Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

JAMES E. SWANN, et al.	**Docket No.**	281
v.		
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.		
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.		
v.		349
JAMES E. SWANN, et al.		

Place Washington, D. C.

Date October 12, 1970

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BOWERS

IN THE UNITED STATES SUPREME COURT

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JAMES E. SWANN ET AL.	:	
V.	:	No. 281
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.	:	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.	:	
V.	:	No. 349
JAMES E. SWANN ET AL.	:	

Washington, D. C.
October 12, 1970

The above-entitled matters came on for oral argument pursuant to notice.

BEFORE:

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

APPEARANCES:

FOR SWANN ET AL.:
Julius LeVonne Chambers, Charlotte, N.C.; and
James M. Nabrit, III, New York City.

APPEARANCES: (Continued)

FOR THE UNITED STATES, AS AMICUS CURIAE:
Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C.

FOR CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.:
William J. Waggoner, Charlotte, N. C.; and
Benjamin S. Horack, Charlotte, N. C.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The first case on for argument this morning is No. 281, Swann against Charlotte-Mecklenburg Board of Education, along with No. 349, Charlotte-Mecklenburg Board of Education against Swann. Is counsel ready? Mr. Chambers, you may proceed whenever you are ready.

ARGUMENT OF JULIUS LeVONNE CHAMBERS

ON BEHALF OF JAMES E. SWANN ET AL.

MR. CHAMBERS: Mr. Chief Justice, and may it please the Court: These cases, No. 281 and 349, are here on writs of certiorari, directed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit adopted a new reasonableness test, approved the plan of the District Court for the junior and senior high schools, and vacated the decision and directed further consideration of a plan for the elementary schools requiring that the District Court apply a reasonableness test.

The plaintiffs petitioned this Court for certiorari. This Court granted certiorari in No. 281 on June 30th, reinstated the District Court's plan of desegregation, and authorized further hearing by the District Court, as had been directed by the Fourth Circuit.

The District Court conducted further hearings in July 1970, and on August 3, 1970, applying the Fourth Circuit's new test of reasonableness, found the plan that it had directed

in February 1970 to be reasonable and reinstated its February 5th order.

The School Board appealed to the Fourth Circuit and petitioned this Court for certiorari prior to the decision by the Fourth Circuit. This Court granted that petition on October 6th, along with the petition of the School Board to review the plan of the Court with respect to the junior and senior high schools which the Fourth Circuit had approved as reasonable.

The Court therefore has before it the complete plan of the District Court which had been directed in February 1970, and reapproved by the District Court on August 3, 1970. We think that the decision of the District Court can be sustained under the equitable discretion of that Court as authorized by Brown. We submit,however,that the Constitutional principles by which the District Court was guided, particularly the requirement for the elimination of all black and racially identifiable black schools on this record and under the circumstances of this case were clearly correct and should be sustained by this Court.

The issues in this case --

Q Do you then think those were clearly correct?

A I think, your Honor, that under the appellate procedure of rules for considering cases on appeal that if there is sufficient evidence to support the decision below

that the Court should sustain the decision of the District Court.

The issues in this case are:

1. Whether the School Board may continue to perpetuate all black or racially identifiable black schools where such schools have been created and fostered by state action, and possible means are available to disestablish such schools.

2. Whether the reasonableness test adopted by the Court of Appeals which would permit continued operation of state created all black or racially identifiable black schools although feasible means are available to desegregate such schools is an acceptable Constitutional test to be applied in school desegregation cases.

The facts briefly summarized are these: At the time of this Court's decision in Alexander v. Holmes County Board of Education, 45,012 of the 59,828 white students in this system were attending all white or racially identifiable white schools. 16,000 of the 24,714 black students were in all black or racially identifiable black schools. These students were attending 82 of the 106 schools in the system. Only 24 of these schools were not racially identifiable. Judge Sobiloff noted in his dissent that the extensive segregation in this system was not fortuitous, that it had resulted from practices of the School Board which had interacted with other

governmental discriminatory practices, so that at the time of the decision of the District Court, the black and white population in this system in school and at home were virtually entirely segregated. As the District Court noted, more black students were in segregated schools in 1970 than at the time of this Court's decision in 1954. The Court had found in April of 1969 that schools had been segregated or their racial identity perpetuated by the practices and policies of the School Board. The Board had located schools, controlled grade structures in order to maintain segregated schools. The Board had also controlled school districts and transportation to perpetuate racially segregated schools. It is too late in the day, 16 years after Brown, to now construct some ingenious device to avoid the Brown decision.

Black children and parents in Charlotte have struggled since Brown, and began in 1965 with litigation in order to obtain a decree as the District Court entered in this case. They desired desegregated education, and know that it can only be obtained under a plan like the one directed by the District Court below. It would be a rejection of a faith that black children and parents have had in Brown, the hope of eventually obtaining a desegregated education, for this Court now to reverse the decision of the District Court and now adopt, 16 years after Brown, a test that would sanction the continued operation of racially segregated schools.

Q How do you define a racially identifiable school, to use your phrase?

A One , your Honor, that has a substantially disproportionate number of black students in the school in consideration of the percentage of black students in the system.

Q In the system it is about 71 per cent white and 29 per cent black. Am I correct about that?

A That is correct, your Honor.

Q So that if a school is 50-50, is that racially identifiable?

A Your Honor, I think it would depend upon the circumstances of the case and the facts in the case.

Q Well, how about the facts of this case, this school system? What is a racially identifiable school?

A I think that in excess of 50 per cent black in a particular school would make that school racially identifiable.

Q And how much percentage white? 71 per cent would exactly reflect the school population in the school district, so I expect 71 per cent white would hardly be racially identifiable as white, would it?

A I think that is correct, sir.

Q How high would it have to get to be racially identifiable?

A In this system, your Honor, I think that 90 per

white or in excess of 90 per cent white would perhaps make it racially identifiable.

Q So a school in this system, and confining ourselves to this system, a school with 90 per cent or more white students would be racially identifiable, and a school with 50 per cent or more Negro students would be racially identifiable.

A That is correct.

Q Was that the test of that phrase used in the District Court? I could not really find any further statement bringing it down to facts or figures than just that loose phrase, "racially identifiable". Maybe I missed something.

A Your Honor, I think that the District Court was basically concerned with the racially identifiable black schools, but in the November decision of the District Court, which appears on page 655 of the Appendix, the Court sets out the schools it considers to be racially identifiable white and racially identifiable black. This appears on page 660-A. Here the Court says that schools that are 86 or 89 per cent white or higher are considered racially identifiable white.

Q So the Court's figure is 86 rather than 90 per cent.

A That is correct.

Q And is the Court's figure 50 per cent black to make that a racially identifiable black school?

A That is correct, your Honor.

Q These schools all had their origin, did they not, in a state supported system of segregated education?

A That is correct, your Honor.

Q I don't know, and I am asking for information. Is there any state in the United States that at one time or another, historically, maybe 100 or 150 years ago, did not have segregated schools?

A That did not have segregated schools?

Q Yes.

A I am not familiar with that. I don't know. I do know that in this system --

Q It was more recent.

A That is right, and that the practices of the Board which perpetuated the segregated system continue down through the present day.

We respectfully submit that the segregated school system considered by the District Court below was the result of the blatant practices of the School Board designed to perpetuate a racially segregated system, that the District Court directed a plan that was both feasible and effective to accord equal educational opportunities to the black children, that the reasonableness test of the Fourth Circuit would merely postpone the enjoyment of Constitutional rights by black children in the system, that the School Board, the

Federal Government, and the amici who have submitted briefs in this matter offer no viable alternative Constitutional standard to that followed by the District Court below, and that this Court should now clearly announce the rule that every black child who has been segregated or denied equal educational opportunity by state practice is to be free from assignment to identifiable black schools in every grade and every state of his educational experience.

The District Court describes Charlotte-Mecklenburg, and I quote, "The central city may be likened to an automobile hubcap, the perimeter area to a wheel, and the county area to a rubber tire." We have here a map which shows the Charlotte and Mecklenburg County area that the Court was concerned with. The area that the Court was principally concerned with was the central area of the city, which the Court likened to a hubcap. This is where the blacks are principally located in the city. The Court described the dividing line between the black and white residents in the city as the Southern Railroad line. 95 per cent of the black residents in the city are concentrated in the small northwestern part of the city.

The District Court found, and this finding was approved by the Fourth Circuit, that governmental practices had created and contributed to these racially segregated patterns. One of the most pervasive was the practice of the Charlotte-Mecklenburg Board of Education both before and after

1954. Both before and after 1954 the Board located schools and controlled school sites to perpetuate segregation. Several all black and all white schools have been built or have had additions since 1954. The Board limited the capacities of schools, controlled grade structure and school district, and used transportation to perpetuate segregation.

The District Court found that the Board had limited and controlled school sizes and districts to perpetuate segregation, and of the 23,600 students transported in this system in 1969-70, only 541 were transported to black schools.

The Court further considered the governmental practice which had contributed to the segregated housing pattern. The Court considered the urban renewal program, public housing, zoning, city planning, streets and highways and private discrimination. All of these practices had interacted and created or fostered the segregated system that was before the District Court.

Additionally, state constitutional and statutory provisions which the District Court collected in its August 3rd opinion all contributed to the segregated system.

The Fourth Circuit found compelling evidence to support the findings of governmentally created segregated schools and housing, and accepted the District Court's findings on the traditional practices of appellate review. The government concedes these findings, and indeed asserts that

these practices, particularly those of the School Board, contributed to the segregated system.

We have, therefore, an archtype state action case no different from that considered by the Court in Brown. We submit that under these circumstances the District Court was Constitutionally obligated to direct preparation and implementation of a plan that would disestablish the segregation of schools, root and branch.

The District Court sought to do this by directing the Board to prepare such a plan. On three occasions, the Board simply refused to submit a plan which would discharge its Constitutional obligation. In December, in default by the Board, the District Court appointed an educational consultant to assist the Court in preparing a plan. The Court directed that the consultant follow such techniques as were necessary to disestablish the all black schools or racially identifiable black schools. The Court set forth 19 principles to govern the Court consultant. We submit that the principles set forth were clearly within the discretionary authority of the Court seeking to fashion an equitable remedy. This is particularly true where the party responsible has failed to discharge its obligation.

The problems facing the consultant were these: One senior high school, four junior high schools and 17 elementary schools were all black. The concentration of Negro

students in these schools was in a triangle roughly four or five miles on each side. Nearly two thirds, or 16,000, of the black students were concentrated in these schools. We have a diagram here which shows the concentration of these schools and the north-south dividing line that the Court mentioned. This line running through here is North Trion Street, and it picks up the Southern Railroad. This line running here is Trade Street, which the District Court mentioned in its order. The concentration of the black students was in this triangle, from Billingsville School up to the northwestern part of the city, over to Williams School, and then back down to the Billingsville School.

Q Is that map on the same scale as the one that you have used before?

A That is correct, your Honor. It is traced from the map presented here. As the Court found, the sides running along this triangle were four or five miles in length.

Q Since we have already interrupted you, would you answer a couple of questions to make it clear to me just what is and what is not in controversy here? As I understand it, Mecklenburg County, outside of the city school situation, is really not in serious controversy. Am I wrong about that?

A That is right, your Honor.

Q I am right about that?

A That is correct.

Q I further understand that the big argument is about the elementary schools. There is a somewhat more limited and minor argument about the high schools involving the transfer of some 300 students outward. But the big controversy is about the elementary schools. Am I wrong about that?

A That is correct, your Honor.

Q Thank you.

Q Mr. Chambers, let me bring you back to Mr. Justice Stewart's inquiry as to your definition of a racially identifiable school. Do I understand from your question that under no circumstances in a unitized system could a school be beyond the prescribed racial balance?

A Your Honor, I was addressing my answer to the Charlotte-Mecklenburg system.

Q I would like you to answer as a matter of general principle.

A Your Honor, I think it again would depend on the circumstances of the case. As we define racially identifiable school, it would be one where the concentration of black students is substantially disproportionate to the percentage of black and white students in the system.

Q Then it follows from that if there is one school beyond the limits that you propose, then it is not unitized, or the system is not unified.

A I would agree, your Honor, provided that there

are plans available which can be implemented to eliminate that disproportionate representation.

Q This means then that you are arguing for racial balance.

A No, your Honor, we are not arguing for racial balance as we understand both the Board and the government to be saying. We tried to set that forth in our reply brief to the government's brief. We are asking for a plan that would disestablish the racial identity of all schools in the system, in a segregated system. We think particularly in this system on the facts of this case that we have a plan that can disestablish all racially identifiable schools.

Q I would like to get away from the facts in this case into a general area. One other question. Do you draw any distinction between the reasonable test which the Fourth Circuit seemed to apply, and the feasibility approach of the District Court?

A Yes, I do, your Honor. The Fourth Circuit begins its test -- and I might say this is basically the test that is proposed by the government -- with a statement that some schools can remain all black or segregated in a unitary system. It talks about the limits that might be imposed. The test that we are proposing is one that began with the assumption that all schools can be desegregated, and would require that these schools be desegregated unless no plan would be workable

or could possibly be implemented.

Q So there is a difference between feasibility and reasonableness.

A Yes, your Honor.

Q How would you apply this standard to a city or an area, a school area, which was 97 per cent white and 3 per cent Negro? Do you mean that every school, each school in that system must be roughly 97-3?

A No, your Honor, we are not arguing for an absolute ratio or percentage in each school. We are arguing only for a test which would require no substantially disproportionate representation or concentration of black students in a particular school.

Q Obviously, or I should think obviously, very likely in a 97-3 ratio, you would not have any all black schools, all Negro schools, would you, but would you conceive that there might be some all white schools?

A Your Honor, I can't say, because it would depend on the facts and circumstances of the case.

Q You mean on the location of the 3 per cent.

A That could be a factor, yes sir.

Q If they were scattered evenly through the total area, then the natural consequence even of the neighborhood school concept would take care of that, probably, wouldn't it?

A Your Honor, I have some difficulty with the

neighborhood school, but if the students are assigned according to non-racial district lines --

Q I am assuming that. That is part of my hypothesis, that no effort was made to direct them to a particular place. But you do concede that there would inevitably be some all white schools probably in that kind of system. It could happen.

A Your Honor, it might, but again I am talking about a hypothetical case, and I can't really discuss it, because it would all depend on what the facts in the situation would be.

Q Then conversely, if you had a 97 per cent Negro, 3 per cent white, then you might again unavoidably have some all-black, all Negro, isn't that true?

A Your Honor, again it would depend on the circumstances and facts. It might, but with all factors that the Court should consider, it might be that all of the students could be assigned to schools without any substantial disproportionate representation of blacks in any school, or concentration.

Q But I glean from your answer, since you said it depends on the facts, that you are suggesting that there is not an absolute Constitutional requirement to take this percentage and mechanically put it in effect in each individual school in the system.

A That is correct, your Honor. I would say, however, as the District Court sought to do here, that it might be an ideal objective that a District Court or school board might use in its discretion to prepare a plan.

The District Court sought to direct a plan that would utilize the various techniques that had been utilized by the Board in preserving segregation. This Board has transported 23,600 students during the 1969-70 school year. An additional 5,000 students rode city busses at reduced fares. 55 per cent or 670,000 students statewide were transported in North Carolina. Approximately 50 per cent of these students in the state and in Charlotte were being transported and were elementary students in grades 1 to 6. Students were transported in Charlotte-Mecklenburg approximately 34 miles round trip each day. The trip averaged one hour and 15 minutes one way.

Charlotte-Mecklenburg also transported approximately 700 kindergarten and pre-school students, ages 4 to 5 years of age, from 7 to 39 miles one way each day. The average cost for transporting students was $20 per student per year, or 22 cents per day. Transportation had been previously used to accomodate and perpetuate segregation. The District Court felt that transportation might also be used in order to desegregate the schools. Charlotte-Mecklenburg has not adhered to any neighborhood concept. The extensive transportation in the system refutes any such notion. Nor is

the Board proposing such now, particularly with the high schools and junior high schools. The basic difference between the plan proposed by the Board and that ordered by the Court is the lack of contiguous link or connecting grids in the Court's plan.

Q Is there any analysis on this previous bussing mileage that you told us about in 1969-70, and before. How much of it was out in the county in connection with consolidated schools out in the county, and how much was in the city?

A Your Honor, the majority of the 23,000 students transported were in the county. The 5,000 students being transported by city bus were the city.

Q Yes, but that was public transportation.

A Public transportation, correct.

Q I was talking about the school busses. The majority of it was out in the county.

A The majority of themwere out in the county.

Q The typical pattern, as we both know, has been for the one room school house, rural school house, for 10 or 12 or more of them to be consolidated into a school involving quite apart from any racial considerations a great deal of bussing mileage. That is true in Vermont and North Dakota as much as it is in North Carolina.

A That is correct, your Honor, but one revealing

fact in this record is that the School Board had purposely located white schools so that they would require transportation. They were away from black neighborhoods. As I indicated a moment ago, of the 23,000 students transported, only 541 were black. So these schools were purposely located so that the 23,000 students being transported would be in the county, and the majority were.

We would like to show the Court another exhibit that we have prepared from the map of the School Board showing that there is basically no difference between the plan proposed by the Board and that ordered by the Court for the junior high school. This is a map. The map prepared by the Board for the junior high school limited the zones to contiguous grids within the map. They resulted in odd-shaped district zones, as the District Court noted. The map prepared by the Court consultant, which the School Board elected to implement --

Q Before you leave that one, Mr. Chambers, that was the School Board's plan as of when?

A As of February 2, 1970.

Q Again please correct me if I am wrong. That, as I understand it, involves what one might call benevolent racial gerrymandering. Am I correct about that?

A That is right, your Honor.

It resulted in the junior high school remaining 90

per cent black. That is Piedmont Junior High School, which is in the inner city.

The Court offered the Board four alternatives in order to desegregate that school. The Court said that the Board could rezone Piedmont district, it could close Piedmont school, it could pair it, or it could adopt the plan proposed by the Court consultant. The Court consultant proposed a plan that established satellite districts. Nine satellite districts were established for the junior high school. The colors on the map show the school district that the satellite has been established for. The blue district in the center, for instance, is set up to be satellite to Eastway Junior High School.

Q That satellite involves one way bussing or other form of transportation.

A That is correct, your Honor.

Q And only one way.

A Only one way. I should point out, however, that in the zone lines that were retained under the Court consultant plan, some white students are being transferred into the formerly all black junior high school. J. T. Williams is an example. In order to desegregate the J. T. Williams school, which is in the innner city, the School Board had to carry its lines out into the county to get some white residents to bring them into the J. T. Williams school, but the satellite

districts that were established by the Court consultant involved only one way bussing, that is black students being transported out to previously all white schools.

To show the similarity between the plans of the Court consultant and the School Board, we have a diagram here of Eastway Junior High School. As I mentioned, the inner city blue satellite is satellite to Eastway Junior High School. It is shown there on the diagram in black. The red lines show the zones for the junior high school of the Board. The black show the satellite district, and the school that the satellite district serves.

The Smith Junior High School is another example. The black again shows the satellite district and the satellite school. The red zone is the line that was proposed by the School Board.

Q Now, in the satellite district, was there also a school building?

A In some areas the students were previously assigned to either Northwest Junior High School, an all black school, or Piedmont Junior High School, or J. T. Williams.

Q When there is a satellite district, and I am really trying to get the definition of terms, I had thought that involved one way bussing usually outwardly to a school from an area where there was no longer a school.

A The way the satellite districts are proposed

here no junior high school is in the satellite area.

Q Any more.

A Any more. The other example that we have is Cochrane Junior High School and H. E. Alexander Graham Junior High School. Again the satellite districts are shown in black and the Board's plan is shown in red.

Q Would you mind defining satellite?

A Satellite, your Honor, is a non-contiguous zone established to serve a school district. For instance, the satellite district here would be the black zone which is not contiguous to the black zone around Cochrane Junior High School.

As the Court pointed out in its opinion also, the efforts of the School Board to use contiguous grids ignored the traffic arteries. The grid zones that the Board sought to adhere to ran diagonally to the traffic. Both the superintendent of schools and the Court consultant said that the plan directed by the Court, or the Court consultant plan, would be much easier to implement.

Q That is because the second plan took the flow of traffic into account more realistically.

A That is correct, your Honor.

Q Did this significantly shorten the travel time?

A It shortened the travel time, and was also easier to implement because we had the traffic arteries that

were considered by the Court consultant in proposing the satellite districts.

Q Did did shorten the traffic time significantly?

A Yes, your Honor, because the satellite districts use the traffic arteries, where the zone lines, the contiguous zones, did not. Some students, for instance, in the narrow corridors proposed by the Board would not even be on a street that could be serviceable for the school to which the students were assigned.

This is equally true of the elementary schools. The Board proposed again to adhere to contiguous zones. It also proposed to limit the schools that white students could be assigned to to schools having 60 per cent or more white students. The plan proposed by the Board would leave nine elementary schools 90 per cent or more black. The plan proposed by the Court consultant did not limit itself to contiguous zones. The Court consultant clustered ten black elementary schools with 24 white elementary schools. Again the Court consultant was utilizing devices that had been used by the Board to preserve the segregated system. The Court consultant stated that the clustered schools were purposely arranged along arterial routes so that the students could easily be transported to these schools.

Q Could you say in a few words what clustering means? I should interject maybe that I think Bouvier is going

to have to get out a new edition of his dictionary with all of these terms of pairing and clustering and satellites.

A Your Honor, pairing has been used to describe the consolidation of two schools.

Q Yes, with two way movement.

A With two way movement.

Q What is clustering?

A Clustering means the pairing, if one might use that word, or grouping of three or more schools.

Q But usually what you do is enlarge the zone around two or more school buildings. Isn't that about it?

A That is possible, your Honor, or you might use the school district that is not contiguous with the school district that is used --

Q I thought that would be pairing, then, rather than clustering.

A We are talking about number of schools for pairing, and we are talking about an increased number of schools for clustering. In the plan here, for instance, that was proposed by the Court consultant, the colors show the schools that are clustered. For instance, the blue cluster in the inner city is Lincoln High School, and it is clustered with Merry Oaks, Albemarle Road, and this.

Q So you have three areas in the cluster.

A That is correct, your Honor. The three white

schools cluster with one black school.

Q But I am speaking now of just geography. When you speak of cluster, you mean three or more.

A That is right, your Honor.

Q Are any of these more than three?

A They are all either two white and one black, or three white and one black school. I don't think either one of them involves more than three white schools.

Another example of the cluster is the University Park Elementary School. It clusters with Rama Road and Montclair Elementary Schools. They are shown in red. As the Court consultant stated, these schools are all arranged on traffic arteries so that the students can be easily transported to and from the elementary schools, and the clusters take into consideration the size of the schools.

Q Pairing involves by definition always only two schools.

A That is the way we have been using the term.

Q And two way movement.

A That is correct, your Honor.

Q And non-contiguous.

A Well, they can be contiguous.

Q They can be.

A Yes, sir.

Q Let us go back for a moment to that last

clustering that you were describing, which is colored in red on your map, and approximates a triangle. What is the distance between the outer perimeter of the triangles, approximately?

A You mean from school to school, or from the outer limits of the triangle?

Q The outer perimeter of one to the other perimeter of the other.

A Your Honor, according to the information supplied by the Board at the July 1970 hearing, the longest distance in any of the clusters would be 12 miles.

Q The schools are not necessarily located at the outer edge of the perimeter.

A That is correct, but the Board was measuring from the outer edge of the boundary tothe outer edge of the boundary of the school that was involved.

Q What is the maximum distance between schools in that particular instance of the red cluster?

A I don't have the maximum distance from school to school in the cluster.

Q Of necessity it is less than 12 miles.

A Less than 12 miles, and in addition, your Honor, the Court found that the average distance that the student would be transported in all of the busses would be 7 miles, and it would take 35 minutes. This is far less than the

average that the students are being transported in the system today, or in 1969-70.

Q What is the maximum mileage pupils were transported before this order was entered?

A Your Honor, the Court found that the average mileage --

Q I am talking about what is the maximum.

A I don't have the actual maximum distance, but one of the exhibits that we produced showed that some students were transported for as much as three and a half hours one way.

Q Three and a half what?

A Hours, one way.

Q What was the mileage?

A I don't know the mileage, your Honor. That is shown on the exhibit that was produced.

Q Was it 90 miles or something like that?

A I would think it would be less than 90 miles.

Q Three hours.

A I don't know the exact mileage that was involved in that.

Q What is the maximum mileage under the recent order of the Court?

A Within the schools affected, the maximum mileage according to the information supplied by the Board was 12.5 miles.

Q That is the maximum now.

A Yes, sir. I don't know about the other 23,000 students. The plan that was directed by the District Court did not affect the majority of the 23,000 students who were previously transported. They are in the areas marked in white and have not been covered. The plan that the District Court ordered for the elementary schools in particular involved only the colored zones. The Court consultant used the zones for the other schools that were not involved in the clustering.

Q I am not talking about that. I am just talking about under this order, under the operation of the schools before this order was entered, do you have the maximum mileage in miles and not in hours?

A I do not have before me, your Honor, the maximum miles that students were transported previously, the longest distance. It is in an exhibit that we introduced at the March 1970 hearings. It is the same exhibit that shows some students were transported for three hours and a half.

Q What is the difference in the mileage, the maximum mileage, in the old order and in this order?

A Your Honor, I can't say the difference between the old and the new, because I don't know the maximum distance previously. What I am saying is that the average previously was 17 miles. The average under the order directed by the District Court is 7 miles. I don't know the longest mileage

previously, but the longest mileage under the plan directed by the District Court was 12.5 miles.

Q It would seem to me like the point of most interest would be the maximum mileage, rather than the average mileage.

A Your Honor, the District Court found the students involved in the plan directed by the Court were being transported less distance and in less time than previously existed in the system. I do not have today the longest distance that was involved under the old plan. We will be glad to supply the Court with it.

Q It is in the record?

A It is in the record.

Q Mr. Chambers, at some point before you sit down, I wonder whether you could summarize precisely as you can the legal issues that you think must be decided by the Court in this case.

A Your Honor, I think that the basic issue involved is whether a school board can continue to perpetuate segregated schools where these schools have been created by state action when a feasible plan is available to disestablish the segregated schools. Basically the Fourth Circuit has said in its reasonableness test that some schools can be maintained segregated in a unitary system. We submit that they cannot be. We submit that on the facts of this case, there is a feasible

plan that will desegregate the schools, and that the District Court was properly correct in saying that all black schools or racially identifiable black schools in this system should be eliminated.

Q That is from the point of view of students.

A From the point of view of students.

Q There is no question about -- or do I misunderstand you -- there is no question about faculty in this case.

A That is correct, your Honor.

Q There is no single racially identifiable faculty under your definition.

A That is correct, your Honor.

Q There is no issue here about transfers from majority to minority, is there?

A No, your Honor. We contend and submit that that kind of provision will not satisfy the Board's requirement to desegregate the schools. It is a provision that the government advocates should be included in the plan where segregated schools are retained.

Q Wasn't it in the Board's plan?

A It was in the Board's plan, too, but the Court of Appeals pointed out that the Board had imposed limitations on the majority to minority transfer, which the Court of Appeals found to be unacceptable. We think that under the plan that the District Court has directed that we

can eliminate all black and racially identifiable black schools.

Q What is the situation there? Do blacks object to this plan?

A Your Honor, it is my understanding that blacks are interested in the plan being implemented.

Q I take it, though, that the plan would under the Court's order not let blacks opt out of the plan. If they preferred to stay in a black school, they would not be permitted to do so.

A That is correct, your Honor. Under the plan directed, there would not be any black schools.

Q What if they wanted to opt out of being bussed, though, and stay in their school?

A They would not be permitted to do that under the plan.

Q What is your answer to the arguments you find in the briefs that this would just be reverse discrimination in the sense that some blacks are kept out of their schools and sent to other schools because they are black and some whites are kept out of schools because they are white and sent to other schools because they are white?

A Your Honor, I think that this Court has answered that question.

Q What is your answer to it?

A My answer to it is the same as this Court's.

Q What is that?

A The School Board and the Court might legitimately consider race, and has to consider race, in order to desegregate a school system.

Q Where did the Court say that?

A The Court has said that in Green. The School Board cannot be neutral. It has created a segregated system and it has now to consider race to disestablish it. The Fourth Circuit has said it. It said it in Weiner versus the Arlington School Board, that a school board had to consider race in order to desegregate, and I think it is absolutely necessary here that the Court consider race to desegregate.

Q My brother, Harlan, suggested that you say something about what the issues are. Is there an issue here to carry out your viewpoint as to whether a court has power, Constitutional power, required by the Constitution, to force a state to bus students to schools and to pay for new busses?

A Your Honor, I think that the Constitution requires that the school board disestablish or dismantle segregated schools that they have created.

Q I understand that.

A I think that as a matter of an equitable remedy that the Court can utilize devices that have been used by school officials to create a segregated system. I think

further that the school board and the Court are not limited to the same devices that have been used to create a segregated system, but can go use other devices that are necessary to desegregate. If this requires bussing, and it has been done in this system -- bussing has been used in the past to segregate -- then the Court can use bussing in order to desegregate.

Q Then as I understand it, your position is that to put your viewsin effect the Court would have to hold that the Constitution requires bussing under certain facts, and that the state can be compelled to buy busses to do that bussing, by the Court.

A I think that the rule would be a bit more general, that being that the Board would have to use what means were necessary --

Q I understand all that. I am talking about a concrete thing.

A If it would require bussing, then I think that the Constitution would require that the Board utilize the facilities to do so, to desegregate.

Q In other words, the Courts could order the states to buy a large number of busses in order to transport pupils, and would be required to do so by the Constitution.

A I think the Constitution requires it. I think the Court should require the school board to do what is

necessary, and I think the Constitution requires --

Q I understand all of the abstract generalities about "necessary". The question I am interested in, and maybe it does at this time, is to carry out your view of what the Constitution compels, a Court of the United States can require schools and states to buy large numbers of busses at tremendous expense to the state in order to transport students.

A Your Honor, may I answer that this way? First of all, I don't think the Court has to go that far to affirm what the District Court did below. I think, however, that as a Constitutional matter, it should be required.

Q In this particular case, how many busses?

A The District Court estimated it would be 138 busses.

Q And the money was available.

A And money was available. In fact, the Court below found that no additional capital outlay was necessary in order to desegregate now.

Q How could you get 138 busses without any outlay of money?

A Your Honor, the Board had available over 107 busses which the District Court found. Additionally the state had advised the Board that it would loan busses to it, which the Board would have to replace either during the school year or next year. In fact, that is what I understand

has been done.

Q Your spoke, Mr. Chambers, of devices, various devices the Court could use. I got an implication, perhaps erroneously, that a device such as freedom of choice might in your view be impermissible. Would that be your view of the matter?

A I am not arguing that, your Honor. I think it might be permissible under some circumstances.

Q Green said that.

A Green said that.

Q You judge the two on efficacy. If it works, it is a good tool.

A That is correct, your Honor.

The test proposed by the government and by the School Board we submit is unworkable and vague. Sixteen years of litigation have taught us that vague standards and tests of good faith of school boards merely prolong the day when black children are able to enjoy equal educational opportunities. This is clearly demonstrated in the argument advanced by the School Board. While advocating a reasonableness test, the Board contends that the Fourth Circuit does not know how to apply its own test, because the Fourth Circuit would sustain the District Court's order with respect to the junior and senior high schools.

This is further demonstrated by the recent case

considered by the Fourth Circuit only a few days after the Fourth Circuit had announced its new rule. This was a case in Clarendon County where a small school district contended that it could not desegregate the schools by using reasonable means. Secondly, the facts of this case do not warrant any standard as proposed or adopted by the Fourth Circuit. Again the facts are simple. We have a segregated system created by state practices, and we have at hand the means for desegregation. The School Board concedes that if it is required to afford black childen in the system an equal educational opportunity, then the plan directed by the District Court is the one which should be followed. Mr. Waggoner, my opposing counsel, reaffirmed that position only recently, when he argued before the District Court during the July 1970 hearing, stating, "So we take the position, if the Court please, that there is no reasonable alternative between the Finger Plan and the Board plan. The alternatives suggested here or portions thereof are unreasonable." He was referring to the HEW plan. "This places the Board and the plaintiffs in a difficult position of seeing a situation where an Appellate Court has ruled one plan does not go far enough and the other plan goes too far." We feel this is where the chips, in this case, fall. There is no middle ground. We note that the government suggests that the same devices used to create a segregated system may be used to disestablish it. We agree and

and go further. Nothing limits this Court or the Federal Courts to these same devices. The Court might use these or more or different ones or a combination. The School Board, the government, and none of the amici who have submitted briefs in this case suggest any viable Constitutional alternative. The Board and the government, as we understand their position, advocate that some non-standard discretion be vested in the School Board to allow them to offer such desegregation as they deign feasible, and to do so when they think the time is appropriate. We do not think that the Constitutional rights of black children in this system should be left to the whims of what school board officials happen to be elected. The Constitution would be a mere mockery if such were the case. Nor do we feel that the alleged preference for neighborhood schools which would preserve racial segregation is an acceptable premise upon which to deny Constitutional rights to the children in this system.

Our record demonstrates, as does the record in Mobile, that the neighborhood schools became in vogue only when school districts were being required to desegregate. Additionally, one cannot argue that there is any less neighborhood under the plan directed by the District Court in this case than that proposed by the School Board, and indeed by the government. As we have shown, the only difference between the junior high school plan directed by the

District Court and that proposed by the School Board is the Board's connecting narrow links, attempting to preserve its standard of contiguous grids. Even the alleged preference of government for contiguous pairing of districts is equally illusory, because the contiguous pairing of districts for neighborhoods under the government's standard does no more than link areas which are unconnected under the plan directed by the District Court. The clustered elementary zones under the District Court's plan merely leave out of those clusters the in between school districts that have already been desegregated.

We would like to show one other example of that. The map, item No. 4, shows the clusters proposed by HEW at the July hearing. One example of that cluster is zone No. 7 which is colored purple. It clusters the Rider school, Statesville Road school, and Lincoln Heights school. Using that cluster --

Q The light in here is not all that good, Mr. Chambers and Mr. Nabrit. Is the pairing the one that runs right next to the orange area? Take the smaller one.

A The smaller district is Lincoln Heights, which runs down in this area. This is a tracing of it, the red outline.

This exhibit here shows the cluster proposed by the government, Zone No. 7, and one of the clusters proposed

by the Court consultant. The Court consultant's plan is in black. The cluster of HEW is in red.

One additional example of how the Court consultant's plan leaves out of the clusters integrated schools is the exhibit involving Marie Davis and Pinewood and Park Road schools, which is shown here in green. The cluster proposed by HEW is shown here in the overlay in purple, involving basically these same schools. The HEW cluster would include the Sedgefield and Collegewood schools which have been desegregated under the zoning plan proposed by the Board. It would additionally result in a predominantly black cluster.

Q What do you think the basis was for the Court of Appeals' setting aside of the District Court's bussing order?

A Your Honor, I think that the Court of Appeals was attempting to establish a standard that would apply nationally, and I think that the Court of Appeals did not have sufficient facts before it at that time to adopt such a standard. I think that it set aside the District Court's plan with respect to elementary schools in order to see if some other plan could be devised that would involve less bussing. I think that when the matter went back before the District Court, including the plan presented by the government and the other plan presented by the minority of the Board, the Court found that the extent of bussing involved in the February 5 order would be basically the same as any other plan

that required desegregation of the schools. The Court found previously, the District Court, that the school system could not be desegregated without bussing students, and continuing to bus students.

Q The Court of Appeals did not say that bussing was not a permissible tool.

A It did not, your Honor.

Q In fact, it specifically approved bussing with respect to the high schools.

A That is correct, your Honor.

Q That was one way bussing.

A Again, your Honor, the high school and the junior high schools involved two way bussing, because some of the students involved in the zone areas for the black junior high schools and the former black senior high school were white students being transported into those formerly black schools.

Q Let me put another question to you which is perhaps related to this. What do you conceive to be the difference between the Green feasible test, as I understand you call it, and the Court of Appeals reasonableness test as a measure of the obligation to disestablish?

A Your Honor, I think that the Court of Appeals reasonableness testbegins with the premise that some black schools can remain all black in a unitary system. It is

general. It has no standards.

Q Well, the Green test would also contemplate that, too, or at least permit that much margin, if it is not feasible. If it is not feasible to abolish every black school, then Green would permit that.

A I think, your Honor, that the Green test begins with the premise that schools should be desegregated, that there should be no black or white schools, but just schools. I think this is the most important difference between the two tests.

Q Doesn't the Court of Appeals also at least subsume that premise?

A I do notthink so, your Honor. I think that it begins with the premise that some all black schools can remain.

Q If what?

A If the School Board uses "reasonable efforts to desegregate the schools". I do not think that that is a test that can be applied uniformly, and that will eliminate protracted litigation for students to obtain desegregated education. I think as Judge Sobiloff stated, it is just another device that will invite protracted litigation and continue denial of Constitutional rights.

Q Suppose North Carolina should conclude to do away with bussing entirely, and have none in the state for the schools. Is it your view that that would be unconstitutional?

A Your Honor, I would think it would depend on the circumstances whether the decision to discontinue transportation was racially motivated.

Q I am just talking about the legislature or the state passing a law to that effect. Suppose they passed a law abolishing bussing. They decided not to have bussing in North Carolina. Would that be an unconstitutional law?

A Your Honor, I can't say at this time, because I don't know the circumstances under which the legislature is acting.

Q It is acting under circumstances that the state did not want to have bussing in the public schools. That is the question I asked.

A There might be circumstances under which the legislature could adopt such legislation. I think that in this case, however, if the legislature were to adopt such legislation solely to prevent desegregation of the schools that it would be within the powers of the Court to direct that the legislature continue with transportation.

Q Do you think it would be our duty to see whether the legislature had passed that law solely for that purpose?

A I think that would be one of the considerations of the Court.

Q We have got that problem in two of these cases that are to follow.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ARGUMENT OF ERWIN N. GRISWOLD, SOLICITOR GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE.

THE SOLICITOR GENERAL: May it please the Court, it has been a long road. We have made substantial progress, and this is evidenced by the fact that few today question the essential rightness of the decision that was reached by this Court in Brown against the Board of Education 16 years ago. It is true that 16 years have passed, but in this connection it may be observed that the Brown case itself was twice argued in this Court, and before the initial decision it was pending here for two and a half years before it was decided. It was also here an additional year, or a total of three and a half years, when the case was set down for further argument with respect to remedy.

For many years there was a serious problem simply in getting the decision accepted. I need not recall Little Rock and Oxford and the confrontation at the University of Alabama. All of that is in the past now, and fortunately and wisely so.

Because of this situation, the Court has only recently had occasion to consider the many problems of detail which arise in the application of the Brown decision. On the basis of a careful survey, I find that there are 25 school

cases which have been decided on the merits by this Court in the 16 years since Brown was decided. A number of these are per curiam decisions. One was Cooper and ~~Iron~~ Aaron which arose out of the Little Rock situation. Other cases involved various aspects of so called massive resistance and interposition, such as Busch again the Orleans Parish School Board.

Then only six years ago in Griffin against Prince Edward County, the Court held that schools could not be closed while public money was spent to support private white-only schools.

During these years, many hundreds of cases were decided in lower Federal Courts and great determination and courage was shown there. Not until recently, however, has this Court had occasion to focus on detailed aspects of the problem. At first in the Brown case, there was only the stark question whether legally enforced segregation was consistent with the Constitution. This Court rightly held that it was not. The problem was then appropriately remitted to the school boards and the local courts to work out the details. As might be expected, it has been found to be a vastly complex problem. One can look at it first with a glass and then with a microscope, and the complexities and the fnfinite variations soon appear.

Actually it has only been in the past few years that this Court has had occasion to deal with any of these matters

of application in detail. For many years school boards, and the courts, too, to a considerable extent felt that compliance was reached under freedom of choice plans. It was only two years ago last May that the Court held that freedom of choice plans alone were not adequate when they did not achieve a unitary school system, as for one reason or another they almost never do. And it was only a year ago last June in the Montgomery County Board of Education case that the Court held for the first time that a District Court could properly require allocation of white and black faculty members in equal proportions to all schools. There is nothing which more clearly marks a school as black as that it has a wholly black faculty.

Now we have another problem in the application of the Brown decision, an extremely important and difficult problem. I think I can put the issue this way without too much over-simplification. What is the standard to be applied or the objective to be sought by a school board or by a court in reviewing what the school board has done? Is the standard or objective to achieve racial balance, or on the other hand, is the standard or objective to disestablish a dual school system and to achieve a truly unitary system? Our position is that the latter is the correct formulation of the objective. We cannot find more in the Constitutional command of equal protection of the laws or of due process of law, which as far

as I know are the only Constitutional provisions, and likewise the most specific Constitutional provisions, involved in this case.

Before going further, I would like to make it as plain as I can that this is not a retreat. There must not be a retreat in this area, where so much has already been done to redeem the promise of America. I recognize, too, that determining what is truly a unitary school system may in actual cases present practical problems of very great difficulty. My essential position is that there is not any basis for saying that this can only be achieved through racial balance.

At this point, I would like to observe that counsel for the petitioners disclaim the phrase "racial balance", both in their briefs and in the argument today, but I found a passage in a brief which was filed late last week, actually it is in No. 436, the Mobile case, which will be argued tomorrow -- this is the supplemental brief for the petitioners in Mobile on page 3 -- where at the bottom of the page, the same counsel say, "Petitioners submit that Mobile's experience under the Fifth Circuit plan underscores" -- and this is, it seems to me, their statement of their intention -- "the necessity for the declaration of a Constitutional standard that in a unitary school system no" -- and that is in italics -- "no black students may be assigned to a racially identifiable black school at any grade level." I am quite willing to accept

that, and whenever I say "racial balance" that is what it means. I don't understand how it can be applied in the District of Columbia or in Mound Bayou, Mississippi, not to mention all kinds of intermediate situations.

But getting back to the question --

Q Mr. Solicitor General, do you read Judge McMillan's opinion as having proceeded on the premise that the Constitution required, or disestablishment required racial balance in the proportional aspect?

A Mr. Justice, I think he may have, although again it is expressly disclaimed in the opinion. But it seems to me that looking to what he did and the way he did it, and I certainly have great understanding and sympathy for the problem with which he was confronted, that he may well have acted on the assumption that he was required to produce what I have called racial balance, or what is defined as no student may be assigned to a racially identifiable school. If he did, then I think that he ought to be required to act in accordance with the proper standard. In any event, as I will conclude, it seems to me that we have come to the place where this Court must define what the standard is, and Judge McMillan and other courts can then proceed in the light of that standard.

Q What is the definition that you use for racially identifiable schools. Do you accept Mr. Chambers' definition, which I think was perhaps more than 10 per cent variation from

the 90-10.

A I think that Mr. Chambers said more than 51 per cent made it identifiable as a black school.

Q Somewhere, and perhaps it was in one of the opinions, is the standard if it has less than 10 per cent whites, it is all black, all Negro.

A I think really the issue here is whether there can be any all black schools, and on the facts of these particular cases.

Q That is the precise issue, or at least one of them in the Mobile case. It is not really the precise issue here.

A It would be the same in the Charlotte case. There were two all black schools left under the HEW plan, which was rejected by the District Court, and it is largely because of that rejection that I conclude that there is a possibility that the judge acted on the assumption that he must produce racial balance.

Q At least to the extent of the quotation that you have just read.

A Yes, Mr. Justice.

Q Then this 10 per cent suggestion that appears in some of the papers in some of the cases now addressing myself to the general and broad proposition, is that anything 10 per cent or less is mere tokenism. Do you accept that

concept?

A No, Mr. Justice, I think it depends entirely on the circumstances, and it seems to me that in proper circumstances, and they may be hard to find, 100 per cent black meets the Constitutional requirement. That is the position that I am taking here.

Q You do agree, though, that if there is an all black school and if feasible or possible to desegregate it, that is all right.

A Mr. Justice, it certainly is all right. There is no question about the power of the school boards and as far as I am concerned the great importance that the school board should find ways to exercise that power, and in the meantime to improve facilities and programs there until they can get it brought about, and to bring about activities through public housing programs and many other programs to minimize it.

Q Without regard to the housing programs, anything else. If the Board refuses to do it, what is wrong with the District Court doing it?

A Mr. Justice, it seems to me that it gets back to the question I have put, what is the objective. Is the objective to eliminate racial balance, to provide racial balance, or is the objective to disestablish a dual school system and establish a unitary one.

Q I would respectfully submit it might be the duty

to see that each black child gets a desegregated education.

A Yes, Mr. Justice, I can understand that position and that is the argument of Mr. Chambers. I cannot find that in the Constitution. The Constitution says "nor shall any state deprive any person of the equal protection of the laws". With respect to the District of Columbia, the only applicable provision is the due process clause. And if there is no affirmative state action which produces or requires the isolation or the separation, I cannot find in the Constitution any requirement that it be disestablished.

Q Do you agree that the bussing of the white children in Charlotte brought about the segregated schools?

A Mr. Justice, there is a great deal of state action in the background in Charlotte, and that of course is an important reason, and for that reason the government has filed a brief in the following case in which we contend or we join in the contention that the North Carolina statute abolishing bussing is unconstitutional.

Q But there is an individual right to each child there, and you agree that the school board could do it if they wanted to.

A Yes, Mr. Justice, and Congress could do it if they wanted to. Congress, in my view -- that is not an issue that is here, but prior legislation enacted under the Fourth Section of the Fourteenth Amendment, I believe the Congress

could require that racial balance be established in all schools. Some states have done it. Massachusetts has a statute to that effect. New York has a regulation of the State Commissioner of Education which points in that direction. It clearly is an objective. My position is that it is not a requirement which can properly be found to be in the Fourteenth Amendment standing alone.

Q Mr. Solicitor General, are we talking here about, as you seem to be now in the colloquy with my brother Marshall, the substantive right that the Fourteenth Amendment confers upon a public school student, Negro or white, or are we talking about the appropriate remedy, or the disestablishment of a concededly unconstitutional school system? They are different, are they not?

A Yes, Mr. Justice, but they are intertwined.

Q If there is a right, an absolute Constitutional right, such as suggested by my brother Marshall, and such as is suggested by the language you read from the brief in the other case, then I suppose that right exists everywhere in the United States in every system where it is humanly possible to do it, unless you have an all white school population or an all Negro school population where of course you cannot have any schools that are not all white or all Negro. But if there exists that substantive Constitutional right that each individual public school student has, that is saying one thing.

But if we are talking about what is open to a court, or what is required of a court to disestablish a concededly unconstitutional system, we are talking about something else, something at least of perhaps a more limited geographic scope, if not more limited in other ways, are we not? They are interrelated, but they also are different.

A They are different questions,but I would find it difficult to contend that if the right was established that the remedy could not be devised to protect the right.

Q My point is that if there is such an absolute substantive Constitutional right, then that right exists in Chicago or North Dakota or Cincinnati or Detroit, as well as in Charlotte.

A Yes, Mr. Justice.

There is nothing new in the position which I am taking. Actually it seems to me this is an example of the tendency of many points in the law to expand themselves to their logical extreme. It is clear, I think, that with the success which so far has been achieved, and it is considerable, though in many places not enough, there has been an expansion of rising expectations. Specifically I think it is clear that racial balance was not regarded as the objective, and I am using racial balance in the sense of the brief from what I quoted, racial balance was not regarded as the objective when the Brown case was presented before this Court, or when it was

decided.

In the Brown case, the United States submitted three separate briefs for the Court's consideration. One was filed on December 3, 1952, and was signed by Attorney General McGranery and by Philip Elman. The next brief was filed in connection with the reargument of the cases and was filed on November 27, 1953. It was signed by Attorney General Brownell, by Assistant Attorney General J. Lee Rankin, and by others. Finally a brief for the United States was filed in connection with the further argument on questions of relief, and this was filed on November 24, 1954. It was signed by Attorney General Brownell, Solicitor General Sobiloff, Assistant Attorney General Rankin, and others.

The position of the United States was the same in all of these briefs. I think that all are relevant. But I will quote only two passages, the first in the brief filed on the first reargument on November 27, 1953. This appears on page 171 of that brief.

"It is not unlikely that in many communities, particularly where separate white and colored residential districts still exist, abolition of segregation will produce no serious dislocations and no wholesale transfers of teachers or pupils would occur. This could result from purely geographical factors, because the pupils of the school ordinarily reflect the composition of the population of the

district in which it is located."

Then in the brief of the United States filed in connection with the further argument on the question of relief we find the following on page 12. There is more along the same lines here. I have only picked out the central passage.

"The extent of the boundary alterations required in the reformulation of school attendance areas on a non-racial basis will vary. This is illustrated by the recent experience in the District of Columbia in recasting attendance boundaries on a wholly geographical basis. In the neighborhoods where there is little or no mixture of the races and where school facilities have been fully utilized, it was found that the elimination of the racial factor did not work any material change in the territory served by each school. In biracial neighborhoods, however, the objective of securing maximum utilization of facilities on a non-racial basis could be achieved only by making radical revisions in the area covered by the formerly Negro and white schools.

Q Mr. Solicitor General, after lunch, it would be helpful to me if you would suggest, if you will, whether the feasibility test of Green and the reasonableness test of the Fourth Circuit are different, and if so, in what respect. That will give you the lunch hour to formulate some ideas on that.

(Thereupon at 12:00 noon, a recess was taken until 1:00 p.m., the same day.)

AFTERNOON SESSION

(Pursuant to the taking of the noon recess, the session was reconvened at 1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may proceed.

ARGUMENT OF ERNWIN N. GRISWOLD, SOLICITOR GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

(Continued)

THE SOLICITOR GENERAL: Before I proceed to the Chief Justice's question, I would like to finish the theme of the argument which I was pursuing when the Court recessed. I had just quoted from the briefs filed by the government 15 and 16 years ago. I think it is relevant to bear in mind that--

Q Which argument was that, the first or the second one?

A This was in the second and the third arguments, Mr. Justice, those briefs I quoted from. But in connection with the second argument, and also the third argument, the Court propounded specific questions to counsel. These appear in 347 U.S. at pages 495 and 496, and 4(a) was as follows. This was the question of the Court at that time:

"Assuming it is decided that segregation of public schools violates the Fourteenth Amendment (a) 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?

It is perfectly plain that the Court there was contemplating limits set by normal geographic school districting.

Now, the oral arguments of all three of those cases have been printed in a book called "Argument", and if they are examined, it is found that counsel for the petitioners there proceeded on the same basis that the contention was not in favor of racial balance or the new formulation of that which appears in the present brief, but was in terms of eliminating a dual school system.

Then finally in the opinion of the Court in Brown in 349 U.S., I think we find recognition of this understanding of the Court. This appears in the opinion.

"To that end, the Courts may consider problems related to administration arising from the physical condition of the school plant, the school transportation system, personnel" -- and here is the important passage -- "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis."

It is apparent, I think,that 16 years ago when Brown was decided, and 15 years ago when the decision on remedies was announced, the objective was not racial balance nor the

related objective as stated in the petitioner's reply brief. The conception of racial balance is something rather new, and it has arisen out of our experience in the intervening years. I think there is much to be said for racial balance in many situations. But my submission is that it was not felt to be the standard or objective when the Brown case was considered or decided, and I do not think that it can today be properly found within the text or within the appropriate penumbra of the two Constitutional provisions which are applicable in this case. Certainly this Court has never so decided.

Now, with respect to the question of the Chief Justice, if the Court will examine our brief with great care, you will find that we have never contended and we have never used the word "reasonable". We have used it when we quoted from opinions, but we have never used the word "reasonable". The word which we have used is "feasible" and how far that is different from reasonable is perhaps a question. I think it is some different and I will refer to it.

One of the chief reasons we have used "feasible" is because that is what the Court used in the Green opinion, where the Court said that it was incumbent for the Federal Courts to assess the school board's proposal in light of the facts at hand, and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.

Now, I think that feasible is a stronger word than

reasonable. Reasonable is a somewhat negative word. Oh, well, you don't have to do that because it would not be reasonable. Whereas, to me feasible has a very strong affirmative connotation. You must do it if you can. You must do it if it is feasible. Feasible means practicable. I would point out that even the petitioners have some qualification in their statement of the situation. Perhaps that appears best in their brief in the Mobile case on page 75. Their phrase is "absolute unworkability". That is certainly vastly stronger than feasible, but even that shows that there are circumstances where they concede it does not have to be done. Their wording is, "We believe that our proposed principle forbidding relegation of pupils to black schools except in cases of absolute unworkability of integration plans" has a number of merits.

Now, we believe that under the test of feasibility which we contend for that there is a strong governmental obligation, an obligation not only on the courts, but also on the school boards, not only to disestablish a dual school system, but to eliminate the vestiges of a dual school system. Here there is no doubt that there was a dual school system really down to 1965, maybe a completely dual school system down to 1965 in Charlotte, and in Mobile down to 1969, and that much of the present picture is a vestige of the situation which arose at that time. We believe there is a very strong

obligation on the school boards and the court to eliminate not only the dual school system, but the vestiges of the dual school system.

In that connection, I would point out some things to which reference has not been made. Steps have now been taken in Charlotte to provide for adjustment of faculities so that there are no longer white faculties or black faculties in any school. Under the orders of the Court, which we support segregation in bussing has been eliminated, and finally there is even with respect to these children in the all black schools who would be left in the two all black schools under the HEW plan, there is free majority to minority election out, so that any black student who wishes to go to a school which is not all black -- I know all of the problems of that, but still the fact is that he can go to another school under the government's plan. It was not included under Judge McMillan's plan because he left no all black schools. But under the Mobile order of the Court of Appeals, such children must be provided with bussing and they are given a priority in the school to which they go. They cannot be told, "You cannot go to that school because it is already overcrowded."

Q You do not contend, I take it, that bussing as such is an unpermissible remedial measure.

A No, Mr. Justice. It becomes a question only with the amount and the distance of the bussing, and there is

one last point I would like to make, which is relevant there. There are no problems in Charlotte as far as the government is concerned with respect to high schools and junior high schools. We have supported throughout the decision of the Court which leaves no all black high schools and junior high schools and requires a substantial amount of bussing. The problem arises exclusively with respect to elementary schools, and that becomes relevant with respect to this question of feasibility. You are dealing with very small children and the distances of bussing are relevant. The taking away from their home areas is relevant. I know that in countywide consolidated schools small children are bussed a long way, but there you have the question of feasibility on the other side. The old one room school house became no longer feasible, and the only way it could be handled, and an obvious improvement, was to take the children in to the centralized school.

So in many ways the words are close together, but we feel there is something much stronger than merely reasonable action is required. The word we have found to use is "feasible", but that might well be backed up with further language to the effect that this is not meant in a passive way. It is meant in an active way, and in particular where there are vestiges of a dual school system, continuing steps must be taken to eliminate those vestiges, but finally the test, the standard is not whether when you get through doing all that is feasible

there remain one or more all black schools.

Q Let us assume a school district or school system where there has not been a dual system, and there is no proof of any official discrimination in pupil assignments, building schools or anything else. From what you said a while ago, I take it that the school board on its own -- well, also let us assume that in this system there are some all black schools and some all white schools. I take it from what you said that the school board on its own could to achieve educational goals adopt a plan which would redraw attendance zones, pair and bus in order to make sure that blacks and whites were going to school together.

A Yes, Mr. Justice, of course.

Q Even though those assignments were made explicitly on the basis of race.

A Even though those assignments were made explicitly by taking race into acoount.

Q You would say the Constitution permits the board to do that?

A Yes, Mr. Justice.

Q I take it, however, from what you said a while ago about the necessity for state action in discrimination that absent that the Constitution would not require the board to do that in a district like I described.

A Absent that or absent any action by Congress

under Section 4 of the Fourteenth Amendment, which I think could also make this as a requirement, or state statutes, as in Massachusetts, but assuming that there is a school zone where there is no vestige of prior discrimination, then I think that puts it in a nutshell. Our position is that there is nothing in the Constitution which requires the elimination of all black or all white schools.

Q Then I take it that your argument is that in the Charlotte case and in the Mobile case, it is the necessity to disestablish, the necessity to provide an adequate remedy for official discrimination that would permit, or that that is the basis for saying the Constitution requires gerrymandering zones, pairing, bussing, or any of these other devices to make sure that blacks and whites are going to school together.

A Yes, Mr. Justice. There are a number of these devices which have been developed.

Q But whatever they are, nevertheless, the fact that the Constitution requires them is based, or the position that the Constitution requires them is based on past official discrimination.

A Because here you have what clearly was a dual school system, and which clearly has substantial vestiges of a dual school system, and a great deal of the existing allocation of students is the immediate consequence of the way the school system was operated in the past.

Q And even though possibly in this district, like in other districts across the country, there might have been all black and all white schools, even though there never had been any official discrimination. It is awfully hard to tell whether there would have been or not, or where they might have been.

A It is very hard to tell, and our position is that under the HEW plan in this case, all that was feasible would have been done, leaving two all black schools. The Judge went somewhat further and ordered to eliminate those two all black schools.

Q Does your argument then come down, from what you have said, to the proposition that Judge Mc Millan used his discretion in doing what he did?

A Mr. Justice, we have put it on a conditional basis in our brief. It seems to us it depends on what standard Judge McMillan used, or what objective he sought to reach. If he felt that he was required to eliminate all of the all black schools, we think he used the wrong standard. Or putting it another way, if he felt that he was required to meet a test of racial balance in all schools, we think he used the wrong standard. If on the other hand, he did not seek that objective, if all he was trying to do was to disestablish a dual school system, including the consequences of past discrimination, then we think that the result was within the

limits of his discretion.

Q Mr. Solicitor General, do you suppose there are many school districts in the whole United States, east or west, north or south, that don't show the vestiges of prior discrimination, at least when you include some of the elements that are included here, such as the enforcement of restrictive residential covenants prior to Shelley against Kramer, or the building of school buildings by school boards to meet the demands of the children in those areas? I wonder if there is a single school district in the United States that does not show such discrimination.

A I think, Mr. Justice, as counsel on my left will say, that when those cases come, they will build a record and I have no doubt that they can show a good deal. I think in many parts of the north they could not show a racial zoning, for example, which existed in the Charlotte case. Racial restrictive covenants probably have been utilized in a great many places, and decisions of school boards and of housing authorities in where to place housing projects and where to build schools are probably there. All I would say is that where it can be shown that existing discrimination is in part a consequence of past discriminatory decisions made by public officials that there seems to me to be a situation where under the Fourteenth Amendment a court can properly intervene.

Q My question was simply prompted by the fact that

your argument is quite limited, limited implicitly to a few situations, but my question was suggesting that it is not limited at all.

A These are all questions of degree. In Mobile I suppose we have it in degree of the highest intensity, and in Charlotte somewhat less. I suppose in northern cities you could find quite a bit, but still a great deal less. In particular there never has been a dual school system as such.

Q How sure are we of that, talking about a hundred years ago?

A In the areas with which I am familiar, there have not been overlapping attendance zones, which is what I mean by dual school systems.

Q Mr. Solicitor General, did I correctly understand you to say that there is a reading of what Judge McMillan did and what he said in his opinion under which it would be consistent with the government's position for us to affirm him?

A I think, Mr. Justice, it ought to be remanded to him to find out whether he felt that he was applying the standard that he had to eliminate all of the all black schools. I think what the Court should do is to establish what is the proper test or standard here, and then remand these cases to the lower courts for the application of that standard. If in the light of that standard Judge McMillan should still come out with the same remedy, I would think there would be much to

be said in support of his decision.

Q If you take the verbal distinction or difference in standard between reasonable and feasible, and you embrace the feasible standard, as I understand it, Judge McMillan purports to have applied the feasible standard. Therefore, in light of applying that standard, he found it was feasible to eliminate all of the all black schools. How do youattack that except on use of discretion?

A Mr. Justice, because it seems to me that it all turns on what his standard or his objective was. If he felt that his requirement was that he eliminate all black schools, he said I can do that and it is feasible.

Q If it is feasible.

A No, he said I can do it, and it is feasible.

Q Well?

A But if the requirement is not to eliminate the all black schools, if the requirement on the contrary is to disestablish a dual school system and to establish a unitary school system, he need not have required as much as he did require to achieve that other standard, which is the standard that we think is all that can be found in the Constitution.

Q I read your remand suggestion, or I understood it as you articulated it here, the remand suggestion to Judge McMillan as meaning that perhaps he was in error if he acted on the assumption that hemust achieve a fixed racial balance.

A Yes, Mr. Justice.

Q And he must elimirate the all black and all white schools.

A Yes, Mr. Justice, we think that perhaps he was in error.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Waggoner is going to be next.

ARGUMENT OF BENJAMIN S. HORACK ON BEHALF OF CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.

MR. WAGGONER: Mr. Chief Justice, may it please the Court: The record in this case is voluminous as evidenced by the small portion of the record that has been printed and presented to the Court. Although the record is substantial, we think that there are some crucial issues which may be simply stated.

The first one is, is racial balance a Constitutional imperative. This has been discussed. We think that if racial balance is a requirement, then there is no need to have plans. All the school board need do is simply report to the Court "We have achieved racial balance." I think it would end the inquiry of the court with reference to what plan, what means you are using.

Q Now, what do you mean by racial balance. It

seems to have different content.

A Pure racial balance, if you went to the limit of it, I would say, would be that you would have 71-29.

Q In each school building.

A In each school building. But I think there are varying degrees.

Q In what area?

A In all areas.

Q In the county?

A Yes, sir. This would be racial balance.

Q Is that what you mean when you use that term?

A I do not mean that, no,sir. My position is that racial balance is where a conscious effort is made through extreme means to achieve the approximate racial balance in each school. Let me apply this to the plan that we have.

The Board plan cut across district lines. The District Court accepted those that produced a racial balance somewhere between 15 and 35 per cent. He went further and said this is not enough. Take these ten schools, nine of which were predominantly black, and one predominantly white, and pair them with 24 other schools, so that you get balance in these schools.

It is argued that there is a range here in the elementary level from 3 per cent to 41 per cent, but you can move out of the 44,000 elementary students, you can move 300

black students and 300 white students, and the range of desegregation in the schools would be between 20 per cent and 35 per cent. A range of 15 per cent certainly is a racial balance. The 300 black students who happen to be in these other schools could balance the school system. This is de minimis under anybody's interpretation, I think.

Q I take it then that if the Court below had decided that I must not have any all black schools, and that the racial character of each school should more or less match the communities within a range of 10 or 15 per cent, you would think that would have been all right if he could have done that without using any bussing? Let us assume just by zone gerrymandering, without any additional bussing at all, just by zone gerrymandering, he could have achieved what he thought was his Constitutional obligation?

A We feel it would be the Constitutional obligation of the School Board to do this. If it can be accomplished by reasonable means to disestablish a dual system by gerrymandering, which the Board did to the extent it could --

Q Is this against the background of a dual school system, or just any place?

A This would be against a dual school system, I would say.

Q Did I understand you then in your colloquy with Justice White to concede that it is the Constitutional duty

of a school board, at least one in which there has been previously, and recently previously, a dual school system, it is their Constitutional duty to maximize compulsory integration?

A I may have given that impression. My concept of the elimination, the affirmative duty, is to take the Green case and the six criteria, eliminate discrimination in faculty, staff, activities, transportation and the other elements.

Now, with reference to students, if you assign children on a non-racial basis, based on proximity and convenience, then you have accomplished a unitary system because you have assigned on the basis of non-racial. This is what Brown talks about.

Q This is if you have done the first five things.

A Yes, sir.

Q Is that correct?

A That is correct.

Q Then you come to the students.

A Yes.

Q It is now your position, as I understand it, if you have done the first five things with respect to faculty, facilities, and so on, transportation, if you have done that, then your Constitutional duty is satisfied if you use color blind neighborhood attendance zones.

A That is correct.

Q Do I understand you correctly?

A Yes.

Q That seems to be a little different from what your answer was before.

A Perhaps it is. Let me state this. The Board has gone further than I perceive the Constitutional duty to be. The plaintiffs are not objecting to it, but I think that their only objection to the Board plan is that we have used racial assignments. I think that is the real key, because if you look at Brown, it says arrange your school districts in compact units. These certainly are not the compact units that Brown spoke of.

One thing I might point out, if racial balance is a Constitutional imperative, then it likewise becomes a Constitutional duty upon all children, black or white, to attend a balanced school. If this is a duty, then is this Court to permit those who by reason of wealth are able to buy their way out of the public school system? North Carolina has 20,000 students in private schools. Will those students be required to come into the public school system to discharge their public duty? Will the 814,000 in New York be required to come into the public school system? The 544,000 in Pennsylvania?

Q Does this case address itself, the case we are now arguing, address itself to anything except duty of the publicly supported school system?

A It seems to me that if you impose a Constitutional duty upon a person because of his race, this is similar to the old draft laws where a person was able to buy his way out of the draft.

Q But does this case direct itself to a duty on the child, or does it direct itself to a duty on the state?

A I think the state, acting as the alter ego of the child, is using the child, and the child thereby has a duty. If you go to racial balance, you are imposing a duty on the child.

Q Are there any parties to this suit rich enough to go to a private school?

A I would think so. One of them just built a 100 unit apartment complex.

Q You don't know whether they can afford it or not, do you? What has that got to do with this case? Is there anything in the record on this?

A No, sir, there is nothing in the record on this, but I think that if a duty is imposed on white children and on black children to submit themselves for the purpose of balancing that this Court certainly should not permit by reason of wealth a child to avoid the duty. This to me is a very real point in this case. The Court is not punishing the school board. It is using the children to accomplish Constitutional systems, and systems are what this Court has

consistently spoken of.

Q You started out to tell us what you thought were the crucial issues in this case. You said the first one is whether racial balance is a Constitutional imperative. Now what is the second one?

A The second one that I would say, if it is not a Constitutional imperative, then what is a unitary system. We again look at Brown and we look at Green. Determine a non-racial method of assigning children to schools. Build compact units. Don't consider race in assignment. Green says discharge the affirmative duty. We have discharged the affirmative duty, because we have desegregated faculties completely, racially percentagewise. We have no dual bus system except that which the District Court has introduced. Each morning we have black busses going out and white busses going in. So we do have a dual bus system, but it is under court order. In my interpretation it would be a non-racial assignment of students based on proximity and convenience.

Q Are you challenging that position of the Court which requires you to have a dual bus system?

A I think that it is unfair. I am just pointing out that this has been the effect. This is one of the evils of the old dual, that you had blacks on one group of busses and whites on the other. The District Court order has done this. All of the junior high black students get on the bus and

go to white schools. In the afternoon they get on the bus and they are all black and they go back home. So we do have the earmarks of a dual bus system.

Q Are you challenging that?

A No, sir. We are not challenging that.

Q I thought that was your whole challenge in this case, this compulsory transportation, whether it be by bus or on foot or by velocipede. What you are challenging is the District Court's order that compels this pairing and clustering and these satellite zones and the other devices to compel greater integration than was provided by the School Board's plan. That is what your challenge is, isn't it? You say that is not required by the Constitution.

A Let me state it this way, if I may. We do not challenge the fact that the busses have only black children or white children on them, but we do object to the fact that their assignment to a school is based on race, black or white, it makes no difference.

Q The situation you describe, I take it you consider an inescapable consequence of the Court's order.

A It is, yes, sir. There is no way around it.

The third question I would suggest is does the Board plan offer a unitary system. We have tried to compare ourselves to other systems in the nation that did not have the laws requiring separation of races to see how far they had gotten

along. This has been excluded. But nevertheless, in our plan, 68 per cent of the black students would be in predominantly white schools, 32 per cent would be in predominantly black schools. There are 103 schools. There would be both races in attendance at 100 of these schools. This to me certainly has the earmarks of a unitary system.

Q If I understand what you said, it is that your client, the Board of Education of Charlotte-Mecklenburg, in its plan went further than the Constitution required it to go.

A This is our position, and again I will state that if the plaintiffs have a complaint, it is that we went too far, because we have assigned children under the Board plan on account of their race.

Now, the fourth question that I would suggest is that once a unitary system is established, is there an affirmative duty to police and maintain ratios. Assuming the District Court's order is upheld by the Court, do we have a duty to maintain these ratios indefinitely in our schools? Do we have to continue bussing for years and years and years?

Q I thought you were about to put it in a different way, that if the pattern is all fixed in 1970, and then by an exodus of people who are moving upward, to take the phrase used in many of the briefs, moving upward to better homes, out where there are more green trees and more green grass, and other people moving in, so that the pattern changes,

must you as a Constitutional matter, as you see it under Judge McMillan's order, reexamine, reappraise, and then go through a process of reassignment to bring yourselves in line with the new population pattern.

A This is precisely what he has ordered. Mr. Horack will address himself to this particular question.

Q Within a specific period?

A May I use this illustration? In our plan this year, we were balanced, as of figures of January 31. When we opened school, we have three predominantly black elementary schools. We have three more that are near black. We have a junior high that is going to be black, or predominantly black before the year is over. When does a school system get out of the business of balancing? Here is a pure case of racial balance, and here we have seven schools, three of which are already predominantly black, and four more to go. Next year what is going to happen? Has Charlotte become another Atlanta where the race is 60 per cent black, 40 per cent white? How do you balance in a system of that kind? I think these are very, very pertinent questions, and the Court should give some deep consideration to them.

Q What has happened since you changed the composition of the schools which were covered by the Court's plan? The Court had anticipated that they would not be all black. Now you say at the opening of school they actually are,

and some more will be soon. What has happened?

A It is an example -- in Charlotte, if I could give the Court a little understanding of the city, it is not like Washington where you have row houses. There are neighborhoods. There are vacant areas. There is another neighborhood. It is fast growing and there has been leap-frogging in the growth of the city.

In one of the schools, called Berryhill, which is a rural school that reaches to the river to the west, an apartment complex has been built in it. Four or five other apartment complexes have been built in other schools in that area. These are low rent housing. They are very nice housing. As the Judge remarked, it is nice to get these people out of the shotgun houses that they used to live in, these old three room houses. But they are moving to these nicer homes, and if you go in and put a 500 unit apartment complex within a school district --

Q Who is moving?

A The blacks are. Most of the public housing that is being built is being occupied by blacks.

Q This is public housing, low rent public housing.

A Yes. One of the other housing projects was built by a black church in Charlotte, 500 units. Another 100 unit apartment complex was built by one of the plaintiffs in this case.

Q Why are only blacks in those public housing units?

A Because there are income requirements, and the blacks by and large are the lower income people. They are in the poorest housing. It is just a fact of life that the blacks move in and the whites don't move in.

Q So the character of the neighborhood of some of these schools has changed by reason of movement of blacks. How about movement of whites?

A The whites have fairly well stayed in the district, but they are simply over-populated. You have a school of 600, and you have it with a ratio of 400 to 200, but you move 200 blacks in and you are 50-50.

Q In Atlanta there was a lot of moving out of the whites, wasn't there?

A Yes.

Q Has that occurred in Charlotte?

A It is occurring. They are moving to the suburban areas. But it may very well be that adjoining counties will begin receiving the white population of Charlotte. I don't know. There is some small tendency along that line.

Q Well, if the other counties receive that white population and the school boards of those other counties are persuaded to do what Charlotte has done, where will they go then?

A It may be that the blacks will not go to those counties. The blacks have historically stayed in the central city where transportation and jobs are usually available.

Q The reason I raised all of those questions as to whether the people move out or in or anything, we have got a situation here of dealing with Charlotte as it is today.

A That is correct.

Q What is your position, may I ask? Take this district, who built these apartments? Did the government or the state?

A They are government financed.

Q Government financed?

A Yes.

Q You say they have moved in. Let us suppose you have one of those areas where they have these apartments. Let us suppose that by reason of that housing or something else, 90 per cent of the people in that area of that school building where they would not have to be bussed are black, 10 per cent white, are you objecting to the fact that they bus these people from that area into another area in order to try to make the blacks and whites conform to a county proportion?

A I have no objection as long as they do it voluntarily.

Q Yes. I am talking about, though, are you objecting to the idea that the Constitution requires it.

A The Constitution does not require this. That is my position.

Q Does it prohibit it?

A There is a question in my mind as to whether or not elected officials could go that far. I don't believe a court can.

Q You think that under the supplement power given under the Amendment for the Congress to supplement the program to prevent discrimination, Congress could do it, but the Courts cannot?

A That is correct.

There are several misconceptions about the facts of this case that I would like to bring to the Court's attention. I have already alluded to the fact that we have promised great desegregation under the Board's plan. There has been a tendency of the District Court, the Court of Appeals and also the plaintiffs and petitioners in this case to suggest that the racial ratios of 1969-70 is what the Board plan produced, where we had 17 predominantly black schools, 5 predominantly black junior highs, and one predominantly black senior high. But that is not what the Board is here urging this Court to approve as a desegregation plan. It is 68 per cent of the blacks who are in the desegregated schools.

Another one is, and we have been continually unable to clear up the question of the instructions that we gave to

to the computer. We asked for an extension of time, and Judge McMillan asked us, "What are the instructions that have been given to the computer?" We responded that the computer will not make any assignments if there are more than 40 per cent black students in the student body. The reason for this was to gain stability. This School Board wants to get out of the courts and get on with educating children, and if we could build a more stable desegregation plan, this was our goal.

When the plan was finally put together, of necessity whites were assigned to minority situations in all of the black schools, ranging from a handful to 17 per cent.

Another point that I would like to point out is that we only bus 514 blacks to all black schools. I ask the Court to catch the connotation on all black schools. What about all of the blacks who live in the county who go to desegregated schools? They receive transportation. We are told that we place schools so that they would be handy to blacks and we bus whites to the predominantly white schools. The Court lists eight schools and says 96 children live around these schools. If the Court will look, these were county schools, all of them having varying degrees of desegregation. Alexander has 30 per cent black. East Mecklenburg has 10 per cent. North Mecklenburg has 28 per cent. Olympic has 41 per cent. These blacks are bussed to schools where there are only 96 people living around these eight schools.

So we asked the Court not to pay too much attention to the statement that only 541 students were bussed to black schools.

Q I have not fully understood your position. Do you favor all of the District Court's order? Do you favor all of the order as it came from the Court of Appeals? Or do you favor neither?

A I favor neither. I don't favor the District Court because he uses racial assignment. I don't favor the Court of Appeals on the secondary level, junior and senior high, because he used racial assignment, and if you look at the senior high plan that he adopted, there was no predominantly black school. The highest percentage the Board proposed was 36 per cent. But the Judge told us to pick up 300 blacks out of these two schools and bus them away out here to the southeastern corner of the county.

Q How far?

A I would estimate about 12 or 15 miles.

Q What for?

A The Court of Appeals said it would tend to insure stability. It was a school that had 2 per cent black students. The what for is something that we have questioned repeatedly ourselves, but it is racial balance. I think it is clearly evident that it is racial balance.

Q Were there any more than 2 per cent of black

people who lived in the area of that school?

A No, sir, they do not. It is a large rural area. Twenty years ago a number of blacks were living there.

Q You mean they are bussed out of an area where they were closer to a school?

A Yes, sir.

Q They are bussed 13 miles into another area.

A Yes, sir.

Q In order simply to see that a certain percentage as shown by the whole county was achieved in that balance?

A It was substantially achieved, yes, sir.

Q What do you favor as an alternative, since you do not favor either of these?

A I favor as an alternate something that is workable, something that is understandable, the same thing that was argued in Brown, the same thing that was argued in Cooper against Arend, the same thing that was argued in Green.

Q What is that?

A You assign children to school on non-racial grounds. The criteria for assignment are proximity and convenience of students to the school.

Q Well, now, Mr. Waggoner, the Board's plan certainly includes all sorts of racial assignment.

A This I acknowledge.

Q Then you are supporting the Board's plan, are

you not?

A I am supporting the Board's plan as an alternative.

Q I thought the Board sat down and gerrymandered the districts as much as they could, paired schools, in order to achieve some intermixture of Negro and white students.

A They did this.

Q They just did not go as far as the District Court did.

A That is correct.

Q Is that Constitutional, or isn't it?

A I think it is not Constitutional, and if these plaintiffs wanted to raise it, they could tell us that we have used racial criteria in making assignments when Brown has told us no racial assignments.

Q But the Board itself has proposed this kind of or this degree of integration, if you want to call it that.

A That is correct. The Board has disregarded its attorney's advice.

Q Your view is that the Constitution does not require what the Board did.

A That is correct.

Q The Constitution does require disestablishment. How do you go about disestablishment unless you take some racial mixing into account?

A The disestablishment that I see comes in the first five factors over which we have control of the Green check list. Faculties; teachers don't have to teach, but students have to go to school, so I think that you can make faculty racial assignments, because the teacher does not have to teach, but under compulsory assignment the student has to go to school. His parents can be jailed if he does not. Transportation we have eliminated. Staff we have eliminated. Facilities, the District Court found there was no discrimination in facilities. Other activities, there is no discrimination there. So this gets you down to where you discharge the affirmative duty with the first five items of the Green check list, and then with students, as Brown commands, you assign students on non-racial grounds, non-racial basis.

Q As I understand you,you agree that so far as disestablishment in so far as there is discrimination forbidden by the Constitution, your position is as I understand it that it is not discrimination forbidden by the Constitution to let pupils go to the schools closest to them, everything else being equal.

A That is correct.

Q Could I ask you a question, Mr. Waggoner? Under North Carolina law, has the child got a right to go to a particular school?

A He has no right. It is an untrammeled

discretion of the Board of Education.

Q In other words, the neighborhood school under North Carolina law is not a requirement.

A That is correct.

Q School zones are discretionary.

A That is correct.

Q A child has no right under North Carolina law to go other than where under the Board plan he is supposed to go?

A I think under North Carolina law or under Constitutional law, the child has a right to go to a school on grounds other than race, or be assigned on grounds other than race.

Q But North Carolina law gives a great deal of autonomy to the local school districts in the state.

A That is correct.

Q That is the way I understood your answer.

A Yes, sir.

Q In other words, in North Carolina the School Board can say all children in the first four grades must go to the school nearest to them, and all students in the next four grades must go wherever they may be assigned, and yet the next four grades in a larger perimeter.

A That is correct.

Q So long as it is not done on the grounds of race.

A That is correct.

Q Has there been any traditional pattern in North Carolina with respect to historically putting children of tender years in one type of school nearby and children of older age at schools at a greater distance?

A It is the historical pattern of the Charlotte system that schools were attempted to be built within three quarters of a mile of the child. I think if you look at our elementary attendance map, which is No. 2, which shows the location of schools, this has been accomplished in large part.

Q Mr. Waggoner, do you have any children of tender age riding school busses as of 1969?

A Well, not of tender age.

Q I don't mean you personally, but the Charlotte school system. They were bussing children of tender age, weren't they?

A They were bussing children of tender age.

Q For the purpose of maintaining segregation?

A No, sir.

Q What other reason?

A They were bussed to get them to school.

Q There was not a school near them?

A They go to the nearest school, ordinarily. This is correct.

Q But they were so far away from the school they

had to be bussed. Did they ever pass by a colored school on their way?

A There are no colored schools in Charlotte.

Q I am talking about before this plan went into effect, when you did have colored schools and white schools.

A I will say this. Before 1965 there were still some vestiges of the old state dual system.

Q And you did bus elementary school children of tender age solely to maintain segregation. Is that true or not?

A We admit that we were a dual system and we busses children to get them to school. We bussed white children past black schools, and black children past white schools. This is incontrovertible.

Q Including children of tender age.

A Including children of tender age, whatever their age.

Q So what is wrong with bussing them for the purpose of integrating?

A Do two wrongs make a right?

Q Is that the only answer?

A I think so, yes, sir.

Q Isn't that a pretty good answer?

A I think it is.

Q The thing that bothers me is that if you assume that historically the state has created a neighborhood that

is segregated, I am a member of that neighborhood, I am a black, the school is black,the teachers are black, and as Justice Harlan says, the Constitutional duty as I understand it is to disestablish the system of segregation.

A Yes.

Q How do you go about getting me, the black student in the ghetto, who wants to get out to another school but I haven't the money to pay the daily bus fare, how is that disestablishment achieved Constitutionally?

A It is achieved Constitutionally. Any child who wishes to get out of the ghetto simply makes application to the school for transportation, and it is furnished free.

Q We start then with the problem of bussing.

A If this is voluntary, if the child makes that election to improve himself --

Q Then the question is whether the Board can make an appraisal as to the number that would be likely to apply. These things have to be arranged, not day to day, but year to year, to order the number of busses, and so on, that would be needed to transport the number that would be likely to want to shift. Is that the problem?

A No, this is not the problem. We can furnish transportation to any student where his race is in a majority to a school where his race is in the minority. This is the feature of our plan that gets around or answers the effectively

excluded portion of Alexandria.

Q It is also a racial assignment.

A It is a racial assignment, but it is voluntary.

Q I know, but it is nevertheless a state action conditioning which school you are going to go to based on race. No white child could transfer out of a school the Negro can. But you think this is wholly permissible?

A I think that it is, because this is voluntary. You are not treading on the rights of somebody else to vindicate your own Constitutional rights.

Q Yes, but you are keeping somebody else on account of his race from doing the same thing.

A I don't understand the distinction you are making.

Q There is a 90 per cent Negro school, a 10 per cent white school. Your rule would say the Negro may transfer to any school where his race is in the minority.

A That is correct.

Q You would not let the white transfer to the same school, and the reason is on account of race.

A That is correct.

Q You think that is permissible?

A I think that is permissible. It has been suggested, I think Green suggests this, not in this context. It says if freedom of choice is used, it must work, so here is

one that works.

Q Mr. Waggoner, if I understand your answer in response to the question about remedy, you draw no distinction between a situation which has a de jure background and one which is purely de facto, if there ever is such a thing.

A There is no distinction, and this is something that time has not permitted us to fully controvert on the very shallow findings of the District Court. Permitted the same leeway that he assumed, I can find de jure segregation in any community in this nation. This is a sincere feeling that I have.

Let me give you one example of the shallowness of his findings. He said, "By use of racial restrictive covenants," the only evidence in this case when it was before the District Court was a North Carolina Supreme Court case involving Charlotte, involving the community calle Chantilly. There the Supreme Court says that there is no uniform scheme of development, therefore there are no restrictions imposed against this property, but because of the provision in the contract against sale to members of the black race, that part of the contract will be enforced.

Chantilly is a school that was predominantly white in 1968-69. We gerrymandered it and brought in children from the old Biddleville school, and now it is desegregated. It is not paired. But my point is the evidence before the District

Court showed on its face that there were no residential or racial restrictive covenents of uniform application on that property, right in the City of Charlotte.

I had hoped in the time that I was here to point out the various aspects of the plans. There is one thing that I would like to do in addressing myself to the brief of the Solicitor General. On page 25 of their brief they suggest that we should consider changing the grade structure. There was substantial evidence developed in the record that Charlotte-Mecklenburg is moving to an ungraded lower school grades. This permits students to move according to their ability within a homogeneous group.

Next they say permit students to transfer from a school in which their race is in the majority to one in which it is in the minority. The Courts below in adopting this technique also required that such students be provided transportation. The Board offered transportation. This has been covered. Charlotte has done this. It has offered it under its Board plan.

They say close unneeded or substandard schools. Since 1965 we have closed and consolidated 20 schools. Is this no action? Is this a recalcitrant school board not exercising any affirmative duty?

Draw zone lines so they cut across racially impacted residential areas instead of encircling. What do you do when

you gerrymander with a computer that does not know where a highway, a creek or a railroad is? We have cut across these zones.

They say plan new construction of school facilities so as to serve students of both races. This we can recognize as being something that can be handled in a border zone between black and white areas. I read in the paper that a 480 acre golf course affluent neighborhood is going to be built. Probably some four or five hundred homes will go in there. This is located near the end of the county, the southern end of the county. How do we build a school that will serve those students and also be desegregated? This is an enigma the courts are going to have to face one of these days. How do you build a school when there is a vast separation between a large group of people of one race and a large group of another? This is something that is going to be an impossibility, and I think the Court needs to consider this in considering racial balance, because if you go to racial balance, there is going to be a lot more transportation.

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

Mr. Horack. You have about 33 minutes.

ARGUMENT OF BENJAMIN S. HORACK, ON BEHALF OF CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.

MR. HORACK: If the Court please, I want to open my

remarks by harkening back to a comment of the Solicitor General here that there was some doubt whether the District Court had ordered that there shall be no all black school in Charlotte-Mecklenburg. There is no doubt about that. On that score, I refer you to I think it is paragraph 5 -- I may be in error on the paragraph -- of the February 5th order, page 822-A of the Appendix, and this is a quote in his order that "No school be operated with an all black or predominantly black student body." So I can see that on that score there is just no doubt about it. That is his order, and I suggest that we can move from that point without being plagued by any doubts.

Q Can I ask you what the record shows with reference to whether there are white people that live in that area? You say he has ordered that there be no black school.

A If your Honor please, of course that order as it applies to the Charlotte-Mecklenburg School Board plan of February 2nd is referring to the nine elementary schools and the one junior high school that remained predominantly black under the Board plan, with black ratios extending from 83 per cent to 99 per cent, which means that in some of those ten schools there were up to 17 per cent whites. At the one junior high, that was 90 per cent black and 10 per cent white.

Q You say he ordered that there should be no all black school in that area where there were 17 per cent colored people?

A He did.

Q Are you defending that?

A No, sir. On the contrary, exactly the opposite. It is because of his order in this extent that there was imposed upon the Board what is called the Court ordered Finger Plan with cross bussing at the elementary level, the so-called satellite bussing at the junior high level to get rid of the one black school, and incidentally, it is interesting to note that at the junior high level that involved bussing out 2700 black children to outlying suburban junior high schools, because there were 758 blacks that made up the 90 per cent at this one junior high. Of course the same is true at the senior high level, and that has already been alluded to, except that had a different switch and twist on it. You talk about balancing, it is there. It is there at the elementary level with its cross bussing and satellite bussing at the junior high.

Q Is that February 5 order also the final order?

A Yes, sir. If your Honor please, the final order, if you are referring to the August 3rd order, I remind the Court that there were those July hearings that were undertaken as a result of remand, where the Court of Appeals sent it back to the District Court, and he found his February 5 order reasonable.

Q And he reinstated it?

A Yes, sir, he reinstated it.

Q Paragraph 6 also says that pupils of all grades shall be assigned in such a way that as nearly as possible the various schools at various grade levels have about the same proportion of black and white students.

A Yes, sir, that is correct. That is in both. There again I would suggest to your Honors that if there really is any serious doubt as to whether racial balancing is involved in this case, I refer you to what Mr. Justice White just alluded to, and upon examination, Mr. Justice White, you will find several other portions of the order of similar import.

Q There seems to be a difference in view on the part of some that it is balancing. What do you mean by balancing?

A Mr. Justice Black, it is hard to define the twilight zone, but you have got the whole hog arrangement, where every school in the system -- for instance, Charlotte-Mecklenburg has 70-30. That is the ultimate. Then I think you have racial balancing as the goal, the objective to be achieved --

Q What do you mean by racial balancing?

A Racial balancing is a device that has as its objective the proportionizing of the student bodies --

Q Whether they live there or not?

A Whether they live there or not -- among the

individual schools.

Q Indeed, every school, is that right?

A Every school, Mr. Chief Justice, but I believe the concept of racial balancing can be short. You can still have something that is properly designated as racial balance that falls short of the ultimate. Judge McMillan, as a matter of fact, said, "I am not racial balancing. I have no order racial balancing. I merely direct racial diversity."

Q What did he mean by that?

A Mr. Justice Black, I don't know. I think it is a word game.

Q Didn't he say, Mr. Horack -- I don't have the opinion in front of me, but I have read it more than once recently -- didn't he say that the touchstone of what the ideal objective should be would be 71 per cent white students, 29 per cent Negro students, in each school building in the district, but he realized that that optimum objective was not possible. But he said what we are going to do is using the Court of Appeals language, what can reasonably be done to make a maximum approach to that objective. That is at least the way he verbalized what he did.

A I would agree, Mr. Justice, with your interpretation or that analysis where Judge McMillan said we can't do it all the way, but we are going to come just as darned close to it as we can.

Q As we possibly can under the test of reasonableness.

A What I do suggest is that the District Court did not give realsincere application to the Court of Appeals test of reasonableness.

Q Perhaps not, but at least he purported to.

A It is only to that degree would I put a post script to your Honor's comment.

Q But the ultimate question, the ultimate bare bones basic question is whether the United States Constitution requires an effort, whether it be the maximum reasonable effort or the maximum feasible effort or the stricter test proposed by the petitioners, at least in the Mobile case, the maximum humanly possible effort, whether or not the Constitution requires any such maximum effort toward that objective that I have mentioned, that is, in this case, 71-29 per cent. Isn't that the ultimate issue?

A If your Honor is asking me do I think that is the ultimate issue, my answer is yes. If your Honor is asking me whether I think that it is a Constitutional imperative, I say no.

Q Well, that is the question. That is the issue.

A I intended to address myself to that.

Q The percentage to be based on the respective populations of white and color throughout the entire county.

A Throughout the system, yes.

Q Can you tell me whether under North Carolina law the School Board would be permitted to establish a plan that went beyond the Constitutional requirements, but would be a plan which because of their plenary authority over schools would be one which the public, the citizens and the students, had to accept?

A That is a tough one, your Honor, and that is why you asked it. I would say no, that the School Board could not, even within the realm of its plenary powers, and those powers indeed are broad. I would put this post script on my response. Again I am going to allude to this later, but I will now to an extent, you talk about the rights of individuals, be they blacks, to attend a desegregated system, or the reverse rights that Mr. Justice White referred to, of the whites, whether their rights are being imposed upon, or used, as it were, and hence denied under the equal protection, I suppose that a School Board can -- excuse me. Let me back up. I think that both of those rights at the ends of the spectrum, like almost any other right under the Constitution, are not a hard nosed absolute. Your Honors will recall that we attempted to develop that thought, which time does not permit now in detail, in our brief, in response to the comments of Judges Sobiloff and Winters and Judge McMillan, who views these rights as absolute rights to attend a school with some acceptable mix,

and that is an individual right, and it cannot be taken away from them, it cannot be denied.

Well, to that I say, as we said in brief, that that right, as well as freedom of speech, right to counsel, jury cases and all of the rest of them, they all, and this Court has recognized this in a long series of cases, are subject to an application of reasonableness.

Now, to your question, Mr. Chief Justice, I think that a school board can reasonably go to a point and require racial balancing, or maybe I had better say that they would have to go to a point that might involve some mixing, a countenance of the races, as it were, but they probably could not go, even under their own inherent powers, so-called, plenary powers, they could not go beyond the point where they edicted racial balancing.

Q Let me test that with this question. Could the school board provide that all children in the first four grades, irrespective of race, go to schools within one mile from their residence, and not have that provision with reference to any other grades? Is there any Constitutional question involved in the school board's right to do that? Or is that discretion?

A If your Honor please, I think that it gets down to the reason why the differential was made. If it were made strictly, if you would presume this with me, for a racial

balancing reason --

Q No, I said irrespective of race, no racial factor at all.

A Oh, yes, sir. Certainly they can.

Q There is no Constitutional question there, is there?

A No. As a matter of fact, it goes without saying that school boards make differences such as your Honor suggested every day in administering the educational program for one reason or other of school systems. Of course I would concede that.

Q That is because you think, as I gather it, that the state has complete control of its schools except so far as forbidden by the Constitution.

A Yes, sir. With reference to this all black school business, I would say this. What is the nature of the right -- let us say it is a black child, although it could be a white -- what is his right under the Brown and Green decisions? It is our view that it is not a right to attend a particular school of a particular mix. On the contrary, it is the right of a child to go to school in a system where every vestige of discrimination has been eradicated.

Q On account of race.

A On account of race. I would agree, therefore, that if the School Board undertakes to evolve a plan, as indeed

the Charlotte-Mecklenburg one did, that evolves zones where the net result -- and where those lines ran had absolutely no racial bias to them at all --

Q I misunderstood. I thought the School Board's plan did have a benevolent racial bias.

A Excuse me. I concede that. It is that phase of it to which your Honor referred that occasions our comment that our School Board plan of February 2nd went far beyond what the Constitutional imperative was.

Q The plan in fact did have a benign racial gerrymander.

A I did. Obviously it did. Admittedly it did. It went far beyond what we say we were required to do.

Q That is what I had understood.

A So I say that the right of a child is to be a part of a system, and hence that is the opposite of what the petitioners contend for, and that is that a child has a right which must eradicate every black school.

Q This is perhaps not the individual Constitutional right of an individual public school student, but rather it is the Constitutional duty of every school board to operate a non-discriminatory system in somewhat of an analogy to the jury cases. It is the duty of a state to have a non-discriminatory system, but it is not the right of any particular defendant to be tried by a jury which is racially

representative of the racial makeup of the community. Is that it?

A I would say your last, namely, the duty of a school board to establish a non-discriminatory system.

Q That is the Constitutional duty.

A I am with you on that phase of it.

Q Well, now where are you not with me?

A The other phase of it is the first part. I say of course the black child, let us say in this instance, has a Constitutional right under the Equal Protection Clause. Now the next question is what is it.

Q That is right, and what do you say it is?

A I say it is to go to school in a system that as far as pupil assignment is concerned the areas, however devised, however arranged, are done so without any racial balance. That is his right, to be a part of that system.

Q Then I did, I think, understand correctly.

A Excuse me. I misunderstood you.

Back to this racial balancing business, time is running short, but I would commend to your Honors' consideration the following portions of the District Court order, if there is any lingering doubt that Judge McMillan did in fact prescribe racial balancing. Appendix 710-A, December 1 order. Appendix 822-A of the February 5 order.

Q You are going a little fast for me. What was

the first one now?

A Appendix 710-A. That is the December 1 order. That is where he said the Court will start with the goal that there should be the idea of the 71-29 ratio. Appendix 822-A, the February 5 order.

Q Could we go back a moment? What is the paragraph of 710-A that you are referring to? I see in paragraph 12, "Fixed ratios of pupils in particular schools will not be set." This is the December 1 order, 710-A.

A Oh, yes, it is paragraph 12, your Honor.

Q That is what I am looking at. "Fixed ratios".

A It starts down there, "In default of any such plan, the Court will start with the thought originally advanced in the order of April 23 that efforts should be made to reach a 71-29 ratio."

I don't know how well I will do on these other paragraph numbers, but the second is the February 5 order, page 822-A of the Appendix. That is the one Mr. Justice White referred to.

The next one, which needs a little emphasis, also in the February 5 order, 823-A, wherein the Court said that the "School Board shall maintain a continuing control over the race of the children", and then page 824-A of the Appendix of the February 5 order again, "shall adopt and implement a continuing program, computerized or otherwise, of assigning

pupils for the conscious purpose of keeping things in a condition of desegregation."

Q Are you arguing that that meant the continuing surveillance to maintain substantially the 71-29 racial balance?

A Forever, you mean? Is that your question?

Q I am asking you. What do you say Judge McMillan meant? Is that for just this year?

A Mr. Chief Justice, your idea about that is as good as mine, and I have none.

Q Well, what would continuing control mean if it did not mean that he was going to continue overseeing it?

A Oh, I think very definitely that is what he is saying to us. I think it portends rather grave problems as a Constitutional matter and as a practical matter from here on out. I think Judge McMillan basically will be an ex officio member of our school board for I don't know how long.

Q How long has this case been in court already?

A This case was instituted back in 1963-64,

Q And it is not settled yet. So why worry about the future?

A Mr. Justice Marshall, we are deeply concerned about the future, not only to acquit in full measure our Constitutional obligation, and apart from the Constitution, to fully acquit ourselves to the children, black and white, in our community. We want to get back to education. That is

why we are concerned about the future. We want to bring this thing to a screeching halt, and we hope as a result of this case we may be enabled to do that. So we are very much concerned.

Q Could I ask you a question, please? You say the School Board went beyond what you think the Constitution required.

A That is correct.

Q Would you say it went there on its own initiative or was it told to do so?

A I think, Mr. Justice, the School Board went to this school board plan which we say went beyond the Constitution "voluntarily" under the pressure of the District Judge.

Q How about the Department of Health, Education, and Welfare?

A There was no problem on that score.

Q No problem?

A No, sir. You see, they did not come into the picture really until the July hearings when they proffered their plan that is shown on Map No. 4 as submitted. The HEW came into the pi cture as a result of the Court of Appeals May 26th opinion, when it was remanded with the strong suggestion, I think it was, that the HEW be brought into the picture, and this is the result of their plan, a plan, I might

add, that was shot down by everybody in sight. I think it is well known that we have had a badly divided Board of nine members, five to four. It is significant that this was about the first unanimous vote that they had had on that Board in I don't know how many years, a unanimous vote against the HEW plan, incidentally, for these reasons. No. 1, it had a grade structure where, for example, in Zone No. 4 there are three elementary schools, and I don't remember the specifics, but one group of children go for grades 1 and 2 here, and then 3 and 4 here, and in some of the zones the children go to four different elementary schools during the course of their six years of elementary schooling. The bussing under it, the District Court Judge found, was about on a par with what his estimates were of the Finger Plan, and the Board minority plan, and furthermore they came out with ratios projected of 57 per cent that we knew would never stick. All in the world you would have would be to end up with resegregation. And in the next place they used schools in these clusters, in this mixing process, which is another type of racial balancing, employed schools that were already desegregated under our school plan.

Those in passing are a few reasons why neither the District Judge nor the School Board had any tolerance for the HEW plan.

Q Are you going to argue at all about whether or

not this order exceeds or violates the Federal law?

A Mr. Justice White, that is going to be a subject matter of the next two cases, and I thought we would finesse it.

Q You referred to the Court of Appeals opinion remanding for the Board to take certain action. Is it your argument that the Court of Appeals opinion required them to take into consideration the balancing process?

A Yes, sir. Let me try my own articulation to a question you asked Mr. Waggoner. As far as the District Court's order is concerned, we are offended by it because it says that we cannot have a black school. It is based upon racial balancing. It was a Court order supplanting a Board plan that we feel was thoroughly Constitutional because it was based and established its line on completely non-racial grounds. That is why we take offense at the order of Judge McMillan.

As far as the Court of Appeals is concerned, I must digress to remind ourselves what they did. Incidentally, we object to the District Court at all three instructional levels, elementary, junior and senior high schools. As far as the Court of Appeals is concerned, what did they do? We approve of their rule of reason simply because in our view in the name of common sense you have got to have a rule of reason about almost anything. But we say that the Court of Appeals applied

or misapplied its own rule in the sense that it, too, issued a ruling that was based on racial balancing for these reasons. What is it the Court of Appeals did? At the elementary level, they said, "School Board, you have not done enough. Judge McMillan, you have done too much. There is too much bussing and transportation and dislocation and so forth when that is superimposed on the secondary level, junior and senior high." So in effect the Court of Appeals found Judge McMillan's elementary plan to be unreasonable. He went back and took another look at it, and found that sure enough, he was reasonable all along.

At the junior and senior high school levels, the Court of Appeals looked at it and said that is not so bad, that is okay, but in so doing, they approved the satellite bussing and the balancing at the junior high, and what is the most glaring example already alluded to at the senior high, they approved that. That is the 300 black children from the inner city that are bussed 12 or 13 miles out to Independence High that under the Board plan had a 2 per cent black population. They took the 300 from schools that we already had an almost perfect mix in under the Board plan, and the only reason they bussed those 300 black kids was to make a white school less white. So really, although the smaller problem, the most glaring single example of racial balancing is the senior high.

Q I understood everything you said except that

you approve the Court of Appeals rule of reason. I did not understand that you did. Of course, no man is going to say "I am against being reasonable", and we are not talking about that, but using this as a term of art, as I understand the rule of reason, as explained by the Court of Appeals for the Fourth Circuit, it is that the Constitution requires maximum racial balancing consistent with what is reasonable, and I did not think you did agree with that.

A You are so right. Yes, sir. You correctly state it. I was using the approval of the rule of reason there in the sense --

Q You approve of people being reasonable. We all do.

A Yes, that is correct. It also does have the technical connotation in the sense that in brief, as I have already mentioned, we developed a line of argument there that says that an individual's Constitutional right in a multitude of areas, religion, speech, jury, counsel and so on, is nevertheless subject to, is not absolute. You can't run into a crowded building and yell "fire" and so forth.

Q You think there is no absolute rule that there shall be no discrimination against people by state laws on account of color?

A I think the rule is absolute. I think it is an absolute as a requirement, but as complex as things are,

in order to accord that right or protect that right, I think you are immediately thrust back into some type of feasibility or rule of reason.

Q You mean the courts are driven back to a rule of "feasibility" or "reasonableness", and the judge is entitled to say whether or not the policy is reasonable which appears in the Constitution?

A Yes. I think it is a very exacting standard of reasonableness.

Q There are some people who might agree with some of your argument but would not agree with that.

Q Are you suggesting that in the same sense that reasonable searches are permitted under the Constitution, but unreasonable searches are forbidden? Is that the sense in which you are using the "reasonable"?

A Perhaps, Mr. Chief Justice. In brief where we are talking about the cost of busses and numbers of busses and dislocation, in the Baldwin case, your distinction as to where petty crimes leave off and you have a right to counsel, and if it is less than six months you don't. Well, why? It is for the efficient, expedient administration of justice, which brings you right into a practical reasonable feasibility aspect of the thing.

Q One other question. I understood you to say something about this matter that I don't quite get. The

question was do you have easily accessible the point where we can find the Court of Appeals opinion remanding the case in order that they might use the doctrine that you are talking about?

A Yes, sir. The Court of Appeals opinion commences at --

Q I mean the part that remands it for that purpose. It might be very important to somebody who believes in state powers, because if the state law provides that this be done, of course in their judgment it should be done.

A The test of reasonableness as expounded by the Court of Appeals appears on Appendix page 1267-A. You see, what they did was they vacated the judgment and remanded it.

Q I was not talking about the test of reasonableness. There is a question in this case with reference to policy, and I wanted to find out where that is. It remanded for the determination of the dispute between you in this case.

A You are talking about the Court of Appeals remand?

Q Yes. Did they in any way coerce or intimidate or tell the Court that it had to take into consideration the balancing process? I understood you to say it did, and I wanted to know where it is.

A Not specifically. The majority of the Court never admitted that they were condoning or using racial

balancing. The dissenting judge who joined the majority in order to have a requisite vote, Bryan, called it like it was and said, "You talk in terms of integration, but I am telling it like it is; it is really racial balancing you are doing." So you have to read the opinion to draw your own conclusions.

Q But that is the point, 1267-A in the Appendix.

A That is where the test of reasonableness is set forth by the Court of Appeals.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Barack. Your time has expired.

Mr. Nabrit. Somewhere during the course of your discourse, it would help me if you would suggest something about your view on the continuing surveillance nature of this order, and what does the Court do if in, let us say, three years, they find that the pattern of population has substantially altered so that the 71-29 is no longer a remedial measure under the standards laid down by that Court.

ARGUMENT OF JAMES M. NABRIT, III, ON BEHALF OF JAMES E. SWANN ET AL.

MR. NABRIT: Mr. Chief Justice, may it please the Court: I will attempt to address that question, because I think the issue of establishing a desegregated system and keeping it that way is one of the important practical problems that a District Court and School Board has to face.

Let me begin, however, by stating that it is our view that Judge McMillan's decision, his desegregation order, can be affirmed on either of two grounds, either on the ground that he did not abuse his discretion in ordering a plan which remedied the wrong he found, and also that it can be affirmed on the ground that Judge McMillan stated the proper Constitutionalobjective. But I think it is helpful if we get down to specifics in some of this, and not talk about some of these complicated phrases like balancing, and so forth, which have different meanings, and lookat the practical problem that Judge McMillan faced last December 1st.

The situation was this. A month earlier this Court had ruled in the Alexander cas e that integration had to proceed at once. Judge McMillan had just found that Charlotte-Mecklenburg had 25 racially identifiable schools in which two thirds of the black children in the city were located. He also found that 90 per cent of the faculities were segregated. And he had just received the School Board's third integration plan since April, and he found that in it they were asserting candidly they did not intend to eliminate all of the black schools. So what he did was, conscious that it was his duty under Alexander to proceed expeditiously, he appointed his own consultant, and he set down in the December 1st opinion to try to give the consultant some instructions about what to do.

Now, Judge McMillan had found that the all black

schools in Charlotte were created by state action, and he concluded that it was his duty under Green to adopt a plan that would remedy that situation, disestablish that situation. He further had heard evidence that it was possible, that there were plans. He appointed an expert and he told him in the passage that Mr. Horack referred to that if the School Board had come in with a plan, I would not have required any fixed racial ratios or anything like that, but in default of them bringing a plan, you should set out, pursuing the ideal objectiver of 29-71, but understanding that you may not be able to each that. And he told him you can use all of the normal administrative techniques of assigning pupils and report back. He also told the School Board again, "You have another opportunity, a fourth opportunity, to bring back a plan."

The plan that the Judge's consultant brought back was not a plan which balanced every school. The percentage of blacks in the system under the plan that the Judge ordered varied from a low of 3 per cent blacks in a school to a high of 41 per cent. Another point, the Judge gave his consultant no instructions that he was to go out and integrate white schools. The instruction was that he was to eliminate the all black schools and the majority black schools, and that was based on a conclusion that it was possible to do so.

In the final analysis, the District Judge's understanding of what he was doing was that he was following

Green. He was assessing the available plans, and picking the plan that accomplished the best result. I submit that it is not error for a District Court in such a circumstance to require a school board to do more than the minimum. It is not the District Judge's job to try to find the fine line of Constitutional demarcation between a segregated system and an integrated one and just exactly get them up to their minimum obligation. His duty is set out in the Green case to desegregate the system root and branch, to integrate the system so thoroughly that segregation will not reoccur, if that can be done.

Q That was directed to an appropriate or at least a permissible exercise of a District Court's equitable discretion to correct a conceded previous Constitutional violation. Did I understand that correctly?

A That is exactly right.

Q You have not been talking about what a Board's Constitutional duty substantively is.

A That is absolutely right. I now am at the point where I address the Chief Justice's question about the duty in such a situation to try to plan an assignment system that will work in terms of Green, and that will not immediately revert back to a segregated system. What the Court consultant did was to use these normal school assignment techniques, techniques that the School Board had been using all along for

drawing school zones, transporting children, to plan strategies to try to avoid the situation immediately turning back to a segregated situation. He was doing this in a fact pattern where you had had a history of that in Charlotte. It had a series of schools that had been integrated and turned black, so that the effort was being made to prevent that from happening again.

This really brings us, I think, to an important analytical point, and that is that the school boards actually do control the racial composition of the schools. Necessarily they do, because there really is no such thing as a neighborhood school that exists in the abstract. The school board determines what the relevant neighborhood is for a school by a whole series of decisions. Those are the decisions that relate to such things as where do you build the school in the first place, how big do you build it, and those two decisions already affect in a sense what its neighborhood might be when you decide how many classrooms to put there. Then another decision that is made that affects it is when you decide how many grades you are going to teach at that school. It is not true, you know -- these cases contain records of the school board using those decisions to keep the place segregated. In other words, it had a compact black community in Charlotte. It would build a school with all 12 grades serving it, and the right size for that black community. This was the kind

of de jure action to affirmatively segregate the District Judge has been talking about. We are not talking about things pre-Brown, before 1954. We are talking about what has been going on all during this massive resistance since 1954 as well.

Q Would you agree, Mr. Nabrit, that school boards, like other bodies, make honest mistakes of error in the size of the school they plan, and the location of it, and honest errors in the sense that the future development of the community proves that their original judgment was not very good?

A I think I am not addressing any of that type of error.

Q Suppose that happens with respect, say, to any one of those two paired, or three or four of those paired groups, so that at the end of the three years, something that was substantially 71-29 now under Judge McMillan's order turns out to be 80-20 or 90-10, does the Court have something like a reapportionment function to order the school board to redraw its lines, or regerrymander so as to restore the 71-29 again?

A My time is really short. Let me try to answer that. My answer is yes, the school board has a continuing duty to control the racial composition of the schools. However, I make that in the context or make that answer against the background of facts which established that the school board inevitably makes decisions which are going to affect the racial composition. In other words, one of the assumptions underlying

give you a little more time in view of our balancing of the time problem, anyway.

A I appreciate that. I hope I can use the time wisely.

Q You have suggested this is a continuing duty of the school board. I have no difficulty with that at all. Certainly that is the function of the school board. Is there a continuing duty of surveillance, a continuing jurisdiction in the District Court, once it has assumed this function in the case?

A The real problem is that unless we have a test based on results, we are left on a test based on good faith. I don't mean to evade your question. I am answering it in this way. Take, for example, the standard offered by the Solicitor General. The Solicitor General says that the factors to be considered are, and he names five, the size of the school district, the number of schools, the ease or hardship for the children involved, the educational soundness of the assignment plan, and the resources of the school district. Those are the factors that the courts are supposed to apply in the brief of the United States in deciding whether or not we are going to have remaining black schools in a particular school system. I am saying that that is so vague and general that what it really amounts to is a good faith test, and what we are after --

Q You say a proper test is a result oriented test, and that that test should be, as I understand it, that there be no racially identifiable individual school, however that phrase may be defined. Do I understand that correctly?

A Yes, that is correct.

Q Or at least without putting a very heavy burden on the school board to show that it is impossible to eliminate a particular racially identifiable school.

A Racially identifiable minority schools, and we do focus on that, because the segregation system had two characteristics, I think, at least two that are relevant to this analysis. One is that black children were excluded by law from white schools. Opposite the other side of the coin, the other facet is that they were required to attend the black schools. The all black school is one of the principal institutions in the segregated system. There is the place where black children are set aside with the state's command that they are not fit to be anywhere else.

It is our submission that the reform has to be on both levels, that there does indeed have to be a new system, if you use the term, under which pupils are not effectively excluded because they are black from these minority schools, but there also has to be a reform of this principal institution the all black racially identifiable school.

Q It is either all black or racially identifiable,

even though not all black.

A I did not speak precisely. It is the racially identifiable school.

Q Minority racially identifiable.

A Yes, the minority racially identifiable.

Q The minority being the minority in that particular school district.

A No, it is the black minority.

Q Well, what if the blacks are a majority in a particular school district?

Q I suppose you would say you could not have a minority white school.

A No, I don't say that. You can't integrate the black pupils unless you integrate the white pupils, so I suppose that would follow. We are not offering a test that is based on the theory that there are some white children at a great remote distance and you have to bus Negroes a great distance to give those white children some integrated experience. That might be good for them. They might learn more about what the world is like if they had that experience. But that is not our submission.

Q But that is the senior high school situation in this particular plan, isn't it?

A No, it is not. That plan was based on trying to develop a strategy against resegregation. The point was

that the west side of Charlotte is tending to go black, and the Court consultant thought that he could make an assignment of pupils based on a comparable distance with all of the other assignments at the high school level -- those pupils going those 12 miles are not going any farther than the average, they were going less than the average, and the Court of Appeals approved that on that basis, -- that he would try to cope with this problem of resegregation.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Nabrit. Thank you for your submission.

(Whereupon, at 3:00 p.m., an adjournment was taken until Tuesday, October 13, 1970, at 10:00 a.m.)