law.
21 This is not a case where a judge has made a decree which
22 condones a failure to comply with the law; it is a case where
23 a District Judge in a case nearly four years old when he acted
24 set down a standard for action which would clearly comply with
25 the law as enunciated by this court.

1 In such a situation the decree of the District Judge
2 should not have been modified by the Court of Appeals.

3 We submit that the judgment below should be reversed
4 and the decree of the District Court should be affirmed.

5 MR. CHIEF JUSTICE WARREN: Mr. Greenberg.

6 ORAL ARGUMENT OF JACK GREENBERG, ESQ.

7 ON BEHALF OF PETITIONERS - 997

8 MR. GREENBERG: May it please the Court.

9 The Solicitor General has stated the facts in thorough
10 detail and I will not rehearse them except to add one additional
11 fact which appears in the record and that is that the exceedingly
12 slow pace of progress, and indeed such progress has occurred,
13 in Montgomery County has occurred in a background of pervasive
14 political opposition to desegregation throughout the State.

15 And the specificity of the District Court's order
16 should be read in the light of how useful an order like that
17 may be with that kind of a background.

18 I might refer to page 392 of the record in which
19 action of the State Superintendent of Education and of the
20 Governor in opposition to faculty desegregation is set forth
21 and that is in the opinion of Lee against Macon County which
22 is in the record here and which was affirmed by this court.

23 A sentence or two is Dr. Meadows, State Superintendent
24 advised the local school official that he was calling in a
25 constitutional officer of the State of Alabama and that the

1 assignment of Negro teachers to white schools was against the
2 law and public policy of the State.

3 And I skip a while and about the same time Attorney
4 Hugh Maddox, legal advisor of Governor, telephoned the
5 Tuscaloosa County Superintendent and informed him that it is
6 the public policy of the State that Negro teachers not teach
7 white children and that the Governor would use his police power
8 to enforce the law.

9 Q What date were those written, do you recall?

10 A It was roughly contemporaneous with the opinion
11 below.

12 Q August '66?

13 A August '66.

14 Q '66?

15 A Yes.

16 While this case was going on and so that the
17 specificity of the order should be seen not only against the
18 background of whatever it was that motivated the local school
19 board but in a certain sense may be seen as a protective
20 device for a local school board which desires to comply with
21 an order.

22 Now as the Solicitor General stated, this case in-
23 volves two fundamental issues. One is the question of the
24 standards by which District Courts should review desegregation
25 plans of school systems which have previously been segregated

1 pursuant to law, and as another aspect of that, more importantly
2 it involves the vitality of this court's decision last year
3 in Green against County School Board where this court held
4 that desegregation plans must work.

5 Two things should be stated clearly at the outset,
6 though they appear in the record and in the briefs and that is,
7 this case does not involve a hiring quota. It is not a case
8 in which any fixed proportion of Negro or white teachers must
9 be employed by the system.

10 The standard of employment may be any objective
11 standard and the standard of employment is set forth in the
12 decree of the United States against Jefferson County, which
13 was entered in this case previously and which appears in the
14 records and the briefs.

15 That is, that only that race may not be a standard
16 in employment. The Jefferson standard included also that race
17 may be taken into account for the purpose of counteracting or
18 correcting the effect of the past segregated assignment of
19 teachers in the dual system.

20 And to that extent, I think anticipated the ruling
21 in the instant case.

22 The second thing I think of considerable importance
23 that should be noted is that the area of disagreement between
24 the Court of Appeals and the District Court is not one of
25 principle and not one of constitutionality but one of standards

1 and workability.

2 Judges Gewin and Elliott in the Court of Appeals
3 on page 766 assert that race may be taken into account for
4 purposes of counteracting or correcting the effects of racial
5 segregation in any dual school system as has been held previ-
6 ously in this court and elsewhere.

7 Their objection to the ruling of the trial court is
8 one that it is not workable, it is not a sufficiently flexible
9 system. On 763 they write "It is our conclusion that the
10 standards fixed by courts with respect to faculty desegregating
11 cannot be totally inflexible."

12 And as a consequence, what they did was they took
13 numerical ratios of substituting and the court order merely
14 doesn't tell the trial court or the school board what to do.
15 It just tells them what not to do on 766.

16 Under the facts and circumstances of this case the
17 order will be modified accordingly and the numerical ratio as
18 set forth in the District Court and decree will be eliminated.

19 Now this court in Green said that a plan must work.
20 The District Judge, writing his opinion shortly before the
21 decision in the Green case anticipated in effect what this
22 court said in Green and he set down a workable standard by
23 which the District Court could work. After all he has to be
24 able to measure whether or not there is compliance and by which
25 the school board can work.

1 As a substitute for that the Court of Appeals gives
2 us nothing and we would like to submit several reasons why we
3 believe the District Court was clearly correct.

4 First of all, as the Solicitor General pointed out,
5 the District Judge has lived with this case for four years.
6 He knows the record, he knows the school system, he knows
7 the defendants, he knows their internal problems and the prob-
8 lems they have with regard to the rest of the State.

9 He found explicitly in his opinion that there were
10 no administrative difficulties either to his immediate goals or
11 to achieving his ultimate objective.

12 Secondly, the respondents in an appendix to their
13 brief set forth what they have done with respect to the interim
14 goals; that is the 1 to 5. And if you look at those statistics
15 they demonstrate that when this school board is given a numerical
16 goal it knows how to abide by it and that a numerical goal
17 can work.

18 Consequently, there is no reason to believe that
19 having been given 1 to 5 they can't do more. Numerical ratios
20 having been stricken from the District Court opinion by the
21 Court of Appeals no one knows what to do now.

22 Should they go to 2 to 5, 2-1/2 to 5, 3 to 5, it is
23 not known.

24 Thirdly, the Superintendent in charge of faculties
25 testified that he needed precise instructions. Generalities
were not good enough for him. Page 657 we have him testify --

1 657 to 658, "I don't know what the objectives of the court
2 order are."

3 This is previously to the numerical ratios having
4 been set down. That has never been set down in any percentage
5 fashion that I know of. It says that you will have reasonable
6 desegregation of faculty and that you will strive toward having
7 each faculty not recognizable as being staffed to a particular
8 race.

9 Now with the order in that form he didn't know what
10 to do. Judge Johnson has told him what to do. The Court of
11 Appeals has struck that out and now he is back where he has
12 started again.

13 The situation is, as he went on saying, that would
14 depend upon what the definition of it is. We have discussed
15 it many times. I do not have a definition of what that would
16 mean and this testimony of the School Superintendent precisely
17 describes what the state of mind of the School Board has to be
18 in the present status.

19 The Court of Appeals has put him back in a situation
20 which according to his own testimony he doesn't know what to do.

21 Now the numerical ratio of 60-40 or 3 to 2 is not
22 taken out of the blue. On page 668 of the record we have
23 Judge Johnson speaking to the superintendent and suggesting
24 that perhaps a numerical ratio like that would be appropriate.
25 And he says "Your student population," he was referring to

1 student population but he really must have meant faculty
2 because the student ratio was somewhat different, "Your student
3 population is 60-40?"

4 "Yes, sir.

5 "Ultimately that will be your optimum if you are
6 going to eliminate the ratio characteristics of your school
7 through faculty?

8 "Nodded to indicate affirmative reply."

9 And so when this was suggested to the School Super-
10 intendent or the Assistant Superintendent in charge of faculty
11 as an acceptable ratio he acquiesced in it, so it is apparently
12 an agreeable way of going about it.

13 Finally, the notion of numerical ratio is one which
14 is entirely suitable for use by this Board; indeed, they have
15 said traditionally that numbers was what they were going to use.

16 On 656 of the record the Assistant Superintendent
17 says, "Well the way I will go about is first I will put one
18 in each school and then I will put two in each school and then
19 I will put three in each school, and so on."

20 So numbers is not an uncongenial impossible way of
21 working it according to their own testimony.

22 And the Judge pointed out indeed in his opinion that
23 the formula which he proposed was little different from what
24 they were doing. You will find that in the record on page 526.

25 Now the numerical ratio, as I pointed out, protects

1 the board in two senses. It protects them because now they
2 know what to do. It is less likely they will be contempt. It
3 is less likely they will be in violation. It protects them
4 also against deprivations by State authorities. And finally,
5 other courts have found this type of approach useful.

6 In the Dowell case in Oklahoma City the Tenth Circuit
7 affirmed the use of precisely such a ratio and it might be
8 pointed out that it was initially suggested by a panel of
9 educators. It is being used in other courts, throughout the
10 country as cited in our brief.

11 Most importantly, however, the Court of Appeals on
12 no record whatsoever substituted a vapid good faith standard
13 requirement for one which is resting on a solid record.

14 We submit to this court that the history of deseg-
15regation in the courts has been that specificity and immediacy
16 bring results and that generalities do not. And this is the
17 sense of the Green decision of this court of last year.

18 Since Green has been handed down, it has indeed been
19 working. More important, its effect is pervasive beyond the
20 judicial system because its standards are being incorporated
21 as the standards of this court on other school desegregation
22 issues are incorporated into the guidelines of the Department
23 of Health, Education, and Welfare.

24 And so it has an effect beyond the ordinary effect
25 of stare decisis. We submit that the Court of Appeals' decision

1 is a throwback. There is no justification for it and that
2 it should be reversed.

3 MR. CHIEF JUSTICE WARREN: Mr. Phelps

4 ORAL ARGUMENT OF JOSEPH D. PHELPS, ESQ.

5 ON BEHALF OF RESPONDENT

6 MR. PHELPS. Mr. Chief Justice and may it please the
7 Court.

8 As the Solicitor General and Mr. Greenberg stated,
9 the issue is whether or not in public education we must have a
10 compulsory mathematical ratio in faculty assignment.

11 We would like at the very outset to emphasize to
12 the court that we are not here and don't take the position of
13 contesting full faculty desegregation. We recognize and the
14 Montgomery County Board of Education recognizes the full
15 faculty desegregation is indeed an important and integral part
16 in the overall desegregation process.

17 We do, however, strenuously object to the compulsory
18 mathematical ratio on the basis that we have outlined. We
19 understand the responsibility of the Board to be to assign
20 people to schools throughout the system so that no school is
21 identifiable by its faculty as being tailored for either white
22 or Negro children.

23 Q Has that been done?

24 A It is in the process now, your Honor, of being
25 done, and we are making, we believe, sir, extensive numerical

1 progress as well as qualitative progress.

2 Q What is the effect of that policy of the State
3 Government that Mr. Greenberg just read a moment ago? The
4 policy of the State Government being against doing this very
5 thing?

6 A Well, if the Court please, Mr. Chief Justice,
7 the data he read was in 1966, in the Macon County, Lee versus
8 Macon County case about three years ago.

9 At that time, Mr. Chief Justice, there were only 1600
10 students throughout the whole State in desegregated situations.
11 We have more than that now even in Montgomery, Alabama.

12 Q Has there been a change?

13 A Yes.

14 Q Has there been a change in the State policy?

15 A Yes, sir, I would say very definitely.

16 Q Has it been announced?

17 A I would say very definitely and I can give the
18 court some examples.

19 Q I would like to hear you tell us how it has been
20 announced.

21 A All right. So right now ---

22 Q I beg your pardon?

23 A Right today or this week in the State of Alabama,
24 the Alabama Legislature is meeting on a called special session
25 that was called by our new governor to consider an extensive

1 program for education. It was presented to the Alabama Legis-
2 lature by bi-racial committee and here is the Alabama Legis-
3 lature meeting, considering recommendations for education
4 throughout the system that were presented to the Governor
5 and presented to the Legislature by a fully integrated committee.

6 Q Has the governor of the State announced in any
7 way that it has changed its policy in this regard?

8 A I believe that that is an announcement in and
9 of itself. Another announcement as far as policy ---

10 Q You mean a statement that it is going to consider
11 education in Alabama is an announcement that it has abandoned
12 all its segregation policies?

13 A I think that, Mr. Chief Justice, is one example.
14 Another example is this: In the case of Lee versus Macon
15 County that Mr. Grady is well familiar with, Governor Brewer
16 appeared before Judge Frank M. Johnson and made the statement
17 that the State of Alabama has no State policy of segregation.

18 That statement was made, I believe, by Governor
19 Brewer in Judge Johnson's court. That, if the court please, is
20 another example. That wasn't in the Montgomery case, but
21 it addresses itself to the court question and Mr. Greenberg's
22 remarks.

23 Another example, as far as the climate in Alabama,
24 on April 15 of 1969, a black person was appointed on the School
25 Board itself in Birmingham, Alabama. We think that is a

1 significant development as far as the climate is concerned.

2 Q I thought we said 15 years ago almost to the
3 day the climate wasn't to be considered.

4 A I am sorry, I didn't understand that.

5 Q My recollection is that 15 years ago almost to
6 the day in Brown versus the Board of Education, we said that
7 climate was not one of the things that should be considered
8 in how desegregation was to be made.

9 A Well, you asked me, I thought, what changes the
10 Governor had made.

11 Q Yes, I was.

12 A And I was attempting, sir, to point out I think
13 that changes have been made. I think that the examples that I
14 have given to the court are some.

15 Another example is this: Just last week a black
16 athlete at the University of Alabama, who had just received a
17 Grant-in-Aid Scholarship was asked by the newspaper concerning
18 racial consideration at the scene of the school house.

19 The black athlete had received the Grant-in-Aid
20 Scholarship and asked about race said, "Everybody has got to
21 be some color. I want to play basketball."

22 We think that the changes that have made, that was
23 a change at the University of Alabama. A change in the
24 Birmingham Board of Education having a black person on the
25 Board, a change in the Legislature of Alabama considering the

1 bi-racial committee, integrated committee's recommendation and
2 calling of a special session of the Legislature.

3 Mr. Chief Justice asked for changes and I think those
4 are changes since the court in 1966 quoted in Lee versus Macon.

5 Q Mr. Phelps, assuming all of that to be true and
6 it to be increasing in the future, about when do you expect to
7 get desegregation in Montgomery County? About when?

8 A Mr. Justice, we are working diligently at that
9 now. We don't state to the court that the ultimate objective
10 has been reached. When? I would say that measuring and looking
11 at it we think substantial progress and I will get to the
12 figures on it in a minute, but I think certainly in the
13 foreseeable future it is hard to give the court a time.

14 Q Will it be after these children have graduated?

15 A I should hope not, Mr. Justice.

16 Q Well, don't you think it will be later than that?

17 A I should hope not. Now, I don't think that it
18 will. No, sir.

19 Q How long did it take you to reach this place
20 since 1954?

21 A True. It has been since 1954 since Brown versus
22 the Board of Education but since 1964 when we in MONTgomery
23 County became under a desegregation program ---

24 Q You don't have -- you didn't volunteer that
25 program. Judge Johnson put it on you.

1 A That is correct, sir.

2 Q If you had been left alone, you wouldn't have
3 moved at all, would you?

4 A We can't argue with the fact that we had the
5 dual segregation in Montgomery County, but we state to this
6 court that we are going about changing the school system ---

7 Q Will it be changed in time to do these petitioners
8 any good?

9 A I believe that these petitioners, Mr. Justice,
10 Arlam Carr has probably already graduated from school so, it
11 did him good, yes, sir. I believe that it gave to Arlam Carr
12 during his time in the public school system in Montgomery
13 or desegregated ---

14 Q Will you get these faculties desegregated before
15 the present elementary school students graduate?

16 A Yes, sir.

17 Q On what basis?

18 A On the basis of making assignments in the future
19 years as we have done between 1967 and today.

20 Q Did you tell Judge Johnson that? Has this come
21 after his order? You thought about that?

22 A No, sir. I believe and the record shows ---

23 Q Did you ask Judge Johnson to change his order?

24 A We asked Judge Johnson, sir, to stay his order
25 pending appeal ---

1 Q But did you ask him to modify it and give you
2 some more time?

3 A In essence, yes, sir, because he gave us some
4 more time in fact in substitute teachers and that was not
5 formally by motion, no, sir. But informally, yes, sir.

6 Q Mr. Phelps, what I am trying to say is if this
7 court asking for more time and all, did you ask Judge Johnson
8 for the same thing you are now asking us for?

9 A We are asking this court, Mr. Justice, for more
10 than more time. We are asking to be able to assign our faculty
11 and staff according to the qualification of the individual as
12 well as to remove the identifiability of the school. That is
13 what we are asking now.

14 Q How long will that take?

15 A In answer to the Justice's prior question, it
16 will be accomplished before the children that the Justice
17 mentioned.

18 Q You mean before these children graduate there
19 will be no faculty in Montgomery County that won't be racially
20 identifiable?

21 A That is right.

22 Q What percentage?

23 A Well, in representing the Board I have to talk
24 to the educators on that question and I am told that ---

25 Q You don't have to talk to educators about race.

1 A Sir?

2 Q You don't have to talk to the educator about
3 race. I said, to a faculty that is not racially identifiable.

4 A Well, as far as percentages are concerned, it
5 is awfully difficult from a standpoint of quality education to
6 answer that.

7 We think that the test is when a parent or child
8 looks at a school, is that school identified as being either for
9 black or white. We think, Mr. Justice, that quality placement
10 is more important than numerical placement.

11 For example, if we put a black teacher or a white
12 teacher that is well qualified for the job in a particular
13 school, and if that teacher is adapted and is qualified, that
14 teacher, black or white teacher, in a black or a white
15 school in a desegregated assignment will become looked upon as
16 a teacher, as a quality educator and not as either black or
17 white.

18 That is true we think unidentifiability in the schools
19 and we can get there if the court please, by quality, whereas
20 if we assign unqualified teachers either black or white in
21 desegregated assignments they will remain black or white
22 forever.

23 Q Well, I assume that all of the white teachers
24 and all of the Negro teachers in Montgomery County are equally
25 qualified.

1 A Well, that is true, Mr. Justice.

2 Q Why are we talking about qualified now? I
3 thought they were all qualified.

4 A Well, that is true, they are qualified to teach
5 the subjects that they have trained ---

6 Q You mean that some teachers aren't qualified
7 to teach children of another race?

8 A Well, a high school science teacher, Mr. Justice,
9 is certainly not qualified to teach an elementary child how
10 to read.

11 Q And I doubt that a science teacher teaching in
12 the junior high school is capable of teaching kindergarten.
13 I assume so. I am talking about equally qualified teachers,
14 equally qualified grades, equally qualified subjects.

15 You say that some are qualified and some are not.
16 Now take seventh grade elementary school teachers. What is
17 the difference in their qualifications?

18 A If we had to meet a racial quota of 60-40 in
19 the elementary grades we would have to take some of the teacher
20 from the elementary grades and move them elsewhere in order
21 to get that quota or bring them into the elementary or junior
22 high grades from some other phase of our system.

23 The 60-40 overall doesn't consider. We have got
24 different ratios of white to blacks in high schools than we
25 do in junior high. Different ratio of white to black in junior

1 high than grammar school. Now if we had to make a racial quota
2 we would have to come along and take them out of elementary
3 and put them into high schools or out of high school and put
4 them into elementary.

5 Q Where is that in Judge Johnson's order that
6 you have to shift them from one level of education to the other?
7 He doesn't say anything like that. He says if you have got
8 100 teachers in the seventh grade elementary school, you
9 divide them up. Period.

10 He didn't say move them from seventh to high school.

11 A Well, the Government and the plaintiff, if the
12 Court please, have asked for a random redistribution. Now
13 random redistribution to accomplish a 60-40 overall ratio
14 would have to be in each particular high school level, junior
15 high school level, elementary level.

16 They asked for a random redistribution and it just
17 cannot from the administrative standpoint work.

18 Q I am not talking about what anybody said except
19 Judge Johnson.

20 A All right, sir.

21 Q He is worried with it.

22 Q Why can't you shuffle your elementary teachers
23 as between white and black schools? Why can't you shuffle
24 your junior high teachers as between the schools and the same
25 with the high school teachers?

1 A Now, for example, we have got different quotas
2 or different actual percentages in our various schools. For
3 example, at junior high school it might well be we have got
4 70-30 instead of 60-40. If we had to come along and we would
5 have more of one than would be able to be used in the 60-40,
6 and we would have to have something to do with those teachers.

7 We would either have to move them up to high school
8 and that would create positions that would have to be found
9 for teachers in other areas. It would just create mass
10 confusion.

11 Q Where you have a 1 to 5 ratio you have got a
12 lot of latitude there.

13 A Well, I think if the court will look at the
14 exhibits in our brief we are meeting a 1 to 5 approximately.
15 Substantially a 1 to 5. We have got more latitude, of course,
16 if the court please than we would have in a 3 to 2 overall.

17 And I think this is significant to bring out at
18 this point. This racial ratio requirement wasn't asked for
19 in the plaintiff's or the Government's motions before Judge
20 Johnson.

21 The first time that it came up was in the suggested
22 decree prepared by the Government. Therefore, the District
23 Court had no opportunity to look into these, we say, impossible
24 effects.

25 Q Well, does the record show, Mr. Phelps, does the

1 record show how many teachers there are in the various levels?
2 For example, does the record show how many teachers there are
3 in the elementary schools and the racial breakdown and in the
4 junior high in the racial breakdown?

5 A Mr. Justice, I believe in order for the record
6 to show that, someone would have to be familiar with the
7 individual school.

8 Q Well, does the record show that? Or doesn't it?
9 It does not? Is that what you are saying?

10 A I don't believe, sir, that it does.

11 Q Is it your point that in order to comply with
12 Judge Johnson's decree there would have to be some shifting
13 of teachers as among the different levels?

14 A Yes, sir.

15 Q Say elementary teachers, for example, going to
16 junior high or high school teachers in elementary levels. Is
17 that what you are telling us?

18 A Yes, I am saying that that is the case and it is
19 going to be the case in varying degrees from year to year.

20 Q Well, is there any proof of that in the record?
21 Is there any evidence in the record, or is there any factual
22 statement from which a judgment may be made as to the serious-
23 ness of that problem on a qualitative basis?

24 A Yes, sir.

25 I believe that it is for this reason. Certainly it

1 will appear from the record and the reports that have been
2 filed over the years that varying numbers of students will
3 attend varying schools each year.

4 Q That is not what I mean.

5 Tell me about the printed record before us.

6 A I can't state to the court that it is specifi-
7 cally in the printed record because we had no way of knowing
8 that we were going to be faced with this ratio requirement
9 and it was not as I said a moment ago in either the plaintiff's
10 nor the Government's motion for further relief and the first
11 time we were faced with a racial ratio requirement was in the
12 suggested order as made by the Government.

13 Q Well, if Teacher Jones, a white person, is
14 teaching first year history in the high school, a white high
15 school, and Teacher Smith, a black person, is teaching the
16 same subject in the first year class in the black school, why
17 couldn't you just change those two teachers?

18 A If it was just those two, Mr. Justice, involved,
19 yes, but if you have got a ratio requirement that you are
20 having to meet you have got to have 60-40 in your black school,
21 60 percent white and 40 percent black, you are going to have
22 to move more than just those two teachers and it is going to
23 get into a process of musical chairs of just shifting teachers
24 around as bodies and it just cannot be the best thing for
25 quality education.

1 Q But I thought that Judge Johnson held that you
2 need not do that school by school. You are to do it by the
3 overall population, isn't that true?

4 A Well ---

5 Q It has to be done by every school?

6 A Yes, sir, and that is something that the
7 Government and plaintiff stated differently in their petition
8 for certiorari than they did on their briefs on merits.

9 Judge Johnson's order says that you have got to have
10 in each school the same ratio of blacks to white as the
11 overall faculty composition demands. And that would not
12 prevent it as Mr. Chief Justice said in petition for certiorari
13 in the briefs they did say what Judge Johnson ordered and it was
14 in each school, sir.

15 Q Would you be satisfied with his decree if it
16 provided for doing it on the basis of your overall school
17 population as distinguished from each individual school?

18 A Mr. Chief Justice, I believe that compulsory
19 mathematical ratios are certainly an innovation in public
20 education. We think this is a very far-reaching decree and
21 effect. We think that certainly a great deal of thought should
22 be given to it and I think that we should have the opportunity
23 to present to the District Courts the effects of the various --
24 and I have outlined some of them, and I will outline some more
25 -- the effects of these arbitraries, we say preconceived

1 mathematical ratios. We say they are unwise, arbitrary and
2 educationally unsound.

3 Q Well you have had just 15 years.

4 A Well, I am going to get to the progress that
5 we made in desegregation, if the court please.

6 In one year the Montgomery County Board of Education
7 in 1966-67 was the first year that pursuant to court order
8 we went into faculty desegregation.

9 Q But you take the position that you are not
10 supposed to do anything until you have a court order compelling
11 you to do it?

12 A No, sir.

13 Q Well, then why do you start with '64. Why
14 don't you go back to '54?

15 A All right.

16 Well, I think that in any event, whether it is '54
17 or whether it is '64, we have 212 full time faculty members
18 teaching in minority assignments today; 111 blacks in 34 white
19 schools and 101 whites in 39 black schools, approximately on
20 a 1 to 5 ratio.

21 Q Are those really very meaningful figures in
22 tying where teachers are teaching by the color of the student?
23 This is a question of faculty. It isn't a question of matching
24 faculty and students. It is a question of integrating or
25 desegregating the faculty, isn't it?

1 A I think the Justice is right. I think what we
2 are striving for is regardless of whether it be a formally or
3 predominantly black or white school, we are striving toward
4 having the faculty in each school, regardless of racial or
5 nonracial composition as not being identifiable.

6 Q Is there anything in this record which would
7 indicate what the distribution of the various grades is of
8 white and Negro teachers. Overall it is 3 to 2. Is there
9 anything in the record that indicates that the distribution
10 between white and Negro faculties is substantially different
11 in the high schools than in the grade schools.

12 A I don't believe so. We would have to take ---

13 Q Is there anything that indicates that the
14 distribution is substantially different than 3 to 2 as between
15 the first grade and twelfth grade, for example, or between
16 the ninth grade and the sixth grade?

17 A Mr. Justice White, I can't say that specifically
18 that there is.

19 Q Well, unless you can, unless you can I think you
20 are asking us to assume that the distribution is different
21 in making the argument that you may have to distribute teachers,
22 redistribute teachers from high schools to grade schools or
23 from the sixth grade to the seventh grade.

24 I can see that if it just so happened that all the
25 teachers in the high schools in all the high schools were white

1 and all the teachers in all the grade schools were Negro, then
2 a requirement of 3 to 2 in each school would obviously require
3 some shifting between high school and grade school but I would
4 just like to know if there is anything really helpful in the
5 record.

6 Q In your Appendix, Mr. Phelps, on page 36 of your
7 brief --

8 A Yes.

9 Q I think that would furnish the ingredients of
10 the information Mr. Justice White and Mr. Justice Fortas have
11 manifested an interest if we knew which of those schools were
12 high schools and which elementary schools. Some are identified
13 and others are not.

14 For instance Bear and Catoma and Chilton and so on
15 are simply all we have is their name. Others are identified
16 as high schools or elementary schools.

17 A This is an example of an area that this court
18 had no opportunity to get into because neither the plaintiffs
19 nor the Government asked for a racial ratio ahead of this
20 hearing and we had no opportunity to present these factors to
21 the court.

22 Q I know but one of your objections here -- I
23 agree it is only one of them -- is that it may require shifting
24 teachers into jobs for which they are not qualified.

25 A That is right, sir.

1 Q I would suppose if that objection was as obvious
2 in the District Court when this provision was proposed as it
3 is now you could have made some showing along these lines.

4 A We had no idea that a ratio, or a ratio quota
5 was going to come out of here.

6 Q Well, did you file for a petition for a re-
7 hearing in the District Court?

8 A As I said, in answer to Mr. Justice Marshall's
9 question, we did not formally, no, sir. We discussed it with
10 the court and we filed a petition to stay pending appeal to
11 the Fifth Circuit.

12 Q You filed a petition to stay after you filed an
13 appeal?

14 A Yes, sir.

15 Q So you made no effort to bring any of this
16 before Judge Johnson?

17 Q Didn't Judge Johnson modify his order in some
18 respect?

19 A Yes, sir.

20 Q At your request?

21 A After we had an informal discussion and pointed
22 out the problems ---

23 Q Well, did you point out this particular problem
24 you are talking about now?

25 A Well, we didn't point out ---

1 Q Well, you had a chance to.

2 A -- in detail that we are pointing it out to this
3 court because we just didn't have the opportunity and the time
4 to study it with our people.

5 Q Well, I take it that Judge Johnson -- I don't
6 see anything in here to indicate that he would expect you to
7 reassign high school teachers to grade school, for example.
8 I would suppose that he would, that his order on its face
9 requires that, I would in the first place be surprised and
10 in the second place I doubt if he would stick to that.

11 A We think that mathematical ratios are dangerous
12 in public education and that is one of the examples and one
13 of the reasons we say we had no opportunity to go into this.

14 Another problem that we have in racial ratios in
15 fact is no one, the school board nor the court can control a
16 teacher in his or her employment. The teacher can resign, go
17 to another school system, or go into another means of employ-
18 ment so here we have got a standard on the employment of
19 faculties that neither the school board nor the court has
20 anything to do about.

21 A teacher can resign if she wants to. She can go
22 into another field of endeavor. Unfortunately in the State of
23 Alabama we don't have the financial resources to hold a lot
24 out to them as far as money. We have to treat them as pro-
25 fessional people.

1 In fact another point we think a drawback on a racial
2 ratio requirement is that you are tying the standard to
3 something that neither the court nor the school board can
4 control.

5 Another point that we bring out and we state shows
6 the lack of wisdom in such a proposal is a yardstick if it is
7 tied to the composition of the entire faculty will vary from
8 one school to another.

9 For example, in Birmingham, Alabama, there are 26
10 percent black and 74 percent white. In Oklahoma City there
11 are 14 percent black, 86 percent white. Washington, D. C.,
12 78 percent black and 12 percent white.

13 You have got a yardstick that varies from state to
14 state, from district to district and even within the various
15 school districts within a given state and as we pointed out
16 a minute ago it varies between your junior high and the
17 elementary even within the same school district and it varies
18 from year to year and we think that the yardstick is ---

19 Q But if you integrated all of the students in all
20 of the schools you wouldn't have any of the problem.

21 A No, sir, and that is hopefully what all of the
22 schools are headed for as the Solicitor General pointed out.

23 Q So since 1954 to date we have made 6 percent
24 progress.

25 A Well, we feel that it is more than that on the

1 current statistics. On current statistics I think we have
2 said and we have got 212 full time classroom faculty teachers
3 now and the superintendent in his testimony before this said
4 that he was going to have in excess of 100 and he has worked
5 diligently at it and it is his statement to this court that he
6 is going to continue to do it without the imposition of a
7 mathematical ratio that certainly cannot be beneficial to
8 quality education when you assign teachers.

9 Q Well, do you object -- are you objecting up here
10 to compulsory reassignment?

11 A No, sir.

12 Q And you agree that compulsory assignment is as
13 a remedy matter that the school board has to be able to do that?

14 A And the Fifth Circuit made that clear.

15 Q Quite, I thought.

16 A The court opinion emphatically said that you had
17 to compulsory assign but we say all right, but in this com-
18 pulsory assignment, let us take the qualification, the indi-
19 viduality of the teacher into consideration.

20 If you lose that, if the court please, and in public
21 education it is going to be at the expense of school children
22 throughout the nation regardless of race.

23 Q Why should there be any difference between a
24 high school history teacher in a black school and a white
25 school so far as qualifications are concerned?

1 A I don't think there is but I think when you have
2 to assign a teacher on the basis of meeting a quota instead
3 of of assigning a teacher on the basis of qualification and
4 after careful consideration of what she was teaching, for
5 example, a science teacher for a science teacher that sounds
6 all right but if this science teacher had been teaching physics
7 at one school, you can't send her over or it wouldn't be right
8 to send her over and teach biology in another school or by the
9 other side of it if a teacher has been teaching general science
10 in a white school it certainly wouldn't be fair to the teacher
11 nor to the child to send her to a black school to teach
12 physics.

13 And those are all elements that have got to come into
14 faculty placement, so I say yes, sir, we don't make a dis-
15 tinction between a white and a black teacher on the basis of
16 qualification but what the teacher is trained to do if it is
17 a science teacher and a science teacher changes from one
18 school to another to meet a quota but if that science teacher
19 had been in general science in a white school, it wouldn't be
20 fair to the teacher nor to the children to teach physics in
21 another school.

22 Q Are your black teachers and your white teachers
23 respectively recruited from different universities? Teacher
24 colleges or whatever they call them?

25 A Not as much now as it has been. I can't say

1 that all the vestiges of that are gone, but they are leaving,
2 that certainly is true to some extent.

3 Q You have got a lot of people there who were
4 recruited in the past I assume.

5 A Yes, sir, that is true.

6 Q Most of the blacks were recruited from segregated
7 Negro Teachers Colleges I suppose.

8 A Yes, sir.

9 Q And most of your whites were recruited from
10 segregated white colleges?

11 A Yes, sir.

12 Q And would you say that the white colleges
13 generally had better facilities and better staff and so on?

14 A I think it would be unrealistic not to say that
15 would be true.

16 Q Mr. Phelps, do you have the exact same books,
17 curricular, subject matter, equipment, in both schools?

18 A I would say substantially so, yes.

19 Q Well, what is the problem with transferring the
20 general science teacher in the predominantly white school to
21 the general science teacher in the Negro school since they
22 have everything exactly the same?

23 A All right, sir.

24 In answer to Mr. Chief Justice Warren's question, if
25 those were the only two teachers as I said, the only two ---

1 Q Well, we have to start someplace.

2 A All right, sir.

3 Q So I am starting with the general science teacher.

4 That is the one you like to talk of. The general science
5 teacher from one school to the other would be no problem; exact
6 same facilities, exact same books, exact same training, exact
7 same grade.

8 A What about this though, sir, if the children at
9 one school had chosen to take physics and not the other, then
10 the general science teacher would be in a position to teach
11 physics.

12 Q Well, in mine I assume that in both schools since
13 they are all the same people, they all chose to take general
14 science. What is the problem?

15 A As far as the one teacher is concerned, they
16 wouldn't be but if we have got a 3 to 2 ratio overall and we
17 have got to meet it in the high school ---

18 Q Well is there that much difference between these
19 schools? You seem to always find a problem here like there is
20 a difference in these schools.

21 A Well, I say this to the court that mathematical
22 ratios are inherently problematical in public education and I
23 have tried to point up some of them. There are many, many
24 more and I think Judge Skelley right in Hobson versus Hansen
25 recognized it when after discussing it.

1 Q Do you think that case is on your side?

2 A I think it is, Mr. Justice, insofar as ---

3 Q I am sure Judge Wright would be surprised.

4 A After discussing Dowell and Kier, Justice Wright
5 said this -- Judge Wright said there will be an abundance of
6 opportunity later for adversary argument on the merits and
7 demerits of the ends and means concerning teacher integration.

8 He said that in Hobson versus Hansen ---

9 Q Well, there is a problem. The whole school
10 system is a problem.

11 A Yes, sir.

12 Q But it tends to be to solve every problem but
13 race.

14 A Well, I think in the school system in Montgomery
15 County, Alabama, we are striving to grope with the problem and
16 to solve it, and we state to the court that we will solve it,
17 that we will solve it in student desegregation and we will
18 solve it in faculty desegregation without the imposition of
19 these compulsory mathematical ratios.

20 The Government in its brief and in argument has said
21 that this is only the mathematical ratio requirement is
22 remedial and not for perpetuity. I suppose they are seeking
23 to make the distinction between a de facto and a school system
24 but when it comes to teacher I fail to see the distinction
25 between de facto and de jure. Certainly it makes no difference

1 as far as the neighborhood as to what teachers are assigned to
2 what schools and I think that even more in a de facto situation
3 of what has been called de facto faculty integration is more
4 important.

5 We can't see either teachers are there or they are
6 not. If they are not there, the school is identifiable it is
7 patterned for one particular race or another we think the
8 problem exists whether you call it de facto or whether you it
9 de jure, the teachers are either there, it is either identi-
10 fiable as white or identifiable as black.

11 They say it is not for perpetuity. The charge of
12 racial imbalance is made, continued to be made, if the charges
13 of a racial identifiability is made the perpetuity of the
14 racial ratio requirement would exist just as long as these
15 charges are made and we say that we are going about it in
16 Montgomery, Alabama, to provide nonracial identified faculty
17 in each school.

18 And we say that it is unwise, educationally unsound
19 and not consistent with quality education to have a mathematical
20 ratio and I have tried to explain but if we are doing it and
21 we are getting it done as the District Court noted in the
22 opinion that has been quoted from, Judge Johnson said that
23 you are doing as much without the racial ratio requirement or
24 that is what you tell us you do as the court is requiring you
25 to do anyway.

1 That is at the record page at 562. What is actually
2 required of the court order is very little if any more than
3 the school board by its testimony is going to do anyway but
4 we plan to assign faculty so the schools are not identifiable
5 racially.

6 And also to carefully consider the quality placement
7 teaching as we pointed out in our brief is uniformly recog-
8 nized as an art. And these are professional people. The
9 individuality in knowledge from one to another is an intensely
10 personal endeavor and it is just not and can't possibly be
11 in the best interest of public education for blacks or whites
12 to assign these people according to quota, to assign professional
13 teachers according to bodies and not as to individuality.

14 Now we recognize that we must foremost in our mind
15 keep the consideration of desegregating the faculty and we
16 state to the court that we are but we ask for the opportunity
17 to desegregate our faculties and do it consistently with
18 quality education.

19 And as the Solicitor General commented, candidly so
20 I thought, the Montgomery County Board has made significant
21 progress. We have got significant progress we say in faculty
22 desegregation and we state to the court that we are going to
23 continue, but we ask for the opportunity to continue with our
24 constitutional requirements to desegregate and at the same
25 time let us consider this vital, the critical element of the

1 individuality in faculty assignments.

2 Q Did you argue this way before the lower courts?

3 A I did if the court please before the Court of
4 Appeals but again I didn't have an opportunity ---

5 Q Did you? Well, let me read from the Court of
6 Appeals. I am sure this is from the Court of Appeals, yes.

7 On page 757 of the record it says, "However, appellant
8 objects to the District Court's order requiring assignment of
9 teachers on the ground that such is not in keeping with sound
10 and quality school administration. We quote from appellant's
11 brief."

12 "In Beckett versus School Board, city of Norfolk,
13 Virginia, 267 F.2d 118, page 139, the court stated in con-
14 sidering faculty desegregation, 'However, in line with the
15 most recent Wheeler case, Wheeler versus Durham City Board
16 of Education, the school board has not adopted the tactic of
17 compelling a teacher to transfer. Moreover, such a practice
18 would not be in accord with sound educational principles.'"

19 Did you argue that below?

20 A Yes, sir.

21 Q How is that consistent with what you are arguing
22 now?

23 A I think it is in context, Mr. Justice, of what
24 I argued on the footnote on the record at page 757 the Court
25 of Appeals says this, "Although appellants consistently argue

1 for voluntary assignment of teachers and staff and contend that
2 sound and quality school administration favors voluntary
3 assignment the following statement is found from the brief
4 of appellant."

5 And we said this in the Court of Appeals and the
6 court below. These appellants fully recognize that they have
7 the affirmative duty to desegregate the faculty throughout
8 the system to the end of the pattern of teacher assignment
9 to any particular school shall not be identifiable as tailored
10 for a heavy of either Negro or white pupils in the schools.

11 The appellant further recognizes that they have a
12 legal right to compel faculty assignment if voluntary placement
13 is not effective and we asked there for the opportunity to
14 voluntary placement is not effective and of course that is
15 best if it can be done.

16 Q But you are not urging up here that the com-
17 pulsory assignment should be eliminated?

18 A No, sir, the Court of Appeals ---

19 Q You may have argued that in the Court of Appeals
20 but you don't up here?

21 A No, sir. And the Court of Appeals emphatically
22 said that we must assign teachers and what we will continue to
23 do though, we will continue to have them volunteer if we can
24 do it consistently with our mandate of complete faculty
25 desegregation. If we can't, then we are going to assign. We

1 are going to try to have volunteers. If we can't get the job
2 done that way we will move into assignment. Of course, every
3 teacher that comes into the system now is told in no uncertain
4 terms that she cannot come to work without clearly understanding
5 that she can be assigned to any school in the system whether it
6 be formerly white or black schools.

7 We think that the progress that we have made in the
8 area of segregation in Montgomery County lends credence to
9 our statements to the court of our good intent. The District
10 Court on five occasions has pointed out in the Court of Appeals
11 order complimented Montgomery County Board of Education on its
12 efforts in desegregation.

13 In September 1967 the hearing that was the start of
14 the hearing that created this before the court now ---

15 Q Can I ask you, now you have got you say 212
16 teachers teaching in schools where their race is the minority?

17 Right?

18 A Yes, sir.

19 Q Now I take it that you feel that those 212 are
20 capable of teaching students of the opposite race?

21 A They were placed if the court please to the best
22 of our ability in accord with quality criteria.

23 Q You just don't deny, you just don't assert carte
24 blanche that teachers of one race can't teach students of
25 another?

1 A No, sir, I do not.

2 Q Where the relationships are bound to be such
3 between the student of one race and the teacher of another,
4 that you can't have a decent educational association?

5 A As I said to the court earlier, I believe that
6 if we are allowed to make the assignments based on individual
7 quality, based on individual consideration, it won't be long
8 before that is looked upon as not black or not white but is
9 looked upon and respected as a professional educator.

10 And some might say that is optimistic. I think it
11 has already happened in the black athlete that has gone to the
12 University of Alabama.

13 Q Why don't you just -- why do you object then
14 to the District Court at least insisting that you try on a
15 3 to 2 basis? How do you know that some of these -- you must
16 be making a judgment -- is part of your judgment -- is part
17 of your objection to this decree that you are not permitted,
18 not permitted to make a judgment that this particular black
19 teacher or this particular black teacher will be unsuccessful
20 teaching students of the opposite race? Is that part of it?

21 A I would say that certainly that is part of it.

22 Q How can you tell that?

23 A Because, Judge, as I said overall and I tried
24 to point out specifically in an area of faculty placement if
25 teachers are assigned according to quotas, according to

1 percentages, it just inevitably is going to lose sight of the
2 critical individuality in teachers and I gave the examples
3 that I have given a while ago.

4 Q I think you have stated that but how about the
5 specific question. Do you think it is a recurring judgment in
6 your school system that when a teacher is not assigned to -- a
7 white teacher is not assigned to a black school or a black
8 teacher is not assigned to a white school because the judgment
9 is that that teacher would not be able to teach students of
10 the opposite race.

11 Is that a recurring judgment in your school system or
12 do you want that kind of "flexibility"?

13 A I am not sure I understand Mr. Justice's ques-
14 tion.

15 I would say this: We want to be able to consider the
16 individuality, quality.

17 Q Well, I am asking about a specific aspect of
18 that. Do you want the right to consider race in the assignment
19 of a teacher?

20 A No, sir.

21 Q You don't want to be -- but you do want to be
22 able to say that well this particular white teacher wouldn't be
23 successful in teaching in that school?

24 A In that particular white school or black school.

25 Q Or this particular black -- because of the

1 racial situation?

2 A I don't believe that the racial consideration
3 is controlling. I think the ability of the teacher regardless
4 of race, the training of the teacher regardless of race, the
5 teaching certificate of the teacher regardless of race, what
6 the teacher had been teaching for the last ten years regardless
7 of race -- those are the things we want to do.

8 And we state in all sincerity if we have a ratio
9 and they say well it is not for perpetuity, it is only remedial
10 and the judge didn't mean for you to do it all at once, we say
11 that let us try to get the nonidentifiability corrected, get
12 the problem solved before such as this, if we say it is never
13 going to be solved but if we state we are going to do it, we
14 are in the process of doing it, the objective we see it ---

15 Q Could I ask you this?

16 To what extent have you had resignations of faculty
17 members which has resulted or which think has resulted from
18 a teacher objecting to have to teach students of the opposite
19 race? Any?

20 A Yes, quite extensively at the outset.

21 Q Based right on that reason?

22 A I would think so, particularly in the summer of
23 1967 and not as much in the summer of 1968.

24 Q Have you been able to keep your complement of
25 teachers? Have you been able to replace those teachers with

1 teachers who are willing to put up with compulsory assignments?

2 A Well, not as well as we would like to.

3 Q Well, yes, but you have been able to get them?

4 A We have been able to get them to the standpoint
5 that we have accomplished what we have here but if it wasn't
6 for resignations, if it wasn't for just saying I won't teach in
7 your system, I will go to Birmingham where there is not that
8 much or I will go to Mountain Brook, Alabama where there is
9 none or if it hadn't been for that we would have had sub-
10 stantially more if it wasn't for resignations or refusal to
11 take we would have ---

12 Q Would you anticipate more on this basis? As
13 a result of this decree?

14 A More resignations? Yes, sir, I think we saw
15 some after the District Court order.

16 Q I thought I read someplace in the record that
17 you no longer have any problem of replacing teachers. It used
18 to be that you would have to have I don't know how many, 70
19 or something like that every year but that now you don't have
20 to do that because you have enough teachers that are staying
21 in the schools.

22 A I think now, Mr. Justice, that the record shows
23 that it is probably a little less than 10 percent faculty
24 turnover and that would be new ones coming in and I think the
25 surge in students is not the problem that it was some years ago.

1 Q Mr. Phelps, in this question of assignment, do
2 you reason from the premise that any teacher who is qualified
3 to teach black students in this county is equally qualified
4 to teach white students?

5 A To teach them the same thing, yes.

6 Q Teaching the same thing. Your reasoning is
7 from that premise is it?

8 A I would say in answer to that, yes, your Honor.

9 One other objection I would like to say as far as
10 we say that the mathematical ratio requirement is unwarranted
11 because of our progress, because of the Court of Appeal's
12 specific directive, the fact that desegregation must be
13 accomplished without delay.

14 We had affirmatively said you had to assign it
15 voluntarily where assignments didn't work. We say that any
16 remedial writ has been handed down by the Court of Appeals
17 we say it is unconstitutional here, too, and we think it would
18 be based, no mathematical ratio has been required that we know
19 about that would require juries to mirror the original com-
20 position of a community.

21 No court has said that we know about that Government
22 agencies have to hire according to racial ratios or that their
23 school children would have to be assigned according to racial
24 ratios. In fact the Civil Rights Act of 1964 specifically
25 says that they shouldn't be assigned to eliminate racial

1 imbalance. And in the area of hiring a jury system which we
2 feel like that it points up the lack of wisdom and inherent
3 dangers that we have here.

4 Just to touch another minute on my statistics, in
5 addition to the 212 full time faculty assignments that we have,
6 every school but one in our system has a desegregated faculty
7 The only school that does not is a three-room rural school down
8 in Pine Level, Alabama. It doesn't have but three teachers,
9 but they have had black substitute teachers.

10 Our student teachers, there are 48 out of 262, 48
11 student teachers teaching in minority assignments, 24 white in
12 7 black schools and 24 black in 12 white schools.

13 There is 48 in 19 schools.

14 In substitute teachers, substitute teachers according
15 to the report filed on December 15, 1968, and according to a
16 letter we received from the District Court, those reports have
17 been sent up here, 701 days have been taught by minority
18 teachers as substitute teachers; 318 days taught by white
19 substitutes in 18 predominantly black schools; 300 days taught
20 by blacks in 30 predominantly white schools or 701 days in
21 desegregated assignments out of a total of 2516 in 48 schools.

22 Two schools in our system didn't have any substitute
23 teachers from September 15 to December 15. Substitute teachers
24 present a terrific problem in that the teacher will call at
25 7:30 or 8 o'clock in the morning and say I am sick and the

1 principal has to get on the phone and find somebody and get
2 them out there. It is a burden and we think that the progress
3 that we made there is substantial.

4 All of our in-service training program throughout the
5 system have been desegregated. We think that is real important
6 there. Here are teachers of both races who are experts in the
7 field will teach a desegregated faculty audience in both white
8 and black schools and we think that is certainly laying a good
9 groundwork toward the continued progress that we state to the
10 court we are going to make.

11 And they do that in a white school one time and a
12 black school the next. Teachers are assigned to other schools
13 for observation of classes to see a more experienced math teacher
14 teach the class and that is done completely on an integrated
15 basis. We think there again it is important.

16 Administrative councils have been completely deseg-
17 regated. Faculty meetings have been completely desegregated.
18 Administrative councils where all were principals, adminis-
19 trative and staff people meet one week in a black school and
20 the next week in a white school.

21 We state to the court that progress that we made and
22 has been noted by the District Court and it wasn't an empty
23 phrase when Judge Frank Johnson told the School Board in 1967
24 I believe or 1966, complimented the Board for operating a
25 school system as professional educators and not as politicians.

1 I think that is significant.

2 As I started to say a moment ago, in September of
3 1967, four months before the order that we are here in court
4 about, Judge Johnson stated that, complimented the Board again
5 as pointed out by the Court of Appeals and said this from the
6 bench on September 5, 1967, "You are dealing here with a school
7 system that you haven't had to take to your appellate court a
8 single instance since you started. It is the only system in
9 the state that you haven't had to do it on. They have done
10 what they have done in good faith and they have been ahead of
11 most of your other systems in every field."

12 We think that that again is evidence of our progress
13 and substantiates what we say we are going to do and addition-
14 ally when Judge Johnson complimented the Board and said that
15 he would recommend other school systems to emulate the conduct
16 of the Montgomery Board, that is not an empty phrase.

17 We say to the Court that we have made progress.
18 The remedial writ has been handed down by the Court of Appeals.
19 We say that we recognize and we are the first to recognize
20 that the ultimate objectives have been reached. We say we are
21 working on it and we are in the process of accomplishing it.
22 We say that we will reach them for the purposes of desegregating
23 our school system in compliance with the Green case, with the
24 Bradley Case, with Rogers versus Powell but also consistently
25 with quality education for the best interest of white children

1 and black children alike.

2 Q May I ask you, since you say you are going to
3 do that, what is your objection to Judge Johnson's decree,
4 your particular objection?

5 A The particular objection, Judge, is that we
6 have to have a ratio in faculty assignment and we say when
7 teachers are assigned to meet a ratio instead of to meet
8 quality education and instead of to remedy identifiableness of
9 a school that you lose quality education for whites and blacks
10 alike.

11 We say that racial quotas are inherently dangerous
12 in public education, that they are tied to ---

13 Q I understood that is what you are moving toward.

14 A No, sir, we are moving toward this: We are
15 moving toward the faculty in each school being not identifiable
16 as either white or colored for the students going to that
17 school.

18 Q How can you do that?

19 A We can do that, Judge, the same way that we
20 have done in the last year by assigning blacks to white schools
21 consistent with quality education and blacks to white and whites
22 to black, not to meet a quota but to remove the identiyingness
23 of either white or black school insofar as the children are
24 concerned.

25 I have tried to go into the specific reasons that we

1 say specifically that the invocation of a compulsory ratio on
2 top of what we say we are going to do is unwarranted, it is
3 unnecessary, unconstitutional and it puts an unwise or detri-
4 mental burden on quality education.

5 Q What school in the city of Montgomery do you
6 have colored teachers teaching the most white children?

7 A Probably the Jefferson Davis High School.

8 Q Where is it situated?

9 A It is situated on Carter Hill Road in Montgomery,
10 Alabama.

11 Q What are the number there of white students in
12 that school and the number of colored teachers?

13 A Another school Mr. Robinson just called my
14 attention to is the Harrison School on the southern bypass in
15 Montgomery. Harrison School has three black teachers and 15
16 white. The Jefferson Davis School, 7 black, 29 white.

17 Generally on the basis those are two examples. There
18 are some that may be more but generally on 1 out of 5 throughout
19 the system teaching across lines so in our schools where if it
20 is predominantly white student population, approximately 1 out
21 of 5 of the teachers in that school are black teachers.

22 Does that answer the Judge's question?

23 Q Are you a member of the Board of Education or
24 just the attorney?

25 A I am just the attorney.

1 Q I see.

2 A But I do state that we have discussed this with
3 our Board and the statements and assurances that I am making to
4 this court are from the Board of Education of Montgomery County,
5 the same people that Judge Johnson said were running a school
6 system as professional educators and not as politicians.

7 Q What has been your experience so far as you
8 understand it? Having these white pupils under the colored
9 teachers in those schools?

10 A It has been favorable.

11 Q It has been favorable?

12 A Yes. I think they tend to communicate well and
13 I think a reason, Justice Black, that it has been favorable
14 is that we have made these assignments on considerations of
15 what the teacher has been teaching and what she was assigned to
16 and she is qualified for what she is doing and those white
17 children look to that black teacher not as a black or a white
18 but as a good teacher.

19 Q You think you have moved that far in Montgomery?

20 A I do, sir. I think we are going to move
21 further.

22 Thank you.

23 (Whereupon, at 12:15 p.m. the oral argument in the
24 above-entitled matter was concluded, the Court recessing,
25 to reconvene at 10 a.m. Tuesday, April 29, 1969.)